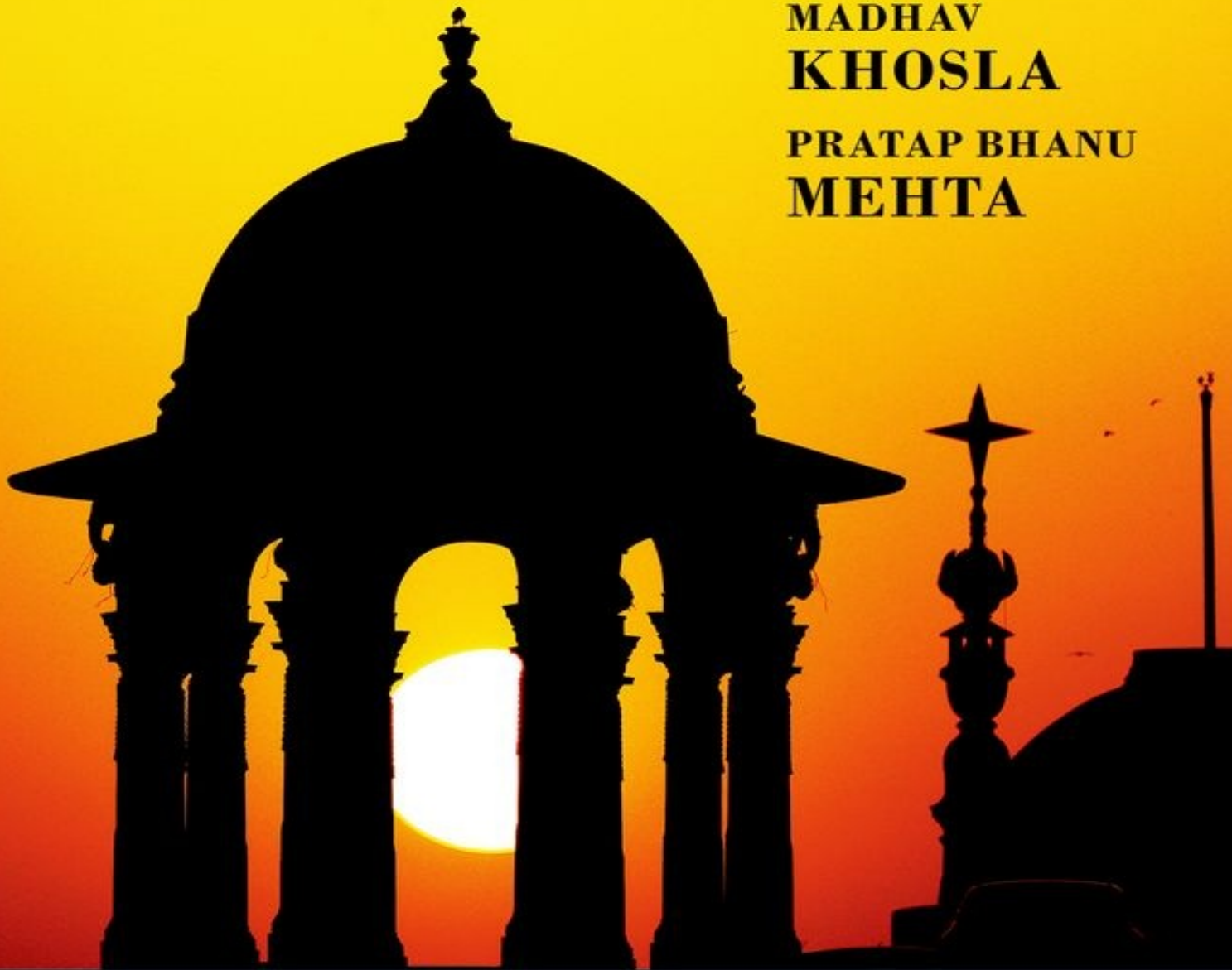


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≡ The Oxford Handbook *of*
**THE INDIAN
CONSTITUTION**

THE OXFORD HANDBOOK OF
THE INDIAN CONSTITUTION

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THE INDIAN CONSTITUTION

Edited by
SUJIT CHOUDHRY, MADHAV KHOSLA,

and
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ADC	Autonomous District Council
AFSPA	Armed Forces Special Powers Act 1958
AGP	Asom Gana Parishad
AIFR	Appellate Authority for Industrial and Financial Reconstruction
AWAG	Ahmedabad Women's Action Group
BCCI	Board of Control for Cricket in India
BIFR	Board for Industrial and Financial Reconstruction
BJP	Bharatiya Janata Party
CAG	Comptroller and Auditor-General
CEC	Central Empowered Committee
CEGAT	Customs, Excise, and Gold Control Appellate Tribunal
CBFC	Central Board of Film Certification
CBI	Central Bureau of Investigation
CEC	Chief Election Commissioner
CJI	Chief Justice of India
CPR	Centre for Policy Research
CISR	Council of Scientific and Industrial Research
DPSPs	Directive Principles of State Policy
DRT	Debt Recovery Tribunal
EC	Election Commissioner
FC	Finance Commission
FEMA	Foreign Exchange Management Act
FRs	fundamental rights
GST	Goods and Services Tax
HPC	High-Powered Committee
HRCF	Act Hindu Religious and Charitable Endowment Act
HUF	Hindu undivided family
IAS	All-India Administrative Services
ICAR	Indian Council of Agricultural Research
ICS	Indian Civil Services
IDRC	International Development Research Centre

IMDT	Act Illegal Migrants (Determination by Tribunals) Act
IND	Indian National Congress
IRIS	Institutional Reform and Informal Sector
IRWDA	InterState River Water Disputes At 1956
ISC	InterState Council
JDAS	Janata Dal Ajit Singh Group
JMM	Jharkhand Mukti Morcha
JPC	Joint Parliament Committee
LARR	Land Acquisition, Rehabilitation, and Resettlement Act 2013
LIC	Life Insurance Company of India
MNF	Mizo National Front
MPLADS	Member of Parliament Local Area Development Scheme
NCBC	National Commission for Backward Classes
NCERT	National Council of Educational Research and Training
NCFSA	National Curriculum Framework for School Education
NCLAT	National Company Law Appellate Tribunal
NCLT	National Company Law Tribunal
NCRWC	National Commissioner Review of the Working of the Constitution
NCT	National Capital Territory
NDA	National Democratic Alliance
NDC	National Development Council
NEERI	National Environment Engineering Research Institute
NITI	National Institute for Transforming India
NJAC	National Judicial Appointments Commission
NRI	Non-Resident Indian
NTT	National Tax Tribunal
OBCs	Other Backward Classes
OCI	Overseas Citizenship of India
ONGC	Oil and Natural Gas Corporation
PC	Policy Commission
PIL	Public Interest Litigation
PIO	Person of Indian Origin
PMO	Prime Minister's Office
POTA	Prevention of Terrorism Act 2002
POTB	profession, occupation, trade, or business
PSC	Public Service Commission
PWDVA	The Protection of Women Against Domestic Violence Act 2005
RBI	Reserve Bank of India
RP	Act Representation of the People Act
SAD	Shiromani Abali Dal
SC	Scheduled Caste/Supreme Court

SIA	Social Impact Assessment
ST	Scheduled Tribe
SEZ	special exchange zone
SLP	Special Leave Petition
TADA	Terrorist and Disruptive Activities (Prevention) Act 1987
TFD	traditional forest dweller
UAS	Licence Unified Access Service Licence
ULFA	United Liberation Front Assam
UT	Union Territory

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CHAPTER 1

LOCATING INDIAN CONSTITUTIONALISM

SUJIT CHOUDHRY, MADHAV KHOSLA, AND PRATAP
BHANU MEHTA

I. INTRODUCTION

INDIAN constitutional law is of immense historical, practical, and theoretical significance. Almost all the issues that arise in the course of thinking about law in modern constitutional democracies find their most intense expression in the evolution of Indian constitutional law. India's Constitution was the framework through which the world's largest and one of its most contentious democracies was brought into being. It was the charter through which an ancient civilisation was set on the road to modernity and radical social reform. It is the framework that provides for the management and accommodation of the most complex ethnic, religious, and linguistic diversity of any modern nation-State. It has been the site where different ideas of development have been contested and reimagined. It has been the normative and legal framework through which the world's largest democracy contests its own future. The future of constitutionalism in the world depends a good deal on the future of the Indian experiment.

This Handbook provides a *tour d' horizon* of Indian constitutional law. This is very much a book for scholars and lawyers, in that the focus is on the ideas, doctrines, arguments, and controversies that constitute the terrain of constitutional law in India. But behind these legal arguments are intense political struggles, social stakes, and economic aspirations. Indeed, one of the things we hope will become clear is that a living constitution like India's has the extraordinary capacity to rearticulate—some would say domesticate—social struggles in the language of constitutionalism. This gives Indian constitutional law a variety, a thickness of doctrine and incentives to conceptually innovate in ways that are unprecedented. We hope this Handbook will prove to be an accessible but rigorous guide to the sheer fecundity of Indian constitutional law.

In this chapter, we seek to achieve three outcomes. The first is to explicate the

historical commitment to the idea of constitutionalism. What kind of commitment was the commitment to constitutionalism? How did the framers understand the constitutional project? We suggest that more than the content of its substantive provisions, the Constitution was seen as inaugurating a new kind of morality. Further, what made Indian constitutionalism distinctive was its self-consciously cosmopolitan character. Secondly, we turn to some of the major substantive tensions that have defined the contours of constitutionalism in India, and give a brief account of the major axes around which the normative and institutional imagination of the Constitution is articulated. Finally, we consider the character of constitutional development in India, in particular the forces that have shaped its evolution.

II. THE HISTORICAL IMAGINATION

The Indian constitutional project can be described in many ways. For its most prominent historian, the project was about ‘social revolution’.¹ For others, it was a political project, an expression of the fact that the Indian people were finally sovereign and dedicating themselves to the universal values of liberty, equality, and fraternity. The project does, in some ways, further all these goals. But the backdrop of those substantive aims contains two meta-aims of the Constitution, as it were, that often go unremarked. When the Constitution was enacted there was a self-conscious sense that in writing a text, India was finding a way to resolve major substantive debates and disputes over norms and values. The task of constitutionalism was a morality that transcended positions and disagreements on particular issues; indeed, its strength was that it gave a framework for having a common institutional life despite disagreements. The second aspect of constitutionalism was the ambition that while the Constitution would serve Indian needs, it would not be bound by any particular tradition. It would, rather, reflect and be in the service of a global conversation on law and values. In the debates over particular doctrines, it is easy to miss the distinctiveness of these two ambitions, and the way in which they have informed the practice of constitutionalism in India. In some ways, more than particular achievements, it is the institutionalisation of these practices, against the odds, that constitutes the greatest achievement and challenge of Indian constitutionalism.

1. Constitutional Morality

Constitutions endure for a variety of reasons.² Some endure because of a deep political consensus. In some societies the sheer balance of power amongst different political groups makes it difficult for any group to overthrow a constitutional settlement. In some cases constitutions provide an artful settlement that does not deeply threaten the power of existing elites, but nevertheless provides a mode of incorporating the aspirations of previously excluded groups. While it is hard, not simply for methodological reasons, to determine what has enabled the endurance of India's Constitution, it is worth reflecting on how the project of constitutionalism was historically understood.

What does it mean for a society to give allegiance to a constitution? India's Constitution bore the imprint of a long nationalist movement that made choices that have shaped its trajectory. The first and most significant choice was the idea of constitutionalism itself. The Indian nationalist movement, while radical in its normative hopes, was self-consciously a constitutional movement. In its early phases, it spoke the language of English law. Even when it acquired, under Gandhi, the character of a mass movement, it was anti-revolutionary. It placed a premium on eschewing violence as a means of overturning social order or advancing political goals. India has been subject to occasional violent political movements, from various secessionist movements to Maoism. But violent revolutionary movements have found it difficult to gain mainstream legitimacy. In that sense, even if not expressed in the formal language of law, a grammar of constitutionalism has marked India's mainstream political choices. Although the idea of non-violence has been associated with Gandhi's legacy, its greatest political practitioners have been India's most marginalised groups. Dalits, who were India's most unimaginably oppressed social groups, with most reason to resent the structural violence of India's inherited social and political order, have in a sense been at the forefront of owning a constitutional culture. This is in part due to the fact that BR Ambedkar, now iconised as one of the architects of the Indian Constitution, was Dalit; this is partly due to the fact that the Constitution gave political representation and representation in public jobs to Dalits, and partly due to the fact that the Constitution saw itself as a charter of social reform. But given the scale of social violence that Dalits suffered, the degree to which they see the Constitution as their own is remarkable. Constitutionalism at its core signifies a politics of restraint.

This idea was at the heart of one of the clearest expositions of the

constitutional project given by Ambedkar. To understand the nature of the commitment to constitutionalism, one might turn to Ambedkar's discussion of the idea of 'constitutional morality', a set of adverbial conditions to which agents in a constitutional setting must subscribe. Ambedkar invoked the phrase 'constitutional morality' in a famous speech delivered on 4 November 1948. In the context of defending the decision to include the structure of the administration in the Constitution, he quoted at great length the classicist, George Grote. For Grote, the prevalence of constitutional morality was 'the indispensable condition of a government at once free and peaceable'.³ Constitutional morality meant, Grote suggested,

a paramount reverence for the forms of the constitution, enforcing obedience to authority and acting under and within these forms, yet combined with the habit of open speech, of action subject only to definite legal control, and unrestrained censure of those very authorities as to all their public acts combined, too, with a perfect confidence in the bosom of every citizen amidst the bitterness of party contest that the forms of the constitution will not be less sacred in the eyes of his opponents than his own.⁴

For Grote, 'constitutional morality' was not simply the substantive morality of a constitution, a meaning that is often attributed to the phrase today. It also did not imply the familiar nineteenth-century usage, where constitutional morality refers to the conventions and protocols that govern decision making where the constitution vests discretionary power or is silent. Rather, Grote's use of the term, and Ambedkar's reliance upon it, focused on a set of historical observations about constitutionalism. Both Grote and Ambedkar accepted the rarity of constitutional morality. Grote's *History of Greece* had been motivated, in part, by a desire to rescue Athenian democracy from the condescension of its elitist critics such as Plato and Thucydides, and argued that Athenian democracy had, even if briefly, achieved elements of a genuine constitutional morality. For Grote, there were only two other plausible instances in which constitutional morality had surfaced. The first was the aristocratic combination of liberty and self-restraint experienced in 1688 in England; the second was American constitutionalism. All other attempts had failed. For Ambedkar, this lesson was an important one, adding to the worry of creating democracy in a country like India, whose society was entirely lacking in democratic spirit and experience.

Ambedkar's turn to Grote served to emphasise constitutionalism as a set of practices. At the heart of this set was the idea of self-restraint. The starkest expression of an absence of self-restraint was revolution. The most important goal of constitutional morality was to avoid revolution, to turn to *constitutional methods* for the resolution of claims. The forms of political action that had

become so famous during the nationalist movement—satyagraha, non-cooperation, civil disobedience—were all at odds with the idea of constitutional morality. The turn to process meant that constitutional morality recognised pluralism in the deepest possible way. Remarkably, Ambedkar emerges as equally, if not more, committed to a form of non-violence as Gandhi. The respect towards constitutional forms is the singular means through which a non-violent mode of political action can come into being. The key challenge in any political society is, after all, the arbitration of difference, although Ambedkar had in mind differences of opinion rather than identity. It was the unanimity of constitutional process that respected the plurality of agents. This is how, for instance, Ambedkar defends the exclusion of socialism from the Constitution.⁵

A related element of constitutional morality is the suspicion of dispositive singular claims to represent the will of the people. In part, what troubled Ambedkar about satyagraha was this very fact—its agents saw themselves as personifying the good of the whole. Any claim to hero worship or personification was a claim to embody popular sovereignty; it was to reject the argumentative sensibility that constitutional morality demanded. For the Constituent Assembly, any claim to speak on behalf of popular sovereignty—to represent sovereignty—was a claim to usurp it. No such claim could be permissible, for the chief aim of constitutional morality was to prevent any branch of government from declaring that it could uniquely represent the people.

2. The Cosmopolitan Constitution

The Indian Constitution is, in a significant sense, a cosmopolitan constitution.⁶ It was a cosmopolitan constitution in its fidelity to the universal principles of liberty, equality, and fraternity. But it is also a cosmopolitan constitution in a second sense. Its text and principles, its values and its jurisprudence, have been situated at the major cross-currents of global constitutional law. The Indian Constitution, when it was promulgated, laboured under the charge of being un-Indian. In the closing debates of the Constituent Assembly, we notice the criticism that the Constitution bore little resemblance to Indian ways of thinking about the law. It jettisoned even the political theory of the man from whom so much of the nationalist movement drew its authority: Gandhi. Instead, it represented an amalgam of many sources and traditions. For instance, it was profoundly shaped by the system of English Common Law that had effectively been institutionalised in India. It bore a deep imprint of the Government of India Act 1935. It borrowed Directive Principles of State Policy from the Irish Constitution, and was influenced by the American debates over due process—all made to serve distinctly Indian political challenges. Even though the Constitution had the political authority of the nationalist movement behind it, it ran the risk of being vulnerable to two charges. The practical accusation was that it was not a constitution suited to India's needs. The theoretical charge was that the Constitution represented a kind of derivative eclecticism.

This is also a charge often made against the subsequent development of Indian constitutional law. The practical accusation against the Constitution can only be answered historically. At this juncture it is sufficient to say that the Indian Constitution has not just endured and consolidated; it has become as much a part of India's national identity as any other institution. It has provided a framework for adjudicating deep political disputes. It is a touchstone frequently invoked to make normative claims. But the charge of derivative eclecticism occludes what is interesting about Indian constitutional law. From its very promulgation, the Indian Constitution situated itself at the forefront of universalism. The Indian nationalist movement was self-conscious about the need to transcend nationalism; Indian Independence was instrumental in realising the unity of mankind. For such a project, it did not make sense to limit the possible sources of normative or legal authority. To be free was not to be bound by a particular tradition, or just a particular political contract. It was to be free to take any tradition and history and make it one's own.⁷

It is for this reason that Indian constitutional law and Indian courts are at the cross-currents of almost all major legal debates. They are not constrained by the sources they cite: they can roam freely over American, English, South African, Israeli, or even Pakistani jurisprudence. They can freely read international law principles into the Constitution. They can read the American First Amendment into the Indian Constitution. While the quality of the reasoning can be disputed in individual cases, there is no question that to enter the world of Indian constitutional law is not to enter into a world of parochial concerns, derived from the peculiarities of a political tradition; it is to enter a global conversation on law, norms, values, and institutional choices.

This conversation bears the imprint of almost all layers of constitutional transformation. Like many constitutions it concerns itself with the limits and constraints on public power, the ways in which the sovereignty of the people can be preserved against various usurpations. It concerns itself with the recognition and protection of human rights. Indian constitutional law innovated in the expansion of these rights, to make social and economic rights justiciable. But it also bears the imprint of complex debates over development and the place of property rights in that process. This is a body of constitutional law that has also allowed for a transition from a State-led, redistributive model of economic development to a more liberalised and globalised economy. It has dealt with the exigencies of a complex regulatory State and the tensions between legislative authority and delegation that a modern administrative State imposes upon politics.

In any constitutional tradition there is a tension between the backward-and forward-looking aspects of constitutional law.⁸ The backward-looking aspects refer to constitutional texts, founders, and intentions. The forward-looking aspects refer to an ongoing conversation on the nature of social contract and the nature of social justice. Even the most entrenched constitution requires relegitimation in the light of changing circumstances, new challenges, and changing social values. In any constitutional tradition, there is a tension in how law positions itself between its authority derived from the past and its utility for the future. Indian constitutional law is fascinating for the way in which the backward-looking aspects of the law—fidelity to a text, the citation of precedent, and the invocation of the spirit of the founders—are invoked in creative reinterpretations of the constitution to make it serve changing needs. The manner in which this tension is negotiated provides an instructive case study of the relationship between constitutional law and political legitimation. It will hopefully invite scholars to consider how constitutional law needs a theory of legitimation that does not reduce it to fidelity to a text or inherited authority on

the one hand, or an exogenously given moral and political theory on the other. It will demonstrate how constitutional law *operates* as a point where the authority of the past and the challenges of the future meet, in the context of an ongoing democratic conversation. In this sense, constitutional law is not just a doctrine; it is a site for the mediation of different tensions and conflict.

When India's Constitution was promulgated, it was often criticised for its distance from Indian society. Even as recently as the fiftieth anniversary of the Constitution, political scientists were arguing that the Indian Constitution was not a reference point for Indian political culture.⁹ But the chapters in this Handbook convey the opposite impression. The greatest success of constitutionalism in India is now the promiscuity of the language of constitutionalism. Tocqueville had suggested that in the United States political questions were often apt to become judicial questions. In India, by extension, a vast range of political, administrative, and judicial matters have become constitutional questions that are routinely brought to the courts. Both citizens and judges invoke constitutional values and doctrine not just when claiming rights, determining jurisdiction, or limiting governmental power. They invoke constitutional values in a variety of claims: from protecting ecology to allocating natural resources, redressing grievances against governments, and bringing ordinary tort claims. Indian constitutional law is interesting precisely because it has constitutionalised so much of Indian life. Indeed, one of the major contributions of this Handbook, through its treatment of most areas of Indian constitutional law, is to document the staggering breadth and depth of Indian constitutional jurisprudence. Moreover, although the Supreme Court features centrally, there is a vast High Court jurisprudence as well. Future accounts of the reasons for India's surprising success as a consolidated democracy that surmounted improbable odds will now have to incorporate the pervasive institutionalisation of legal disputation against State power.¹⁰

III. CONSTITUTIONAL TENSIONS

In its very design, many of the major tensions that have characterised Indian politics and the formation of the Indian State have actually been codified into law. Some of these tensions are familiar in constitutional law, such as the tension posed by the separation of powers. In India, this tension was centred on the very existence of a text. The formal amendment process, by which Parliament was empowered to amend the text in most instances, coupled with the recognition of

judicial review, meant that the Constitution pulled itself in both the direction of written constitutionalism and parliamentary sovereignty.

Rights too navigated competing impulses. If we take the conception of rights, for instance, we find that even within the text these rights have been situated at the axis of two tensions: rights and qualifications. The project of universalism had to negotiate the brutal realities of freedom and partition; the Constitution bears traces of that historical trauma. As regards rights, there was the further innovation in the form of the Directive Principles of State Policy. These were contrasted with the fundamental rights, which unlike the Directive Principles were judicially enforceable. While the Directive Principles suggested that constitutional law was meant to promote substantive welfare outcomes, fundamental rights, as rights classically are, emphasised the importance of means. The recognition of the right to property but also the State's responsibility for land redistribution, for example, placed the tension between means and ends in law.

The debate between centralisation and decentralisation was another source of friction. At the founding, two pressures led to a centralising vision: a concern for the security of society, and the belief that localism was a threat to the emergence of a modern conception of citizenship. The State needed to emancipate individuals; it needed to liberate them from their parochial concerns. Yet, over time there has been a constant clamour for power from below, and a constant pressure to renegotiate power between different levels of government (the Centre and the States; and the States and local bodies). Several constitutional devices, from regional emergency powers to the concurrent list, meant that the tensions between functionalism and participation found constitutional manifestation.

Finally, the Constitution was a charter of individual liberty. It promised freedom for individuals, but it also recognised the salience of community identities, both to redress historical injustices and to protect minorities. This inherently set up a tension in the constitutional project, on matters ranging from affirmative action and reservations to minority educational institutions. Were minorities an exception, or was their recognition simply a heightened effort at equal protection? Did reservations serve to transcend identities like caste, or did they instead consolidate permanent identities? Was the ultimate constitutional project one of power sharing between different group identities, or one built around the liberation from identity?

As the chapters in this Handbook show, the Indian constitutional experience presents rich and fascinating material on how these tensions have worked out.

IV. THE CHARACTER OF INDIAN CONSTITUTIONALISM

1. State Failure

The expanding scope of constitutionalism merits some reflection, and provides an interesting window on to the setting of Indian constitutional law. There are several pressures that have led to an ever-expanding constitutional discourse. For one thing, the Indian Constitution is itself one of the longest constitutions in the world. A striking feature of the founding imagination was a penchant for codification.¹¹ Many routine administrative matters, like service rules for public employees, for example, find their way into the Constitution. The Constitution itself was not just concerned with the rights of citizens, the limits of government power, democracy, or social justice. It was also very much part of a State building project, where the framers wanted to protect many institutions of the State from the vagaries of ordinary politics. It is almost a tautology to suggest that a long constitution will vastly expand the scope of constitutional adjudication. But the expanding recourse to the Constitution was inherent in its length.

The second reason for the expansion of constitutional language was, paradoxically, the opposite. It bears reiterating that India is a poor developing country, with relatively low State capacity.¹² The background condition of State capacity has a great bearing on how constitutional law evolves. Low State capacity expresses itself in many ways. The State does not address citizens' grievances effectively. Often, political gridlock prevents legislation from being enacted. Indian courts are also themselves an example of low State capacity: underfinanced, understaffed, and struggling to keep up with the sheer volume of demands placed on them. But society's demands and sufferings cannot wait for the glacial pace of change in State capacity. Courts have often found themselves mediators between this vast array of demands and low State capacity. They have had to step in where other institutions could have done the task; they have had to craft remedies in the absence of any administrative backup; they have had to bear the weight of sending a signal that the Indian State has some forum where it responds to human suffering and injustice.

Many of the innovations and peculiarities of Indian constitutional law come from these demands: necessity is indeed the mother of invention. The public interest litigation movement, for example, where courts relaxed the rules of standing for litigants and often intervened in matters of public interest that normally should have been within the domain of the executive, is one such example of innovation. Another example is the fact that India has a very

underdeveloped system of tort law. Tort law requires not just background legislation, but also a sophisticated State apparatus that can adjudicate claims. In the absence of available tort remedies, courts have had to use constitutional remedies to provide relief that would normally have been available in tort law. Or faced with severe cases of breakdown of administrative accountability of the executive, courts have often taken recourse to constitutional law to craft remedies. If judicialisation has been one of the major themes in recent Western constitutional theory, constitutionalisation appears to be the phenomenon most visible in India.

This attempt to use constitutional law to compensate for massive State failure is not without its costs. Some argue that it is somewhat paradoxical that an already overburdened Supreme Court would choose to take on greater burdens by stretching constitutional law in this way. It invites scepticism about constitutional law in two ways. First, there is the scepticism whether Indian law too easily breaches the boundaries between constitutional and other forms of law. This introductory chapter is not the place to settle this debate. Many contributors offer different points of view on this matter. But what is of interest is the way in which the Indian material opens up a new inquiry into how the domain of constitutional law is conventionally defined; what are the forces that explain its scope and reach. Secondly, it opens the question of the extent to which providing constitutional remedies can effectively compensate for State failure. Many critics have pointed out that the Supreme Court's reliance on stretching constitutional law—by discovering new rights, for example—is relatively ineffective in addressing the sufferings it purportedly claims to address. Often the grandiosity of constitutional doctrine is not matched by the strength of the remedies. But, regardless, the Indian experience provides a fascinating window on the possibilities and limits of constitutional discourse in bringing about substantive justice. It demonstrates the ways in which constitutional doctrine is shaped by background institutional capacity, not just by normative or formal legal considerations.

2. Design and Structure

The coherence and stability of a body of constitutional law also depends on the character of the institution from which it emanates. In countries like India, with a written constitution that provides for judicial review, that institution is the judiciary. The American constitutional experience has shown that constitutional courts where judges have extremely long tenures, and the modes of appointment depend on direct accountability to the political executive, will produce a certain kind of jurisprudence. We can expect political cleavages or political philosophies to be very clearly expressed. We can also expect them to be articulated in strikingly consistent terms over the lifetime of decisions.

The Indian Supreme Court looks very different in comparison. Historically, appointments to the Court have had very little to do with the political ideology of individual judges. There is a relatively high turnover of judges; the judges do not sit *en banc* but on separate benches; cases which make it to large constitutional benches are often a function of the exercise of power by a small group of judges; such benches are often constituted at the discretion of the Chief Justice; and finally the identity of the Court itself is complicated by its dual appellate and constitutional roles. In such an institutional setting, there is not as much internal coherence in constitutional jurisprudence as we would like to see. The system as a whole also lacks the classic rule of law characteristics—consistency, a strict application of *stare decisis*, and so forth. The extent to which this worry is real or imagined is a matter of debate, and varies across different areas of law. But it does mean that internally within the court system, Indian constitutional law is probably shaped by more judges than is the case in any other jurisdiction.

Another feature of the Indian case has been the position of the Supreme Court in comparison with the High Courts. In matters of day-to-day justice, both in terms of access and ease of disposal, there has always been a major concern about the Indian judiciary's capacity to deliver. One of the ways in which the Supreme Court has tried to compensate for potential miscarriages of justice is by increasing its jurisdiction and by a liberal approach towards admitting appeals from lower courts, thereby implicitly diminishing their constitutional status and role. This has been made possible, in part, by the constitutional text itself, which allow the Supreme Court to exercise jurisdiction on a range of grounds. The credibility of the Indian system rests much more on the Supreme Court than it does on other courts. In the long run, we might find that what seems like a compensatory mechanism against State failure can also exacerbate it. But the

more important point is that the legitimacy of constitutional law has come to be invested in the Supreme Court.

The development of constitutional law is almost invariably viewed externally—that is, in how it interacts with other institutions—but several chapters in this Handbook demonstrate that internal features cannot be ignored in the Indian case.¹³ The aforementioned features of India’s constitutional system may certainly mean greater incoherence and instability. Yet, they also have the potential advantage of ensuring that the judiciary is never captured by particular ideological tendencies; and, even if it is, the capture is short-lived. One expects far more suspense in Indian constitutional adjudication. While that may not be conducive to the stability of doctrine, it may well have helped to secure the stability of the system as a whole.

3. Law and Democracy

One standard way of describing the evolution of Indian constitutional law is as a transition from black letter law to a more structural reading of legal materials.¹⁴ A second way has been to see it as a product of political compromise and negotiation.¹⁵ While both these outlooks have much in their favour, neither fully captures the relationship between law and democracy in India. Indian constitutional law is not simply the site of a preconceived normative yardstick, nor is it a distinctive form of reasoning we can call purely legal, or a mask merely covering hidden political acts and agendas. Rather, it has always been marked by the need to take into consideration not just its inner structural coherence, but also the way in which law will be rendered legitimate in society.

In such a context, one aspect that shapes constitutional doctrine is the idea of compromise. A constitutional culture can be subject to three kinds of compromises. The first is a compromise between norms and social forces. In examining doctrine we are tempted to ask how the logic of a particular normative principle or the text of a statute plays itself out in constitutional adjudication. But the particular way that our understanding of a normative principle or a statute is shaped can itself reflect something deeper: it can reflect a compromise of competing social forces. The tension between the normative and realist reading of constitutional law, between the logic of moral claims and the logic of social forces, has been a feature of all constitutional law scholarship. The second kind of compromise can be a compromise between competing and sometimes incommensurable values. Should individual rights or group rights be given equal normative weight? Sometimes these compromises are enshrined in a constitution itself. The third kind of compromise often arises in the context of judging the suitability of law to particular situations, where there are differing assessments of what the *consequences* of law might be. This is a compromise forced, as it were, by a gap between an assessment of social reality and desired norms.

What makes this Handbook interesting is that, unusually for a book on constitutional law, the chapters *thematise* the issue of constitutional compromise, and in doing so open up a new and interesting way of looking at constitutionalism. The idea is not so much to say that Indian constitutional law does not aim for coherence or principle; the activity of litigants and judges would be unintelligible without some such presumption. But the chapters are striking in capturing the degree to which constitutional law is shaped by the

necessity for all three kinds of compromises. These compromises are not dilutions of the constitutional agenda; they are a means of advancing it. The judgement on the nature of these compromises varies. Some scholars think these compromises give Indian constitutional law an unusual degree of heterogeneity; others think they provide creative ways of reconciling competing demands in ways that keep the constitutional project alive and expand its reach. They faithfully reflect the need to build legitimacy for a constitutional project in a diverse society.

At one level, it is easy to argue that the Supreme Court has become the final arbiter of the Constitution; it can even pronounce duly enacted constitutional amendments unconstitutional if they violate the basic structure of the Constitution. But, as these chapters also demonstrate, the competition over who is the final custodian of the Indian Constitution remains very much an open question. The Constitution has evolved through both partnership and contestation between different branches of government. The Supreme Court, may, on occasion, draw a red line through what legislatures can do; it can claim adjudicatory supremacy. But equally the legislature can deeply transform the shape of the Constitution, as it has done through a hundred amendments. Importantly, however, the Constitution is not solely shaped by duly instituted branches of government. Both legislatures and courts also respond to what might be understood as their readings of popular constitutionalism. There is a productive tension between the formal and legalistic understandings of constitutional law and the popular expectations and demands on constitutional law.¹⁶ As Ambedkar had envisaged, constitution is not just a noun; it is also a verb. It is co-produced by the collaboration and participants of different actors, where any claims to authority will always be contested.

If this is correct, then one needs to see the actors in a democracy as participants in a dialogue on public reason. It is often asked what canons of reasoning discipline judges. Are they bound by normative considerations they import into interpretations? Are they bound by theories of interpretation? As constitutional law has expanded in scope and thickness, these questions are raised with even more urgency. One way of thinking of proper judicial behaviour is to invoke a set of formal considerations. On this view there are certain formal restraints on judicial behaviour. Judges are bound by the text of the constitution. In traditional legal conceptions, courts are disciplined by a set of formal techniques. These techniques also form the basis of the authority of their decisions. Despite their ubiquity, however, these are not so much normative constraints on judicial behaviour as they are forms in which judges express their opinions. Constitutionalism is a practice that is constantly being created and

recreated through the actions of concrete agents, including judges.

If Ambedkar is right, then the idea of constitutional morality cannot be reduced to pure normativity, on the one hand, or pure legal form, on the other. Instead, his emphasis on public criticism, and the need to maintain the conditions for it, points to a different role for constitutional law. It is not the site for dialogue between different branches of government. It is simply a node in a conversation between law and democracy. The effort at public reason involves judges thinking of the legitimacy of their own decisions. Apart from formal legal techniques—the engagement with precedent, texts, etc—the task involves thinking what reasonable people would accept and agree upon. This is not crude consequentialism, where judges simply gauge which decisions people would obey, but rather a genuine inquiry into what reason demands against extraordinary background social pressures. It is an effort to bridge the gap between representation and legitimacy. The compromise that occurs is a compromise aimed at deepening the constitutional project.¹⁷

V. CODA

The study of Indian constitutional law has proceeded, by and large, in two ways. One way to approach the field has been through careful and technical analyses of legal doctrine, aimed largely at the legal profession. The last definitive contribution of this kind was the fourth edition of HM Seervai's multi-volume *Constitutional Law of India*, which appeared nearly two decades ago.¹⁸ Another mode of engagement with the field has been more academic in nature. It has ranged from monographs and books to edited volumes and journal articles. Despite the richness and brilliance of several academic contributions, this scholarly literature has been somewhat disorganised. It has struggled to receive institutional anchoring, has ebbed and flowed with the passage of particular scholars, and has focused on certain areas of constitutional law, while largely ignoring others. As a result, Indian constitutional law has found it hard to consolidate as a field of intellectual inquiry. One ambition of this Handbook is to remedy this misfortune. The chapters in the Handbook are not burdened by a specific editorial outlook. Each chapter aims to provide a comprehensive picture of the legal position, but also to articulate the individual author's distinctive voice and perspective. We hope that this will allow for the chapters to be both a resource and a source of debate.

That debate will involve both the descriptive character and prescriptive

ambition of Indian constitutionalism. How is India's constitutional journey to be judged? India's Constitution has provided some kind of an enduring framework. The fact that intense social conflicts are resolved through constitutional means must be regarded as one of its major achievements. It has seen limited but clear moments of breakdown, namely, the Emergency of 1975–77 and the use of regional emergency powers; periods during which constitutional morality has been kept in abeyance. Constitutional success might also be considered through the lens of social change. Here the record is less promising. Putting aside the methodological question of how much a constitution can compensate for exogenous factors, has the Indian Constitution served the task of social transformation? While it has certainly led to democratic empowerment and the inclusion of certain marginalised groups in society, it is less clear whether it has contributed in a substantive way to redressing structural inequality or served as a consistent, overarching weapon against discrimination. Similarly, if we focus on the outcome of particular institutions like the Supreme Court, we can acknowledge limited success. The Court has often played a crucial part in changing the public discourse on particular matters, but it is not certain that it has had any major systemic impact. The question of success and failure is, in part, a question of what we expect from constitutionalism and what we hope for it to achieve. Important as this question is, it should not distract us from the importance of the cementing of constitutionalism. One of the things that helps constitutionalism to take root is a critical culture of constitutional argument. The heartening news is that, whatever our individual yardsticks for measuring success and failure may be, the chapters in this Handbook confirm that constitutional argument in India is intense, diverse, and alive.

¹ See Granville Austin, *The Indian Constitution: Cornerstone of a Nation* (Oxford University Press 1966) xxi.

² The section draws extensively on Pratap Bhanu Mehta, 'What is Constitutional Morality?' (2010) 615 Seminar 17.

³ Cited from *Constituent Assembly Debates*, vol 7 (Lok Sabha Secretariat 1986) 38, 4 November 1948.

⁴ Cited from *Constituent Assembly Debates*, vol 7 (Lok Sabha Secretariat 1986) 38, 4 November 1948.

⁵ See *Constituent Assembly Debates*, vol 11 (Lok Sabha Secretariat 1986) 975–76, 25 November 1949.

⁶ This conception of cosmopolitanism overlaps with Somek's, though Somek is less concerned with the diverse sources and authority of law, which is a second sense of cosmopolitanism that we focus on. See Alexander Somek, *The Cosmopolitan Constitution* (Oxford University Press 2014).

⁷ Two initial and path-breaking efforts at understanding the sources of Indian law are Rajeev Dhavan, *The Supreme Court of India: A Socio-Legal Critique of its Juristic Techniques* (NM Tripathi 1977) and Marc Galanter, *Law and Society in Modern India* (Oxford University Press 1989).

⁸ See Lawrence Sager, 'The Domain of Constitutional Justice' in Larry Alexander (ed)

Constitutionalism: Philosophical Foundations (Cambridge University Press 1998) 235.

⁹ See Sunil Khilnani, 'The Indian Constitution and Democracy' in Zoya Hasan, E Sridharan, and R Sudarshan (eds) *India's Living Constitution: Ideas, Practices, Controversies* (Permanent Black 2002) 64.

¹⁰ This institutionalisation has received less attention than one might expect in even the most important and sophisticated studies of India's democratic career. See, for example, Ramachandra Guha, *India After Gandhi: The History of the World's Largest Democracy* (Picador 2007); Ashutosh Varshney, *Battles Half Won: India's Improbable Democracy* (Penguin 2013).

¹¹ See Madhav Khosla, 'Modern Constitutionalism and the Indian Founding' (draft on file with authors).

¹² See generally, Devesh Kapur and Pratap Bhanu Mehta, 'Introduction' in Devesh Kapur and Pratap Bhanu Mehta (eds) *Public Institutions in India: Performance and Design* (Oxford University Press 2005) 1; Lant Pritchett, 'Is India a Flailing State? Detours on the Four Lane Highway to Modernization' (HKS Faculty Research Working Paper Series RWP09-013, John F. Kennedy School of Government, Harvard University 2009) <http://www.hks.harvard.edu/fs/lpritch/India/Is%20India%20a%20Flailing%20State_v1.doc>, accessed October 2015.

¹³ Another kind of internal courtroom dynamic that deserves more attention, both in India and elsewhere, is the interaction between lawyers and judges. In many ways, the articulation of constitutional law takes place through a judge-lawyer dialogue—not just a dialogue between the judge and other branches of government—and attention towards the practice of constitutional advocacy can help shed light on this phenomenon. Unfortunately, no chapter in this Handbook is devoted to this task.

¹⁴ See SP Sathe, 'India: From Positivism to Structuralism' in Jeffrey Goldsworthy (ed) *Interpreting Constitutions: A Comparative Study* (Oxford University Press 2007) 231. Sathe's thesis is in part about constitutional evolution and in part about the practices of constitutional interpretation. While dated, the most important study of the latter theme in the Indian context remains P Tripathi, *Spotlights on Constitutional Interpretation* (NM Tripathi 1972).

¹⁵ See Granville Austin, *Working a Democratic Constitution: A History of the Indian Experience* (Oxford University Press 2003). For a more nuanced account of the interaction between law and politics (though limited to specific decades), see Upendra Baxi, *The Indian Supreme Court and Politics* (Eastern Book Company 1980); Upendra Baxi, *Courage, Craft, and Contention: The Indian Supreme Court in the Eighties* (NM Tripathi 1985).

¹⁶ See Upendra Baxi, 'Outline of a "Theory of Practice" of Indian Constitutionalism' in Rajeev Bhargava (ed) *Politics and Ethics of the Indian Constitution* (Oxford University Press 2008) 92.

¹⁷ For an elaboration of the Supreme Court's role in democratic engagement, see Pratap Bhanu Mehta, 'The Indian Supreme Court and the Art of Democratic Positioning' in Mark Tushnet and Madhav Khosla (eds) *Unstable Constitutionalism: Law and Politics in South Asia* (Cambridge University Press 2015) 233.

¹⁸ HM Seervai, *Constitutional Law of India*, vols 1–3 (4th edn, Universal Book Traders 1991–96).

PART I

HISTORY

CHAPTER 2

CONSTITUTIONAL ANTECEDENTS

ROHIT DE

I. INTRODUCTION

WHAT are the antecedents of the Indian Constitution? For some, such as the Supreme Court of India, the answer is simple. It described the coming into force of the Constitution as the moment at which:

[T]erritorial allegiances were wiped out and the past was obliterated ... at one moment of time the new order was born with its new allegiance springing from the same source for all, grounded on the same basis: the sovereign will of the peoples of India with no class, no caste, no race, no creed, no distinction, no reservation.¹

While the Constitution did usher in a new order, its claims to have obliterated the past remain unconvincing, even to contemporary commentators. The Constitution text contained aspects of imperial charters and colonial legislation, and in several cases reproduced sections verbatim.

Therefore the question of origin remains a fraught one. Traditionally, constitutional historians have traced the antecedents of the Constitution through a series of British colonial legislation that laid down the architecture of the State and introduced limited forms of representative government.² This canon produces a Whiggish narrative, where Independence and the republican Constitution appear to inevitably succeed the various colonial reforms, echoing British liberal justifications of imperialism as training Indians for self-rule.³ The Constitution's perceived antecedents draw the ire of both the Right and the Left. Liberals and the political Left point to the structural and institutional continuities between the colonial State and the post-colonial, and argue that despite the institution of adult suffrage the constitutional order rests on the logic of authoritarianism.⁴ Organisations on the Hindu Right, pointing to these same provisions, have attacked the Constitution for being alien and inauthentic as it imposes structures developed by the British upon India. These anxieties about antecedents were reflected in the closing debates in the Constituent Assembly when members worried that the Constitution would fail as it was made by the 'slavish imitation' of Western constitutions.⁵ K Hanumanthaiyya summed up the

mood as he regretfully said, ‘we wanted the music of *Veena* or *Sitar*, but here we have the music of an English band’.⁶

This chapter departs from traditional narratives of constitutional antecedents in three ways. First, it treats the Constitution as a set of interactions between constitutional texts, constitutional aspirations, and the quotidian practice of constitutional law.⁷ In treating the Constitution as a set of heterogeneous practices and expectations rather than a succession of legislation we avoid the teleological narratives of both the State and Indian nationalism, emphasising the contingency of events and the reception of ideas. As Arvind Elangovan has argued, the conflicts over the Constitution in its first two decades require us to shift the idea of the Constitution as a product of grand ‘consensus underwritten by nationalism’ to that of the Constitution as a product of a series of conflicts, several which were unresolved.⁸ Finally, this chapter examines both aversive and aspirational borrowings, to recognise alternatives that were available but consciously rejected.⁹

The chapter opens with a critical reading of the various texts (charters and legislation) that emanated from above and established the architecture of power in colonial India from 1600 to 1948. The second section provides an overview of the various attempts by Indian groups to draw up constitutions or articulate claims against the State. Finally, the third section looks at constitutional practice examining legal strategies and judicial review in colonial India.

II. CONSTITUTIONAL TEXTS

1. The Age of Charters

Historians of British and American constitutionalism have focused on a particular transformation, the shift from an organic, unwritten constitution to a definite and written one. In contrast, modern constitutionalism in India begins with a written text on a precise date: 31 December 1600, the day that Queen Elizabeth granted a Charter to a company of London merchants to trade with the East Indies. Charters were grants of perpetuity in Latin addressed to a particular group and kept as a permanent record. The Charter of 1600 delegated both legislative and judicial powers to the governor appointed by the English East India Company (EEIC) in India ‘for the better advancement and continuance of said trade and traffick ...’ including the power to administer criminal law. Since the Company was formed for maritime trade rather than territorial administration, many of the powers of the EEIC officials derived from the absolutism of martial law and naval discipline, including the power to make emergency regulations.¹⁰ As the EEIC’s territorial control expanded, new charters granted them powers of full territorial jurisdiction, including the powers to issue coinage, administer justice, and punish interlopers. Importantly, the charters incorporated a principle of repugnancy by requiring that all company laws had to be ‘reasonable’ and not contrary to the laws and customs of the English realm.

The Charter had only granted the Company the jurisdiction over English subjects, but it soon found itself dealing with claims of Indians. Recent scholarship has described the formation of an imperial legal culture over the seventeenth century through conflicts between Parliament, the Crown, and the EEIC as English subjects challenged the authority of the Company, and Indian litigants sought to take advantage of English law and rhetoric.¹¹ Initially the residents of the EEIC territories found that they had limited options. The Company enjoyed wide latitude over civil and criminal justice, and unlike the American colonies, made no procedural rules or appeals to the Privy Council.

The EEIC’s growing power raised concerns within the British Parliament, particularly because of the Company’s close association with the monarchy. Parliament sought opportunities to check the independent legal authority of the Company, and by the early eighteenth century forced a new constitution upon the Company.¹²

The Charter of 1726 established an ‘Anglo-centric’ legal order in Madras, Bombay, and Calcutta, which brought the Indian territories firmly into the

British legal world.¹³ It explicitly provided that the law of the Company settlements in India was to be that of England, to the extent that circumstances would permit. It set up mayor's courts headed by aldermen who were tenured for life, guaranteeing a degree of independence and explicitly provided for appeals to the Privy Council.¹⁴ These courts were instructed to make their decrees according to 'justice and right'. The Charter also granted EEIC governors legislative powers akin to those enjoyed by royal governors in America, which were subject to the approval of the EEIC directors in London and not repugnant to the laws and statutes of England. As the growth of litigation against the Company in its own courts indicates, by the late seventeenth century, there was a growing belief across British territories that a publicly available printed charter was both a source and a limit of governmental authority.¹⁵

The EEIC struggled to contain the behaviour of the courts in India, as neither the officials in India nor the directors in London retained any power to overturn decisions or to change legal practices. Structural factors, like distance, also played a role; the mayor's court often reached its verdict well before legal advice from London reached India. Unlike other EEIC officials who were bound by their employment contracts to obey the directors of the Company, judicial officials, particularly members of grand juries (which occasionally included Parsi, Hindu, and Indo-Portuguese residents) were not. As Fraas has painstakingly shown, these bodies frequently protested deviations from authority and procedure laid down within the Charter. For instance, the grand jury in Calcutta frequently released prisoners being held without trial by the Governor, delivering scathing rebukes for violating terms of the Charter.¹⁶ While the conflicts were framed as a tension between English law and liberties and the Company's authority and local practices, Fraas demonstrates how the courts were less concerned with strict application of English law than with shoring up the authority and independence of the mayor's courts.¹⁷

It is important to note that despite the Charter, the impetus towards creating a constitutional order did not come from above. Neither Parliament nor the Privy Council sought to impose the new constitutional principles upon the Company administration; instead, it developed from litigants who determined the issues that were to be contested.

2. Parliamentary Control and Mughal Constitutionalism

The English victory at Plassey in 1757 caused the first major disruption to this imperial constitutional order. With the grant of the Diwani of Bengal, Bihar, and Orissa, the EEIC found its powers dependent on two sources of authority, through a Charter by the British Crown and as a vassal of the Mughal emperor. Successive military victories transformed the EEIC territories from a clutch of cities and factories to a large landed power. The EEIC's military successes in India corresponded with fiscal problems in London and gave the British Parliament an opportunity to restructure the EEIC government in India to check 'abuses in administration'. The Regulating Act of 1773 introduced three fundamental changes that would set a path of dependency for the Indian administrative framework. First, it transformed the relationship between the three presidencies by placing Bombay and Madras in subservience to Bengal. Previously, each presidency lay with the Governor-General in Calcutta. This gives India a longer history of local centralised authority when compared to the British colonies in North America, Africa, and Australia. Secondly, it formalised the idea of cabinet government by vesting authority with the Governor-General and his council of four. The original Act named the first four councillors, the majority of whom were known political opponents of the Governor-General. By limiting the term of the Governor-General and his councillors to five years, it gave British parliamentary convention statutory authority.^{[18](#)}

Finally, section 13 of the Regulating Act established a Supreme Court of judicature at Fort William which, apart from the civil, criminal, ecclesiastical, and admiralty jurisdiction, also had the jurisdiction to 'hear and determine all complaints against any of His Majesty's subjects for any crimes, misdemeanours, or oppressions ... and also to entertain, hear and determine any suits or actions whatsoever, against any of His Majesty's subjects ...'^{[19](#)}

The wide jurisdiction of the courts set the stage for political conflict between the Supreme Court and the EEIC. The Supreme Court now had a mandate to govern matters relating to all British subjects and Company employees (which included Indians). There was considerable ambiguity over the definition of a Company employee, which allowed Indians who were not British subjects to take action against the Company. As Lauren Benton has shown, many Indians attempted to defeat local representatives by appealing to more distant authorities

like the Supreme Court in Calcutta, and in the process simultaneously challenging and strengthening the legitimacy of the colonial State. These repeated appeals helped strengthen a legal authority that was removed from both metropolitan power and the need to derive legitimacy from local politics.²⁰

The period from 1781 to 1833 saw a constant legislative battle to secure parliamentary control over the EEIC and the Indian territories. Searching for new principles that could resolve the anomalous situation of a private company exercising sovereignty overseas, partisans of both sides used Mughal constitutionalism (or what they assumed was Mughal constitutionalism) as a guide for the colonial State.²¹ Warren Hastings, attempting to shore up the authority of the Company-State, argued that its absolute powers were premised on a notion of Mughal absolutism, and argued that all property rights to land ultimately vested in the EEIC as the successor to the Mughal emperor. Philip Francis, Hastings' opponent on the council and later in Parliament, recognised Mughal despotism but argued that it was not arbitrary, and that private property rights existed under Mughal benevolence.²² Scholars have suggested that when legal appeals to classical Rome and the Anglo-Saxon past were ideologically exhausted, Burke turned towards Indo-Islamic republicanism as an alternative source of constitutional legitimacy. Edmund Burke, in his opposition to Hastings, argued that Mughal rule was not despotic but was stable and had a legal basis for governance, and challenged Hastings' use of Mughal constitutionalism as a cloak for arbitrary authority. Francis and Burke echoed contemporary Whiggism in their defence of the rights of the Indian nobility and landowners, which were based on very poorly understood notions of Islamic law and Mughal governance.²³

The Acts of 1781 and 1784 and the Charters of 1813 and 1833 gradually marginalised the role of the EEIC in governing India and placed governance structures under strict parliamentary scrutiny. The cabinet government imagined in the 1773 Act was diluted when an amendment in 1793 provided that the Governor-General and provincial governors could act in extraordinary cases without the concurrence of the Council, inasmuch as that power would 'tend greatly to the strength and security of the British possessions in India, and give energy, vigour, and despatch to the measures and proceedings of the executive government ...'²⁴ This clause essentially gave Governor-Generals enormous powers to act independently, which individuals like Lord Cornwallis and Wellesley used to expand territory and transport local administration.

It also gave statutory recognition to the personal laws of Indians, by requiring that the Supreme Court's jurisdiction over Indians would be on condition that

‘their inheritance and succession to lands, rents, and goods, and all matters of contract and dealing between party and party, shall be determined, in the case of Mahomedans, by the laws and usages of the Mahomedans and where the parties are Gentus, by the laws and usages of the Gentus ...’²⁵

The increased parliamentary control from London was balanced with the reduction of judicial opposition in India. Under the Act of 1781, the Governor-General and his Council were exempt from the jurisdiction of the Supreme Court for all Official Acts.²⁶ The power of the Supreme Court to intervene in questions of revenue was also strictly contained,²⁷ a feature that would now continue until 1947. The tribunals run by the EEIC were formally recognised by Parliament and in 1813, an attempt was made to amalgamate the Company and Crown courts. Similar conflicts would play out with the establishment of the Supreme Court of Bombay in 1823, which culminated in Governor Elphinstone challenging the Chief Justice to a duel, and the entire Supreme Court going on strike when the government refused to obey its writs of *habeas corpus*.²⁸ Lord Macaulay charged the Supreme Court for creating ‘a reign of terror, heightened by mystery ... it consisted of judges not one of whom was familiar with the usages of millions over whom they claimed boundless authority ... no Mahratta had ever spread through the province such dismay as this inroad of English lawyers’.²⁹ The challenge posed by the courts was sought to be redressed by the introduction of a law member in the Governor-General’s Council, who would be conversant in common law, and would ensure that legislation was free of defects. The Law Member was imagined as a constitutional authority located within the executive. The push to codify civil and criminal procedure was partly to discipline wayward judges and courts.

Was constitutionalism in India between the eighteenth and early twentieth centuries entirely a discourse between the English? In terms of practice, cases and appeals brought by Indian litigants were instrumental in putting the system into operation, and petitions to Parliament spurred figures like Burke into action. At the level of ideas, there is only limited evidence of competing indigenous ideas of constitutionalism. However, Ghulam Hussain Tabatabai’s contemporary account of the decline of Muslim power and the rise of the British in Bengal, provides a few interesting fragments of what Indians thought of British administration. Ghulam Hussain argues for a comparable notion of an ‘ancient constitution’, noting that all conquering powers had absorbed an established structure and practices which even ideologically driven rulers like Aurangzeb did not tamper with. The English appeared to be ignorant of these rules (or chose not to follow them), thus depriving people of the benefits of governance.³⁰

Partha Chatterjee notes that Ghulam Hussain's concept of Mughal political tradition lay not in a theory of sovereignty but in the function of government in looking after the people, a task that Hussain believed the English had ignored.³¹

3. The Viceregal Age: Petitioning and Representation

In November 1858, Queen Victoria was proclaimed Empress of India and the Indian territories brought under direct control of the British government in London. The Proclamation went on to assure native princes that their treaties would be 'scrupulously maintained'; present territorial possession would not be extended; all natives in Indian territories would enjoy the same privileges as all British subjects; anyone, irrespective of their race or creed, could be admitted to offices; all religious observances would enjoy equal and impartial protection of law and there would be no interference with religious practice; and the Proclamation assured her subjects that 'all rights' connected with land inherited from their ancestors would be protected and in framing laws due regard would be paid to 'the ancient rights, usages and customs of India'. The Proclamation of 1858 had sought to address the perceived causes of the revolt of 1857, securing the loyalty of the princes and zamindars, as well as addressing fears of interference with religious and social matters.

However, the Proclamation took on a life of its own and was frequently referred to as a 'magna carta' by Indians in various walks of life. Glimpses of the Queen's Proclamation appear in more informal settings; for instance in 1884 Dennis Fitzpatrick, the Lt Governor of Punjab, reported that 'a Mussulman' quoted constitutional principles at him demanding that he overturn an order by a district magistrate that placed a local ban on cow slaughter. The petitioner argued that the 1858 Proclamation protected his right to slaughter cattle for religious purposes.³² Almost half a century later, Muslim groups from Mysore petitioned the Viceroy asking him to intervene to overturn legislation by the Mysore Assembly banning cow slaughter on the grounds that it violated the 'Magna Carta of Queen Victoria'.³³ These arguments carried a lot of political traction with the executive but had little impact before the courts of law. In *Queen Empress v Tegha Singh*, the temple custodians who had been arrested for violating the Arms Act by storing weapons in the temple premises argued that the Arms Act violated the Queen's Proclamation of 1858 that guaranteed no one would be molested by reason of their religious faith or worship. As the High Court had acknowledged that the firearms in question were worshipped in the

temple, the custodians should be exempted from the operation of the Act. The High Court rejected the contention, implying that the Indian legislatures could enact a law in contravention of the Queen's Proclamation.³⁴

Mithi Mukherjee argues that the royal Proclamation was not a shift just in political control but in the discourse of imperial justice itself. She identifies two separate strands: 'justice as equity', which placed the British State in the role of the mediator between various communities in India, and 'justice as liberty', which offered the promise of self-governance in some distant future. These notions of justice are located in the figure of the monarch and not in some form of 'ancient constitutionalism' or natural law.³⁵

These forces were reflected in the emphasis the constitutional changes of the next fifty years placed on questions of representation. The Indian Councils Act of 1861 reconstructed the Governor-General's Council by separating the legislative functions from the executive through the creation of a legislative council, at least half of whose members were required to be non-official persons. The Act also designated that a member be appointed specifically for public works. This separation of powers between the executive and legislature was softened by the requirement that any matters relating to public revenue or debt, religion, military, or naval affairs required *prior* sanction of the Governor-General. All legislation required the Governor-General's assent before being enacted into law.

An attempt was made to decentralise administration by restoring the independent powers of legislation of the Bombay and Madras Presidencies, which had been revoked in 1833. There was also a rudimentary division of legislative subjects between the centre and the provinces, with the requirement that in certain subjects the Governor-General's permission was required before legislating. Further, all local Acts required the assent of the Governor-General as well as the Governor.

Thus, these reforms provided the promise of freedom but deferred it through strict controls for both quotidian and extraordinary situations. The 1861 Act limited the Governor-General's power to proclaim an emergency to six months. Ironically, the national emergencies were first declared to achieve administrative aims, such as Lord Mayo's imposition of an additional half per cent of income tax, or the exclusion of certain border districts from the jurisdiction of regular courts.

The Indian High Courts Act that was enacted simultaneously in 1861 abolished the troublesome Presidency Supreme Courts and replaced them with High Courts. The reforms were ostensibly intended to create a uniform legal

system across the country, and were to be followed by the enactments of the Penal Code, the Code of Civil Procedure, and the Criminal Procedure Code.

Finally, the bureaucracy was transformed with the enactment of the Indian Civil Service Act 1861, which regularised all irregular appointments to the bureaucracy in the past, but now mandated a formal appointment system for members of the covenanted services. Until 1857, the colonial bureaucracy was not a professional body, as it later came to be. Appointments were an important source of patronage for EEIC officials and the lucrative nature of the jobs was premised on opportunities for rent seeking. The services were notionally open to all British subjects in India, though the nature of the selection process meant that very few Indians would be eligible.

The carving out of executive, legislative, and bureaucratic spheres was followed by a series of reforms in 1891 and 1909, which sought to increase the representation of Indians within the various councils of government. In 1892, the number of nominated members in the Governor's Councils was increased with a promise of introducing electoral representation in the future. The Indian Councils Act of 1909 (Morley–Minto Reforms) brought into being limited electoral systems to elect some members to the provincial and central legislative councils. While official members (usually bureaucrats) would be the majority in the central legislature, non-official members would be the majority in the provinces. The electoral process reflected a corporatist understanding of Indian society, with members being elected from separate electorates representing particular special interests. While a bulk of these were municipalities and local boards, they also included merchants' chambers and federations of commerce, universities, planters' associations, landlords, and significantly, Muslims. The demand for separate electorates for Muslims had been first articulated in 1906 in a memorial submitted by the Muslim League to the Viceroy.

Can we describe this account of legislative reforms as constitution making? It is important to recognise that all these reforms were prompted by a surging demand from below for greater representation. Unlike the reforms of the previous century, every legislative change was brought about by a vigorous campaign by members of the public. Each reform failed to meet expectations and led to splits between political parties; for instance, dissatisfaction with the changes of 1892 led to the extremist group emerging within the Indian National Congress. As Dietmar Rothmund observes, a curious dialectic began to be established between popular agitation and constitutional reform, with each set of reforms designed to fulfil certain agitational demands, but in the process sparking further agitations.³⁶ Therefore until 1919, this dialectic of constitutional reform dominated the nationalist movement, evolving a constitutionalist

discourse similar to China, Persia, Turkey, and Egypt, which all saw variations of a ‘constitutional revolution’ in the early twentieth century.³⁷

4. The Last Acts of Empire: The Government of India Acts of 1919 and 1935

In a lecture first delivered in 1923, Dr BR Ambedkar told his students:

The Constitution of British India is contained in an enactment called the Government of India Act, 1919. A student of the Constitution of India therefore has not to search for the constitution as the student of the English Constitution has to do. His position is very much like the position of the student of the American Constitution, whose problem is nothing more than to understand and to interpret the statute embodying the Constitution of the United States.³⁸

It is only in the 1920s that we see the popularisation of the notion of Indian constitutional law and its introduction as a separate subject for study in law faculties.³⁹ This was partly due to consolidation. The Government of India Act 1915 finally repealed the unrepealed provisions of over forty-seven Acts going back to 1772 and consolidated them into a single legislation, building in the idea of the Constitution as a single statute.

The Government of India Act of 1919, which codified the Montague–Chelmsford proposals, broke with the earlier reforms in two important ways. First, unlike the Morley–Minto reforms, Edwin Montague categorically stated that this concession to India was with a view to the ‘progressive realization of responsible government in India as an integral part of the British empire’.⁴⁰ Recognising that this move could only come in phases, it introduced a system known as ‘dyarchy’ within the provincial governments. This system divided the areas of functioning into ‘transferred’ and ‘reserved’, the former being looked after by ministers responsible to a popularly elected assembly and the latter (more crucial subjects) held by executives. While the Governor was to govern on the advice of the ministers with regard to transferred subjects, he had the discretion of rejecting such advice when he had ‘good reason’ to.⁴¹

More exclusions from popular rule were built into the reforms as the Montague–Chelmsford report had acknowledged that all provinces contained ‘areas where material to build political institutions was lacking’ or were seen as ‘civilisationally backward’. Provincial governors applied for excluding a variety of territories from the operation of the Act, including almost the entire States of Assam, Orissa, and the Chota Nagpur plateau. Almost all the exclusions applied

for were granted. While regimes of exception had existed in colonial India since the eighteenth century, this was the first time the exceptions were codified and made permanent.

Despite the celebratory tenor, the Constitution of 1919 angered both the colonial officials in India and the Indian public. The reforms were followed almost immediately by the draconian Rowlatt Act, which curbed existing rights and remedies under the Penal and Criminal Codes, limited the jurisdiction of courts, and sought to extend the powers of the executive to detain and try political prisoners. Despite the vehement opposition of every non-official member in the legislature the bill was voted into law using the brute official majority. The Rowlatt Act led to popular unrest and the massacre at Jallianwala Bagh, further discrediting the reforms. The first elections held under the 1919 Act were officially boycotted by the Indian National Congress.

While the new legislatures became important venues for debate and critique, diarchy itself failed in practice as government departments were by nature independent and constituted an indivisible unit that was hard to separate. KV Reddi, a minister in the Madras government, would wryly remark that he was the ‘minister of development minus forests, minister for industries without factories, electricity or labour and minister for agriculture without irrigation’.⁴² The Reforms Secretary, William Morris, had to admit that they had created a ‘cumbrous, complex, confused system having no logical basis...rooted in compromise and defensible only as a transitional expedient. The difficulties in the scheme were quite incurable by mere alterations of acts and rules.’⁴³

Importantly, the Montague-Chelmsford Report had a clause stating that the working of the Act would be reviewed after a period of ten years, making it clear that the constitutional text was not enshrined in permanence. The review commission itself, headed by Viscount Simon and consisting entirely of British members, outraged all shades of political opinion and led to a systematic boycott from major political parties. The report of the Simon Commission in 1929 was followed by three Round Table Conferences, where a variety of Indian leaders from British India and the Princely States were invited to discuss constitutional reforms with British political leadership across parties. Because of the Congress Party’s boycott of two of three Round Table Conferences and the heady politics of the civil disobedience movement, the drier discussions in London have been dismissed as of little importance. However, the conferences were important for the first articulation of several new arguments, be it the women’s representatives rejecting the idea of reserved constituencies for women or the repeated insistence on a Bill of Rights by the delegations representing women, minorities,

and labour.⁴⁴

The Government of India Act 1935 was finally enacted amid stiff opposition from the Conservative Party and brought into being the Indian federation comprising both British provinces and the Princely States. The Act reflected many of the recommendations of the Simon Commission, including the idea that the Constitution should contain within itself a provision for its own development, and should not be rigid. Implicit in the notion of constitutional progress was the idea that representative government could only evolve in India through stages. While the Constitution was a statute, the preamble acknowledged that the convention within the British Empire was that the details of the Constitution would not be exhaustively drafted but would develop naturally through conventions or terms of instruction issued from London. It rejected the possibility of temporality defining the stages and said there was no requirement for periodic commissions of inquiry.⁴⁵

Importantly, it removed the system of diarchy for the provinces, increased franchise to about 14 per cent of the population, and provided for popularly elected ministries in the provinces. Significant emergency powers were retained by the Governor to maintain law and order and protect minorities. The Union government was left unchanged, to mollify Conservative opinion, except that the size of the legislative assembly and the franchise were both increased. Significantly, as the third section of this chapter will demonstrate, it established a Federal Court in Delhi, which would have jurisdiction over constitutional questions as well as disputes between provinces.

While agreeing to contest the first provincial elections, the Congress Party denounced the Government of India Act as a 'slave constitution that attempted to strengthen and perpetuate the political and economic bondage of India'.⁴⁶ It charged the creation of the federation as an attempt to maintain British control by checking popular forces with the help of 'reactionary feudal classes', referring to the powers given to the princes as well as groups like the landlords and zamindars, who were represented in the second chamber. While the members of the Lower House of the central assembly would be indirectly elected from provincial legislatures, the members of the Upper House would be directly elected from special constituencies. Despite the idea of an evolving constitution, the Indian legislatures did not have the power to amend the Constitution, but could only pass resolutions recommending amendments on certain questions, such as the extension of franchise, method of election, *etc.*⁴⁷ It noted that the assembly envisaged would continue to be a non-sovereign body subject to the British Parliament.⁴⁸ The 1935 Act had greatly expanded the powers of the

Governor-General, leading Churchill to remark that it would arouse Mussolini's envy. The Congress noted that the 'new constitution' was worse than that of 1919 because it made explicit many of the emergency powers that were implicit. Not only did the Governors continue to enjoy the power of veto, unlike 1919 they were also given independent powers of legislation.

The Congress also launched a more substantive critique of the Constitution for failing to address questions of economic and social deprivation. While health and education were starved of finances, the top-heavy administration focused on law and order. The 1935 Act made it difficult for elected governments to aid Indian trade or industry and constitutionally protected British financial and trading interests in the country. For instance, the Federal Legislature was given very limited control over the Reserve Bank. The Railways, in which a substantial amount of British capital was invested, were to be controlled by a special statutory body of bureaucrats called the Railway Board. While the 1935 Act had no Bill of Rights, it specifically prohibited laws imposing sanctions upon British subjects domiciled in the UK with regard to either entry into India or to the 'acquisition, holding or disposal of property, the holding of public office, or the carrying on of any occupation, trade, business or profession'.⁴⁹ This effectively created a non-discrimination clause that applied only to British-domiciled persons. Corporate personalities were also protected, with the Act guaranteeing that a company incorporated in the UK would not be subject to Indian company law. British entities were also ensured non-discrimination in questions of taxation and of eligibility for government grants.⁵⁰

The idea of the economy held captive by the Constitution was powerful, given how central economic development was to the nationalist discourse. It is perhaps not coincidental that the Congress Party set up the National Planning Committee in 1940 to focus on State intervention to bring about social and economic development and redistribution.

III. CONSTITUTIONAL ASPIRATIONS

In terms of checking the rising tide of nationalism, the constitutional settlement of 1935 was a spectacular failure. Not only did the princes, the bulwark against the nationalists, refuse to participate in the federation, but also the Congress Party decided to contest elections and performed spectacularly, forming governments in most provinces. Within days of the election, eight provinces and the central legislative assembly had passed a resolution asserting that the

Government of India Act 1935 ‘in no way represents the will of the people’ and ‘has been designed to perpetuate the subjection of the people of India’. They demanded the repeal of the Act and its replacement by a constitution for a free India framed by a Constituent Assembly elected by universal adult franchise.⁵¹ How does this act of ‘constitutional defiance’ then fit into a history of the Indian Constitution?⁵²

In this section, we briefly explore the history of constitutional aspirations, which is ‘the passionate insistence that the constitution must be (or in other words must be made to be) a recognition and expression of legitimate aspirations’.⁵³ It is an account of how the constitutional texts discussed in the previous section were received and reimagined by Indians over the years. This section focuses on readings and understandings of rights, though one could do the same exercise for questions of federalism, separation of powers, or local self-government.

The earliest sets of rights claims against the colonial State emerged in the new urban centres of Bombay, Madras, and Calcutta. As scholars have long recognised, the most articulate statement of liberal constitutionalism came from Rammohan Roy in early-nineteenth-century Calcutta. Roy, who has been usually cast into the teleology of Indian modernity, has recently been located within a global trend of demanding liberal institutions across the world in the early nineteenth century. His centrality to this world was recognised by the decision of Spanish liberals to dedicate the Cadiz constitution of 1820 to Rammohan Roy.⁵⁴ Roy’s liberal constitutionalism was not a product of Western education, but arose from a particular urban social milieu at the turn of the nineteenth century, when an association of non-official Europeans, mixed-blood Eurasians and Portuguese, and the new Indian elites of Calcutta formed ‘a novel, even if unstable and short-lived early modern formation seeking to assert the freedoms of the subject against arbitrary and absolute power’.⁵⁵ English migration to India increased in the early nineteenth century, and Englishmen who were not associated with the Company found that their traditional liberties of appeal to the British Crown were severely restricted, and made common cause with others similarly disenfranchised by influential social groups. Rammohan Roy began to represent himself as being born within British dominions and ‘entitled to all the privileges of the natives of Great Britain’. Among his early tracts were his vociferous defence of the freedom of the press as ‘an invasion of civil rights’, the restriction of appeals to the Supreme Court, restrictions on movement, and the exclusion of natives from juries. He set up a contrast between British and Mughal rule, noting that under the Mughals, the ‘natives’ had enjoyed all

political privileges including the right to hold the highest offices of the State without disqualification or degrading restrictions. The loss of such political consequence under the British was to be compensated by the more secure enjoyment of civil and religious rights, and the failure to ensure this challenged the compact.

These urban coalitions, particularly in Bombay and Calcutta due to their proximity to Portuguese and French territories, were also influenced by the news of constitutional transformations in Napoleonic Europe. However, as Chatterjee points out, this cosmopolitan liberalism was short-lived; by the mid-nineteenth century racially mixed meetings became a rarity in Calcutta and the space for a creolized constitutionalism was eclipsed.

The other source of rights that Burke articulates as ‘Mughal constitutionalism’ and Roy as ‘ancient constitutionalism’ draws from pre-colonial traditions where antiquity itself was the chief source of rights, frequently asserted in the context of land or privileges of office.⁵⁶ The demands for protection of ‘ancient customary liberties’ by subjects ranging from Hindu widows demanding their inheritance rights to temple authorities resisting taxation formed the more broad-based secondary order of rights claims in colonial India. This order drew upon promises made by the colonial government in 1772 and in 1858 to apply Hindu and Muslim religious laws to matters concerning marriage and inheritance. These promises became sites of furious contestation between the State and various groups of citizens. As recent scholarship has suggested, the administration of Hindu and Muslim law did not merely resurrect scriptural authority, but transformed it through liberal ideas of equality, women’s rights, and difference.⁵⁷ As Tanika Sarkar argues, rights were conjugated from messy encounters between scriptural law and the Anglo-American legal system, rather than through some form of systematic political thinking.⁵⁸

The Queen’s Proclamation of 1858 and the direct assumption of control by the British Crown saw an increasing number of Indians assert that as subjects of the Crown they were entitled to ‘equal and impartial protection of the law’. Increasingly, elite Indians began to claim the rights of a citizen *within* the Empire rather than against it, despite express denial of the same by both London and the white settler colonies.⁵⁹

The Indian legal public was not dissuaded by the illiberal nature of the colonial constitutions; as one textbook writer advised lawyers, ‘the acts of parliament were mere bare skeletons into which the breath of life came from other sources’.⁶⁰ What were some of these other sources? One example comes from the Congress agitations against the Rowlatt Bill, which the Congress had

condemned as ‘interfering with the fundamental rights of the Indian people’.⁶¹ Given that there were no designated Bills of Rights, it is clear that by ‘fundamental rights’, they are referring to the rights of procedure, appeal, and review granted under the Criminal and Civil Procedure Codes.⁶² The idea of these procedural law codes as guaranteeing rights continued even after Independence, when Special Tribunals that carved exceptions to these norms, for instance for oral admission of evidence or to trial by jury, were condemned by the Supreme Court.⁶³

The other major source of constitutional imagination remains the multiple constitutions drafted by different groups of the Indian public, beginning with Tilak’s Swaraj Bill of 1895. The Bill provided for a small list of broadly worded rights that included rights to free speech and expression, property, personal liberty, inviolability of one’s home, equality before law, equality to admission to public offices, and the right to petition for redress of grievances. Early articulations of rights, such as the Declaration of Rights of 1918 that the Congress demanded be included in the Government of India Act 1919, expanded the list of civil and political rights to include the right to bear arms, the right to life and liberty, and the freedom of press and association. However, by the 1920s the proposed Bills of Rights expanded to include social and economic rights culminating in the Resolution of Fundamental Rights and Economic Changes at the Karachi Session of the Congress in 1931.⁶⁴ The resolution argued that in order to ‘end exploitation of the masses, political freedom must include economic freedom’. Along with fundamental rights, the resolution also provided for the ending of bonded labour and child labour; free primary education; the expansion of a labour welfare regime protecting unions, women workers, and providing a pension and a living wage; providing for the redistribution of resources through the ending of usury and State control over key industries and national resources; and finally, recognising the communal problem, it laid out protections for minority rights. It was abundantly clear that any future Constitution of India would contain an extensive list of enumerated political, social, and economic rights. Almost all the rights enumerated in the Nehru Report and the 1931 Resolution found their way into Parts III and IV of the 1950 Constitution. The only right that disappears completely is the constitutional right to bear arms, which, given the violence on the streets in 1946, is unsurprising.

IV. CONSTITUTIONAL CULTURE

One of the key features of constitutional culture is a limited government, usually checked by the judiciary. Unlike the UK, the courts of the British Empire came to exercise judicial review quite early through the application of the doctrine of *ultra vires*. Since the colonial legislature was created through a British legislation, it was subordinate to the British Parliament. Therefore any law that transgressed the provisions of the parent statute that constituted the colonial legislature could be void.⁶⁵ In 1877, the Calcutta High Court acquitted two persons accused of murder on the grounds that the law that they were convicted under was *ultra vires* the Indian Councils Act 1861.⁶⁶ The Privy Council would reverse the acquittal on appeal but did not question the powers of the High Court to review legislation for constitutionality. The Privy Council observed that the Indian legislature had its powers expressly limited by the British Parliament and could not go beyond its limits.⁶⁷ While there was no express provision for judicial review in the 1935 Act, the discussions before the parliamentary committee had recognised that this would be a necessary consequence of a distribution of legislative powers between the centre and the provinces.

Despite the gradual centralisation of the executive and legislature after 1857, the judicial architecture of India remained fragmented. The Indian High Courts Act of 1861 abolished the old 'Supreme Courts' established by Royal Charter in Bombay, Calcutta, and Madras and replaced them with High Courts which acted as the Supreme Courts of appeal, reference, and revision from all subordinate courts in their province. Subsequent legislation duplicated the High Courts in other provinces, though in recognition of their former royal status, the courts in Bombay, Madras, and Calcutta continued to enjoy a limited original jurisdiction within the limits of the original Presidency towns.⁶⁸ The final seat of judicial authority remained the Judicial Committee of the Privy Council in London, which exercised wide powers of superintendence, as the royal prerogative to give special appeal could not be restricted by a law in British India. Despite frequent avowals of the superiority of the Privy Council and praise for its wisdom, by the 1920s the Indian legal profession had begun to articulate a demand for a Supreme Court in India. Not only were appeals to the Privy Council expensive, time-consuming, and available only to the super-wealthy, but institutionally, the limited awareness of Indian laws and the absence of dissenting opinions hampered the clarity that lawyers wanted. The Privy Council's lack of connection with public opinion in India was one of its greatest flaws.

Several provincial authorities and almost all the legal public bodies such as bar associations and vakils' associations favoured a Supreme Court in India in the 1920s. However, when the proposal for a court with an all-India jurisdiction was finally put forward during the Round Table Conferences, it was driven more by concerns of federalism than by judicial autonomy or unresponsiveness. The Round Table Conferences proposed to create an all-India federation of the British Indian provinces and the Princely States and to provide responsible government in the provinces. Support for a Federal Court came from both the Indian States that were concerned about being dominated by the central legislature and provincial politicians who feared that the unelected central executive would curb their powers, and from minorities, who were worried about the consequences of majoritarian electoral politics. These concerns would require an independent judiciary, which would have the power to declare *ultra vires* legislative acts that encroached upon minority rights or other spheres of government. The Federal Structure Committee decided to grant the provinces juristic personalities so that they could sue each other and the Union government before the Federal Court.⁶⁹

In the Third Round Table Conference, there was an attempt by the delegates from British India to expand the proposed Federal Court into a Supreme Court with a much wider jurisdiction over appeals. This was strongly resisted by representatives of Princely States, who feared judicial encroachment into the internal affairs of their States.⁷⁰ The Joint Select Committee deferred the decision on the Supreme Court by providing that the legislature may expand the jurisdiction of the Federal Court in the future. The Government of India Act 1935 provided for a Federal Court that would have jurisdiction not only over the interpretation of the Constitution but also over the interpretation of any laws enacted by the federal legislature. The Court also had appellate jurisdiction over civil and criminal cases, which were certified by the High Courts as involving a substantial question of law. The Act provided for the appointment of judges by the King on the recommendation of the Secretary of State for India, in order to immunise the Court from local politics. Compared to the High Courts, Federal Court judges had greater security of tenure. Their retirement age was 65; they were paid handsome salaries out of the consolidated funds which were not controlled by the legislature; the legislature was prohibited from discussing the conduct of judges or changing their salaries and tenure; and perhaps most importantly, Federal Court judges could only be removed on grounds of misbehaviour or infirmity upon the recommendation of the PC.

The Federal Court was finally inaugurated two years after the commencement

of the Government of India Act. Despite the initial fanfare, expectations were low. The federation that had been the motivating factor behind the Court had failed to come into existence due to the recalcitrance of the Princely States, leaving the Court with a much-reduced jurisdiction. The first three judges, while eminent legal figures, were not known for their independence or boldness of vision. The new Chief Justice Maurice Gwyer had been a civil servant in London and was the main draughtsman of the 1935 Act. His successor, Patrick Spens was a Conservative MP before his elevation. Of the Indian judges, Varadachariar had a distinguished but fairly non-controversial judicial career; Sir Shah Sulaiman had famously upheld the conviction of the revolutionaries in the Meerut Conspiracy Case; MR Jayakar had been a leading moderate politician, favoured by the establishment; and before his appointment, Zafrullah Khan had led the government benches in the central legislative assembly and had been a member of the ViceRegal cabinet.⁷¹

The new Court faced opposition from the existing legal establishment. Both the Privy Council and the High Courts saw the Federal Court as a potential encroacher on their jurisdiction and privileges. Viscount Simon, the Lord Chancellor, repeatedly questioned the need for the Court. The Chief Justices of Bombay and Calcutta publicly protested efforts to expand the Federal Court's jurisdiction, noting that to 'interpose a new untried court in Delhi between them could only diminish the status and authority of the High Court and make the Privy Council more remote ... diminishing the confidence of the Indian public in the administration of justice in this country'.⁷² The location of the Federal Court in New Delhi, a city with an undistinguished local bar, was viewed with considerable scepticism.

The remarkable successes of the Federal Court are attributable not to institutional factors, but to the vision and judicial entrepreneurship of its judges, notably Sir Maurice Gwyer. At the inaugural session of the Court, Chief Justice Gwyer reminded his audience of the judicial role:

Obedying the old maxim that it is the *part of a good judge to enlarge his jurisdiction*, I have for a moment looked far into the future ... It will always be our endeavour to look at the Constitution of India ... not with the cold eye of an anatomist but as a *living breathing organism*, which contains within itself as all life must, the seeds for future growth and development ... The Federal Court will declare and interpret the law, and that I am convinced in no spirit of formal or barren legalism.⁷³

The judges could have easily chosen to develop a narrow and strict construction of the 1935 Act, but instead they interpreted it widely to admit a greater range of cases and devise creative solutions. The Act also emphasised its role as the apex court in India. Explaining why they had rejected four consecutive leaves to

appeal to the Privy Council, Chief Justice Gwyer reminded the Viceroy ‘that we were not a subordinate court ... we were not disposed to encourage Indian litigants to seek for decisions on constitutional questions other than in their own Supreme Court, the first Court sitting on Indian soil with jurisdiction over the whole of British India’.⁷⁴

The outlook of the Court undoubtedly influenced its jurisprudence in two key areas of federalism and civil liberties.⁷⁵ During the wartime emergency, the Federal Court emerged as a champion for civil liberties using its limited jurisdiction to strike down government detention policies, declare special criminal courts unconstitutional, and liberalise the standard of prosecution for the offence of sedition.⁷⁶ This resistance was all the more striking given the deference shown by the House of Lords towards the executive on the question of detentions during wartime.⁷⁷ The criticism of the Federal Court shocked the colonial regime and caused considerable difficulties in maintaining the emergency.

On the question of federalism, the Court remained acutely aware that for the first time popular legislative assemblies had taken over the administration of the provinces. The provincial ministries were led by nationalist leaders, who were elected on an agenda for social and economic transformation. Several of the new transformative laws disturbed the status quo and led to legal challenges before the Federal Court. MV Pylee, in his magisterial review of the Federal Court’s jurisprudence, argues that ‘the impression is strong and the conclusion almost inescapable’ that the Court was bent on establishing provincial autonomy under the new federation.⁷⁸ While the text of the Constitution favoured the centre over weak units the Court evolved doctrines to balance the powers. Several provincial legislation dealing with urgent social and economic questions, such as the United Provinces Rent Remission Act or the Madras Temple Entry Act, could have been declared invalid on a narrow reading of provincial lists or for their incidental encroachment of the central lists. Acknowledging the popular support behind the provincial legislation and recognising that the intention of the 1935 Act had been to increase self-government in India, the Federal Court ruled liberally.⁷⁹ In deliberating the federalism cases, the Court frequently turned to precedents from the United States of America, Canada, and Australia, both drawing on their experience but also locating the rather precarious Indian federation amid the most successful ones. Upon his appointment, MR Jayakar insisted that the library should contain authoritative textbooks on federal constitutions as well as a complete set of Federal Court reports from Australia, Canada, South Africa, and America.⁸⁰

Unsurprisingly, the Federal Court over its first decade built up a constituency of support not just among lawyers but also among the general public. Nationalist leaders of every ilk, from Gandhi to Rajaji to the Indian National Army invited the judges and the courts to arbitrate on thorny political questions, leading to an editorial in the *Dawn* to caustically remark that the 'CJI has been put in the form of a moral mentorship next only to the position occupied by the Metropolitan Archbishop of India'.⁸¹ The Federal Court's stellar defence of civil liberties led to an increasing recognition that the Supreme Court should have a formal role in the defence of civil liberties. The Sapru Committee report on constitutional principles recommended that 'difficult questions of constitutional law involving civil liberties and rights should directly go up to the Federal court through its original jurisdiction rather than a long and protracted trial in the lower courts'.⁸²

The supportive role played by the Federal Court on federalism reassured nationalist leaders, who noted that the Federal Court did not have the power to grant special leave to appeal and its jurisdiction was limited to cases where an appeal was certified by the High Court. The Sapru Committee recommended that these powers be granted to the Federal Court, making it more accessible.

V. CONCLUSION

Indian constitutional law became a subject for examination at Bombay University in the 1920s and one of the early textbooks attempting to define the constitution noted:

[T]he term constitution is used in two widely differing senses. It may mean the written instrument of fundamental law which outlines the governmental system, defines the power of governing bodies, enumerates and guarantees rights of its citizens and lays down other principles and rules to be observed in carrying on the affairs of the state. Or it may denote, the whole body of laws, customs and precedents either partially or not at all committed to writing, which determine the organization and workings of government.⁸³

This chapter seeks to explore both meanings of the Constitution in pre-Independence India. Instead of rejecting earlier texts as 'imperial' and therefore contaminated, it recognises the active participation of several members of the future Constituent Assembly in the drafting and reception of these earlier documents. The members of the Constituent Assembly and their advisors did not operate behind a veil of ignorance, but as this chapter outlines, carried a certain conception of the constitutional order in their mind.

The theme of dualism ran through the constitutional history of India. From the

dual system of administration in Bengal to the diarchy introduced by the Montague–Chelmsford reforms, colonial government had continually separated the seats of power and responsibility. This had proved particularly frustrating to the Congress governments that were formed in 1937 and caused a deep suspicion about the fragmentation of executive authority. The gradual construction of a federal system with the integration of the Presidencies in the nineteenth century and devolution to the provinces in the early twentieth had made the workings of the federal government, both administratively and fiscally, familiar questions. From the late nineteenth century, there was a belief that Indians were entitled to certain rights and a gradually expanding support for enumerated rights that would address political, social, and economic questions. The stellar leadership of the Federal Court in the 1940s had created a broad consensus on the need for an independent Supreme Court with powers of judicial review. But perhaps most striking was a belief shared by politicians, bureaucrats, and judges across the ideological divide that constitutions would continually evolve and that constitutionalism meant a commitment to principles (there existed disagreement as to what these principles would be) rather than to a strict interpretation of a text.

¹ *Virendra Singh v State of Uttar Pradesh* AIR 1954 SC 447 [28] (Vivian Bose J).

² For a representative sample, see MV Pylee, *Constitutional History of India 1600–1950* (Asia Publishing House 1967); AB Keith, *A Constitutional History of India 1600–1935* (Methuen and Co 1969); M Rama Jois, *Legal and Constitutional History of India* (NM Tripathi 1984); VD Kulshrestha, and BM Gandhi (ed), *V.D. Kulshrestha's Landmarks in Legal and Constitutional History of India* (5th edn, Eastern Book Company 1995).

³ Sumit Sarkar, 'Indian Democracy: The Historical Inheritance' in Atul Kohli (ed), *The Success of India's Democracy* (Cambridge University Press 1991) 23–46.

⁴ The position is best encapsulated by Ayesha Jalal, *Democracy and Authoritarianism in South Asia: A Comparative and Historical Perspective* (Cambridge University Press 1995); Oishik Sircar, 'Spectacles of Emancipation: Reading Rights Differently in India's Legal Discourse' (2012) 49(3) *Osgoode Hall Law Journal* 527.

⁵ *Constituent Assembly Debates*, vol 7 (Lok Sabha Secretariat 1986) 212, 5 November 1948 (Damodar Swarup Seth). The term 'slavish imitation' gained some currency among critics in the Constituent Assembly and was used a few times. See also *Constituent Assembly Debates*, vol 7 (Lok Sabha Secretariat 1986) 349, 9 November 1948 (Raj Bahadur).

⁶ *Constituent Assembly Debates*, vol 11 (Lok Sabha Secretariat 1986) 616, 17 November 1949.

⁷ Upendra Baxi, 'Outlines of a Theory of Practice of Indian Constitutionalism' in Rajeev Bhargava (ed) *Politics and Ethics of the Indian Constitution* (Oxford University Press 2009) 92–118.

⁸ Arvind Elangovan, 'The Making of the Indian Constitution: A Case for a Non-Nationalist Approach' (2014) 12 *History Compass* 1. For the consensus model of constitution making, see Granville Austin, *The Indian Constitution: Cornerstone of Nation* (New Delhi: Oxford University Press 1966) and Sarbani Sen,

The Constitution of India: Popular Sovereignty and Democratic Transformations (New Delhi: Oxford University Press 2007).

⁹ Kim Lane Scheppele, 'Aspirational and Aversive Constitutionalism: The Case for Studying Cross-Constitutional Influence through Negative Models' (2003) 1(2) *International Journal of Constitutional Law* 296.

¹⁰ Arthur Mitchell Fraas, '*They Have Travailed into a Wrong Latitude*': *The Laws of England, Indian Settlements and the British Imperial Constitution 1726–1773* (unpublished dissertation, Duke University 2011) <<http://dukespace.lib.duke.edu/dspace/handle/10161/3954>>, accessed October 2015.

¹¹ Arthur Mitchell Fraas, 'Making Claims: Indian Litigants and the Expansion of the English Legal World in the Eighteenth Century' (2014) 15(1) *Journal of Colonialism and Colonial History*.

¹² Philip Stern, *The Company-State: Corporate Sovereignty and the Early Modern Foundations of the British Empire in India* (Oxford University Press 2011).

¹³ Arthur Mitchell Fraas, '*They Have Travailed into a Wrong Latitude*': *The Laws of England, Indian Settlements and the British Imperial Constitution 1726–1773* (unpublished dissertation, Duke University 2011) <<http://dukespace.lib.duke.edu/dspace/handle/10161/3954>>, accessed October 2015.

¹⁴ John F Shaw, *Charters Relating to the East India Company from 1600–1761* (Madras Government Press 1887) 232.

¹⁵ Mary Sarah Bilder, 'Colonial Constitutionalism and Constitutional Law' in Daniel W Hamilton and Alfred L Brophy (eds) *Transformations in American Legal History: Essays in Honor of Professor Morton J. Horwitz* (Harvard University Press 2009) 28–57.

¹⁶ Arthur Mitchell Fraas, '*They Have Travailed into a Wrong Latitude*': *The Laws of England, Indian Settlements and the British Imperial Constitution 1726–1773* (unpublished dissertation, Duke University 2011) 302–04 <<http://dukespace.lib.duke.edu/dspace/handle/10161/3954>>, accessed October 2015.

¹⁷ Arthur Mitchell Fraas, '*They Have Travailed into a Wrong Latitude*': *The Laws of England, Indian Settlements and the British Imperial Constitution 1726–1773* (unpublished dissertation, Duke University 2011) 309 <<http://dukespace.lib.duke.edu/dspace/handle/10161/3954>>, accessed October 2015.

¹⁸ Regulating Act 1773, s 10.

¹⁹ Regulating Act 1773, s 14.

²⁰ For a detailed discussion of the case and its implications for jurisdictional politics, see Lauren Benton, 'Colonial Law and Cultural Difference: Jurisdictional Politics and the Formation of the Colonial State' (1999) 41(3) *Comparative Studies in Society and History* 563.

²¹ Nitin Sinha, 'Continuity and Change: The Eighteenth Century and Indian Historiography' (2012) 2 *South Asia Chronicle* 416.

²² Robert Travers, *Ideology and Empire in Eighteenth Century India* (Cambridge University Press 2007) 218.

²³ Humberto Garcia traces the circulation of Sale's 1720 translation of the Quran to explain what Burke and his contemporaries understood Islamic law to be. Humberto Garcia, *Islam and the English Enlightenment: 1670–1840* (Johns Hopkins University Press 2012) 96–108.

²⁴ 1793 (33 Geo 3 c 52), s 47.

²⁵ 21 Geo 3 c 70, s 17.

²⁶ 21 Geo 3 c 70, s 1.

²⁷ 21 Geo 3 c 70, s 9.

²⁸ PB Vachha, *Famous Judges, Lawyers and Cases of Bombay: A Judicial History of Bombay During the British Period* (NM Tripathi 1962) 191–99.

²⁹ Thomas Babington Macaulay, *Critical and Historical Essays, Contributed to The Edinburgh Review*, vol 3 (Longman, Brown, Green, and Longmans 1852) 388.

³⁰ Ghulam Hussain Khan Tabatabai, *Siyar-ul-Mutakhhherin or a View of Modern Times, Being a History of India from Year 1118 to 1195*, vol 3, tr Hajee Mustafa (1780).

³¹ See discussion of Ghulam Hussain's work in Partha Chatterjee, *The Black Hole of Empire: History of a Global Practice of Power* (Princeton University Press 2012) 83–84.

³² 'Note on Agitation on the Cow Question: Office of the Assistant to the IG Police, Punjab, Special Branch' ILO: L/P&J/298/1984 (British Library, Asian and African Studies Collection, London).

³³ 'Protest of Mahomedans Against Legislation for the Prevention of Cow Slaughter in Mysore', FN 216/1930 (National Archives of India).

³⁴ *Queen Empress v Tegha Singh* (1882) ILR 8 Cal 473.

³⁵ Mithi Mukherjee, *India in the Shadows of Empire: A Legal and Political History, 1774–1950* (Oxford University Press 2010).

³⁶ Dietmar Rothmund, 'Constitutional Reform versus Nationalist Agitation in India: 1900–1950' (1962) 21(4) *Journal of Asian Studies* 505.

³⁷ Where authoritarian monarchs and colonial governors attempted to pacify restless publics by granting written constitutions, which provided for limited representation but in each case failed to satisfy the majority of the public.

³⁸ BR Ambedkar, 'The Constitution of British India' in *Writings and Speeches*, vol 12 (Government of Maharashtra 1993).

³⁹ See eg, KA Shah and GJ Bahadurji, *A Commentary on the Government of India Act, (Consolidated) of 1919, with Additional Chapters on the Indian Local Governments, Indian Army, Indian Finance, and the Native States in India* (NM Tripathi 1924); MC Chagla, *The Indian Constitution* (Bombay Book Depot 1928); JN Verma and MA Gharekhan, *The Constitutional Law of India and England* (2nd edn, Popular Book Depot 1931).

⁴⁰ C Ilbert and Meston, *The New Constitution of India* (University of London Press 1923) 27.

⁴¹ Stephen Legg, 'Dyarchy: Scalar Geographies of Interwar-India' (forthcoming). I am grateful to Stephen Legg for sharing his unpublished work on diarchy.

⁴² Cited from Sachchidananda Sinha, *Dyarchy in Indian Provinces in Theory and Practice* (East India Association 1926) 18.

⁴³ Sachchidananda Sinha, *Dyarchy in Indian Provinces in Theory and Practice* (East India Association 1926) 18.

⁴⁴ The Indian National Congress boycotted the First and Third Round Table Conferences and sent MK Gandhi and Sarojini Naidu as its sole representatives for the Second Conference. As an organisation, the Congress claimed to be the sole representative Indian organisation and challenged the claims of various invitees to speak for 'sectional interests'. It is significant to note that many of the personnel involved in the Round Table Conferences would be elected to the Constituent Assembly two decades later. Historians of political thought in India have yet to compare and contrast how their ideas evolved over this period. These figures included Nawab Hamidullah Khan of Bhopal (who as head of the Chamber of Princes negotiated with the assembly), MR Jayakar, BR Ambedkar (Depressed Classes), Homi Mody (Parsis), Maharajah Kameshwar Prasad of Darbhanga and the Nawab of Chhatrri (landlords), B Shiva Rao (labour), Sarojini Naidu (women), and KC Neogy, BN Rau, and CD Deshmukh (who were in attendance as part of the British Indian Delegation staff).

⁴⁵ John Simon, *Report of the Indian Statutory Commission*, vol 2 (HM Stationery Office 1930) 5.

⁴⁶ ZA Ahmad, *A Brief Analysis of the New Constitution: Congress Political and Economic Studies No 3* (Political and Economic Information Department of the All India Congress Committee 1937).

⁴⁷ ZA Ahmad, *A Brief Analysis of the New Constitution: Congress Political and Economic Studies No 3* (Political and Economic Information Department of the All India Congress Committee 1937) 308.

⁴⁸ Government of India Act 1935, s 110.

⁴⁹ Government of India Act 1935, s 110.

⁵⁰ Government of India Act 1935, ss 112, 116.

⁵¹ 'Resolution in Provincial Assemblies Regarding Constituent Assembly' in B Shiva Rao (ed) *The*

Framing of India's Constitution: Select Documents, vol 1 (Indian Institute of Public Administration 1966) 93, August–October 1937; 'Resolution in the Central Assembly Regarding the Constituent Assembly' in B Shiva Rao (ed) *The Framing of India's Constitution: Select Documents*, vol 1 (Indian Institute of Public Administration 1966) 94, September 1937.

⁵² While collections of documents that focus on the Indian Constitution always mention these resolutions as part of the teleology of the Constitution of 1950, they are absent in all traditional legal and constitutional histories which focus entirely on the Government of India Act 1935.

⁵³ Hendrik Hartog, 'The Constitution of Aspiration and "The Rights That Belong to Us All"' (1987) 74(3) *The Journal of American History* 1013.

⁵⁴ Christopher Bayly, *Recovering Liberties: Indian Thought in the Age of Liberalism and Empire* (Cambridge University Press 2012) 47.

⁵⁵ Partha Chatterjee, *The Black Hole of Empire: History of a Global Practice of Power* (Princeton University Press 2012) 141.

⁵⁶ Sumit Guha, 'Wrongs and Rights in the Maratha Country: Antiquity, Custom and Power in Eighteenth-Century India' in Michael Anderson and Sumit Guha (eds) *Changing Conceptions of Law and Justice in South Asia* (Oxford University Press 1997) 14.

⁵⁷ See particularly, Tanika Sarkar, 'A PreHistory of Rights: The Age of Consent Debates in Colonial India' (2000) 26(3) *Feminist Studies* 601; Rachel Sturman, *The Government of Social Life in Colonial India: Liberalism, Religious Law and Women's Rights* (Cambridge University Press 2012).

⁵⁸ Tanika Sarkar, 'Something Like Rights? Faith, Law and Widow Immolation Debates in Bengal' (2012) 49(3) *Indian Economic and Social History Review* 295.

⁵⁹ Sukanya Bannerjee, *Becoming Imperial Citizens: Indians in the Late Victorian Empire* (Duke University Press 2010).

⁶⁰ KA Shah and GJ Bahadurji, *A Commentary on the Government of India Act, (Consolidated) of 1919, with Additional Chapters on the Indian Local Governments, Indian Army, Indian Finance, and the Native States in India* (NM Tripathi 1924). See also Stephen Legg, 'Dyarchy: Scalar Geographies of Interwar-India' (forthcoming).

⁶¹ *The Rowlatt Bills—A Criticism* (British Committee of the Indian National Congress 1919).

⁶² Rohit De, 'Rebellion, Dacoity, and Equality: The Emergence of the Constitutional Field in Postcolonial India' (2014) 34(2) *Comparative Studies of South Asia, Africa and the Middle East* 260.

⁶³ *State of West Bengal v Anwar Ali Sarkar* AIR 1952 SC 75; *Abdur Rahim v Joseph A Pinto* AIR 1951 Hyd 11 (FB).

⁶⁴ Niraja Gopal Jayal, *Citizenship and its Discontents: An Indian History* (Permanent Black 2013). The other major articulations were the Commonwealth of India Bill of 1925 and the Nehru Report of 1928.

⁶⁵ DD Basu, *Tagore Law Lectures on Limited Government and Judicial Review* (SC Sarkar and Sons 1972) 282.

⁶⁶ *Empress v Burah & Book Singh* (1878) 3 ILR Cal 64.

⁶⁷ *R v Burah* [1878] UKPC 26.

⁶⁸ Rohit De, "'A Peripatetic World Court": Cosmopolitan Courts, Nationalist Judges and the Colonial Appeal to the Privy Council' (2014) 32(4) *Law and History Review* 821.

⁶⁹ For a detailed account of these proceedings, see MV Pylee, *The Federal Court of India* (Manaktalas 1966) 64–83.

⁷⁰ Most Princely States were judicially autonomous and while several since the 1920s had established Chief Courts, very few had true judicial independence.

⁷¹ Gwyer Strudwick Papers, MSS EUR F506/11/; IOR/L/PO/8/98(I) L/PO/203 (I) (Kania–Spens).

⁷² 'Memorandum from the Chief Justice of Bengal on the Proposed Enlargement of the Appellate Jurisdiction of the Federal Court', 21 March 1940 IOR: L/PJ/8/458/381.

⁷³ Maurice Gwyer, *Convocation and Other Addresses* (Cambridge Printing Works 1942) (emphasis added).

⁷⁴ Sir Maurice Gwyer to Lord Linlithgow, 9 November 1942, IOR/L/PO/8/98(I) L/PO/203 (I)/149.

⁷⁵ Rohit De, 'The Federal Court and Civil Liberties in Late Colonial India' in T Halliday, L Karpik, and M Feeley (eds) *Fates of Political Liberalism in the British Post-Colony: The Politics of the Legal Complex* (Cambridge University Press 2012) 59–90.

⁷⁶ *Keshav Talpade v Emperor* AIR 1943 FC 72 (detention); *Emperor v Benoari Lall Sarma* AIR 1943 SC 36 (Special Criminal Courts); *Niharendu Dutt Majumdar v King Emperor* AIR 1942 FC 22 (sedition).

⁷⁷ *Liversidge v Anderson* [1942] AC 206; *Greene v Secretary of State for Home Affairs* [1942] AC 284.

⁷⁸ MV Pylee, *The Federal Court of India* (Manaktalas 1966) 205.

⁷⁹ Pylee draws an interesting contrast with the contemporaneous legal challenges to the New Deal. Note that courts the world over had watched the battle between the Supreme Court and a popular President and must have drawn lessons. Given the popular nature of the provincial laws and the state of nationalist feeling in India, ruling against the provinces would have led to a massive hue and cry: MV Pylee, *The Federal Court of India* (Manaktalas 1966) 209.

⁸⁰ MR Jayakar to Sir Shah Suleiman, 6 April 1937, MR Jayakar Papers (National Archives of India). Gwyer enclosed the names over thirty textbooks on constitutional law from different countries, as well as comparative work done by AB Keith.

⁸¹ 'What is He After?' *Dawn* (New Delhi, 18 December 1943). *Dawn* was an English-language daily published by the Muslim League and was critical of the Congress.

⁸² *Constitutional Proposals of the Sapru Committee* (Padma Publications 1945) 247–48.

⁸³ JN Verma and MA Gharekhan, *The Constitutional Law of India and England* (2nd edn, Popular Book Depot 1931) 227.

CHAPTER 3

INDIAN CONSTITUTIONALISM

crisis, unity, and history

UDAY S MEHTA

. . . neither morals, nor riches, nor discipline of armies, nor all these together will do without a constitution.

John Adams¹

India is bound to be sovereign, it is bound to be independent, and it is bound to be a republic.

Jawaharlal Nehru²

I. INTRODUCTION

MODERN democratic constitutions are the form, or more precisely, the prior shape, the stipulated mould, to which political power, and its various structures, have to conform. Constitutional founding moments express that inescapable circularity in which they are authorised by the people, but which, by the structures that constitutions put in place, reconstitute the people as subjects. Constitutions identify people as the ultimate source of power, and yet they also transfer that power; simultaneously making them subjects of power and limiting the way in which people can participate in its exercise. In the process they often express a deep implicit distrust of people, while also giving them a collective identity and a sense of agency. Constitutions give to modern politics its supervening identity, and in turn they circumscribe what would count as legitimate forms of political and collective behaviour. They supply the distinctive structure, order, and boundaries, and in particular the specific mode by which power expresses itself. But they also designate other forms of existence as illegitimate, improper, and extra-constitutional. In this sense, they ostracise by marking out the boundaries between constitutional form and the social remnants that exceed it. Because constitutions have acquired the legitimacy of being an almost mandatory form of collective self-expression, it is difficult to recover a sense of the plenitude from which they assumed this singular standing. It is especially difficult to recover a sense in which collective

identity was not, or need not be, associated with the constitutionalising of power.

This chapter considers from a rather abstract standpoint the background conditions, understood mainly as ideas, which informed the Indian Constituent Assembly (1946–49) as it reflected on the future identity of the country and the role of the Constitution in forging that identity. Such a perspective, given its abstractness and focus on ideas, requires justification because, in a familiar rendering, constitutions, including the Indian one, are identified with concrete events that are contextually saturated. They are typically taken to be the product of a historical process, rich with decisive events, forceful personalities, collective struggles, and constitutional antecedents. All of this is true of the Indian case, where the nationalist movement, legislative documents like the 1935 Government of India Act, the Cabinet Mission Statement of 1946, along with towering personalities like Ambedkar and Nehru, decisively shaped the content of the final Constitution. As living documents, constitutions, perhaps more than any other instrument of the State, are in a constant process of producing their own ongoing textual references, closely associated with other constitutional and legislative antecedents. My focus, instead, is on broad ideas such as the pressing urgency of political identity, the basic centrality of unity, the reliance on the professed permanence of crisis, and the role of the social, and the idea of the future. All these ideas, in my view, had a defining significance for the Constitution and the vision of country it put in place. Yet one might understandably argue, especially in light of issues such as fundamental rights, the directive principles, separation of powers, federalism, or more broadly, the specifics of institutional design—which are the pointed concern of the text of the Constitution, and which now have a rich history of case law and legislative intent—that the perspective offered here hovers too far above the text of the Constitution and the relevant context. This may be true. My justification for my orientation relies on two considerations. First, the study of the Indian Constitution in terms of its constitutional antecedents, the evolution of doctrine, its relationship to political and legislative context, and the analysis of case law has already been done by expert scholars such as Granville Austin, HM Seervai, and many others.³ The fact that such a field of study is now clearly demarcated speaks of its self-assurance, which in turn allows reflection on the Constitution to cordon itself off from the broader intellectual tradition of which it was once an emergent part. Self-confidence often expresses itself in self-enclosure and self-reference. This relates to the second reason I offer for my orientation. Despite the truly impressive and growing self-assurance of this body of literature, there has been a relative neglect of ideas, often of a distant provenance, which in many ways were the philosophical reservoir that nourished constitutional thought. The

evidence of this influence on the Constitution is often obscured. It hides in many ways in the binding of the text. These ideas often belong to a moment when the very distinctiveness between philosophical, religious, political, and constitutional thought was deeply embattled and entangled, and where each was subject to the other's distinct and shared urgencies. In focusing on these ideas, I hope to present not just the logic that is internal to them, but also to point to the way in which they opened and delimited the constitutional vision of India during the process of its initial and self-conscious articulation.

II. CONSTITUTIONAL IMPERATIVES

Every constitution has a complex and distinctive provenance. Each is the product of specific struggles, opportunities, and social contexts. These conditions mark constitutions, as they would any event that emerges from the rich vortex of history. But, in another sense, constitutions, at least modern ones, respond to imperatives, which though they have a history—in this case a modern history—in a crucial manner also transcend the logic of historical causation. These imperatives are embedded in narratives of destruction and creation, of generating power and constraining its exercise, of creating unity out of plurality and limiting plurality in the name of unity. They function as though they were natural conditions, which impose an almost primal necessity on constitutions: a necessity which is putatively not driven by the logic of history, but by a meta historical narrative that refers to a broader set of conditions that are deemed to underlie it—conditions that have assumed an almost metaphysical status. The imperatives refer to existential conditions, which occasion a distinctly political response; not merely in the familiar sense in which politics answers to the vagaries of extant conditions, but in a more architectonic and mythic sense in which it professes to redress a predicament that traverses all conditions.

It is commonplace to think of constitutions as seeking to establish fundamental norms of justice, legality, and the forms and offices of governance. This is, of course, true. In its original articulation the idea comes from Aristotle.⁴ Alexander Hamilton, in expressing the first axiom of modern constitutions, famously declaimed that they were a mechanism to ensure that ‘the streams of national power ought to flow immediately from that pure original fountain of all legitimate authority’, namely the consent of the people.⁵ At one level, constitutions are literally the articulation of a plan that establishes the major political institutions of a society: parliament, the executive, the judicial

framework, the superior law that constrains ordinary law, the mode and extent of judicial review, the manner in which power is apportioned in different branches of government, the stipulations of the franchise, the rights that citizens have and with respect to whom they may be exercised, along with a variety of other norms that make up the political template of the state. In this sense, constitutions are rightly thought of as ‘the rules of the game’ that give expression to a vision of a society in the process of its coming into being.⁶

But this familiar rendering of what constitutions are and do misses a narrative consensus that precedes the framing of constitutions, and which constitutions, as it were, merely reflect. It is a consensus about the State and its identity, and about a specifically political redress to a modern predicament.⁷ At the risk of some exaggeration, one might say that European constitutional history since the seventeenth century was articulated around the nuances of this consensus, which was forged on the wreckage of theological disputes and a displacement of inner convictions, along with a vision of social evisceration that could no longer hold society together, and the corresponding and singular redress offered by the power of the State and the unity of the nation. It is this consensus that stands behind and motivates much of modern constitutionalism. One should not be surprised by these distant influences. History almost always yields more than its starting point.

Understanding the imperatives that drive modern constitutionalism is important because they make clear that notwithstanding the epic sense in which constitutions are associated with an act of a people’s sovereign choice, in other ways they are the products of a prevenient logic and destiny in which what is chosen is already, as it were, substantially given. The epic and the sovereign are thus also acts of ritual repetition, where a professed break with history also enfold it into a pre-existing narrative of necessity. It is perhaps a banal and self-evident feature of that narrative, but one that bears repeating, especially in a context where typically there are other claims to authority, namely that constitutions put into place principles that are structured around the idea of ruling and being ruled.

The stakes of this recursive process were more pronounced in post-colonial societies that came to political self-consciousness in the latter part of the twentieth century. Notwithstanding the idealism of the nationalist struggle, the conclusion of that process was invariably constrained by a preformed and limited template of possible identities. In expressing their grievances against empires, the formerly subject societies had stridently vouched for their own difference and their own glowing nationhood hallowed in distinct hues in a

crowded field of extant social norms and practices. But in articulating themselves as political entities, a task specific to constitutionalism and nationalism, they were perforce destined to affirm their existence through acts of sovereign repetition; in a borrowed vocabulary with its own distinctive and implicit traumas and its own reliance on a tool box of familiar concepts in which, to recall Hamilton, the power of the state was the principal font and purpose.

Postcolonial constitutionalism, in many ways, emerges from this dual and awkward pressure of, on the one hand, having to give expression to a distinctive national emotion; and on the other, discovering that the familiar form of constitutionalism is already alloyed to an ancient imperative script, of distant sectarian battles, which were linked in terms of redress with a particular conception of power and its relation to the nation. Hence in its political articulation the nation, almost unwittingly, finds itself to be a 'fragment' of a larger discursive constellation with a prescribed political destiny.⁸ The fact that the first three words of the American and the Indian Constitutions are the same only hints at the deeper sense in which the former serves as one of the templates for the latter, not least by making both constitutions the product of 'the people's' collective action. The Constitution prescribes for the nation its primary mode of existence, and in doing so folds it into a narrative in which its distinctiveness is qualified, not least because its many untidy edges are fit into a stipulated mould. It bears repetition that the project of the nation, which notwithstanding the euphoria of 'Independence', in many ways was to constitute a 'we, the people', under conditions where that national identity was still deeply contested, is for the Constitution, already taken as a settled fact. In the case of the Indian constitutional founding this was doubly the case. Not only was the Constituent Assembly authorised by an existing government, the interim government, along with the Cabinet Mission statement of May 1946, but also the deliberations on the future Constitution were significantly constrained by the Government of India Act of 1935.⁹ Nehru's declamation at the head of this chapter conveys a sense in which that destiny was chosen, but also already prescribed. There are implicit in this settlement the meanings of other important terms such as power, authority, consent, rights, and federalism. Yet the dialectic of the contestation regarding a national identity and a constitutional vision in which it is a fact is never ultimately stable or fully settled. It permeates everyday life, if nothing else as a reminder that even the imperatives that wrap themselves in the garb of meta-historical necessity are not immune from an essential experimentalism that marks history and public life.

III. A NARRATIVE OF CRISIS AND ANARCHY

The most salient and, in many ways, determinative existential contention that informs constitutional founding moments is that the extant conditions of a society are deemed to be deeply disturbed by an intractable crisis, which renders society anarchical and exposes human life to severe exigencies, and at the limit, to unnatural forms of suffering and death. In its constitutional significance, the contention is not really dependent on a historical claim about the present actually being marked by anarchy, even though most often a factual claim is made to buttress the philosophical argument.¹⁰ The claims of anarchy and acute disorder function as meta-historical postulates that put into motion a series of implications. The importance of this foundational contention and its status for constitutionalism lies in that it points to a gap that needs to be filled, and the untenability of the extant framework of society as offering the appropriate binding material to fill the gap. This thus motivates, with pressing urgency, the need for a State and its cognate, the citizen. In its most powerful and elaborate philosophical articulation the idea is, of course, associated with Thomas Hobbes, who famously deployed the fact, and even more consequentially, the idea, of civil war and anarchy as the generative postulate of modern politics and the rationale of the modern unified State. It was civil war and its anarchical implications, along with the impossibility of its resolution in religious terms that had motivated it, that necessitated a new idiom of power, which displaced the language of conscience (the inner realm) with one whose mandate was the peace and security of the outer body, of both the individual and of the unified State. Hobbes was substantially indifferent to the content of the religious beliefs that had spurred the English Civil War. What was essential was their displacement as the grounds for public obedience. What mattered in terms of the structure of the State was the status of being a citizen, and one could only be a citizen by being the subject of a sovereign. Hobbes was similarly less concerned with the specific substance of laws; rather, in serving as warrants for peace they had to express the will of a sovereign power. One of Hobbes's many enduring contributions to the broad logic of constitutionalism is in having made the State reliant, at least implicitly, on a narrative of anarchy and civil war. Many constitutions, including the Indian one, in their founding self-conceptions paid deep homage to this narrative and philosophical resource.

The invocation of crisis, strife, impending disunity, sectarian divisions, and the prospect of mayhem are ubiquitous in the reflections of the Indian Constituent Assembly Debates that precede the Constitution. The British

imperial authorities had themselves for long grounded the legitimacy of their rule as the sole basis for avoiding chaos and mitigating the sectarian crisis which would result from their departure.¹¹ Especially in the early speeches of the Constituent Assembly, where a broader context is being imagined, the invocation of crisis constitutes a haunting background to the deliberations. A few examples make this clear. They are meant to capture the ambient mood of the deliberations and a conceptual orientation—one that is closely linked to the constitutional vision and the urgencies that motivate that vision. Rajendra Prasad, for example, speaks of the context as recalling other such assemblies; it is, as he says, a context of ‘... strife and bloodshed ... conducted amidst quarrels and fights’.¹² Nehru, in one of his early perorations, refers to the freedom struggle as the ‘valley of the shadow’: ‘we have gone through [it] ... We are used to it and if necessity arises we shall go through it again.’¹³ Purushottam Das Tandon, while referring to separate electorates, recalls the bloody American Civil War and accuses the British of having created the ‘... possibility of civil war in our country ...’ and again ‘it is quite possible that civil war may occur ...’¹⁴ Sri Krishna Sinha speaks of strife and the spirit of rebellion as making possible and underlying the very existence of the Constituent Assembly.¹⁵ In much the same spirit, MR Jayakar says ‘... frankly there is danger ahead, danger of frustration, danger of discord and division ...’¹⁶ Ambedkar recalls and quotes from Burke’s famous speech *On Conciliation with America* precisely because he thinks that the situations in the two assemblies, Britain in the late eighteenth century and India in the context of the Constituent Assembly, are analogous. They are both riven by the belief in the expedience force, but Ambedkar, quoting Burke, continues, ‘... the use of force alone is but temporary. It may subdue for a moment; but it does not remove the necessity of subduing again; and a nation is not governed, which is perpetually to be conquered.’¹⁷ Finally, returning to Rajendra Prasad from a later point in the debates, we may note his description of the extant context of India as being one in which ‘there is a fissiparous tendency arising out of various elements in our life. We have communal differences, caste differences, language difference, provincial differences and so forth.’¹⁸

The background to these apprehensions about civil war and anarchy is a concern with the Muslim question, issues of caste, and pervasive inequality and destitution—hence broadly the social question. Following Independence and especially following the outbreak of hostilities in 1948, there was the additional and recurrent, and as it turned out the semi-permanent, invocation of the threat of war with Pakistan. In their combined effect they produced a generalised anxiety, not altogether dissimilar to Hobbes’ assessment of England in the mid-

seventeenth century. It was a picture of a society fraught with the danger of subjective enthusiasms, religious difference, and social and economic divisions. The collective image it produces is of a society in which unity had to be crafted through a new settlement. It is, of course, undeniable that the entire period of the Constituent Assembly, and the early years of the republic, were shadowed by real crises, especially after the failure of the Cabinet Mission, the outrageous expediency of Mountbatten's plans for the transfer of power, the refusal of the Muslim League's representatives to join the deliberations, the horror of partition, and the assassination of Mahatma Gandhi. The concern with war, the prospect of disunity, the anguishing worries about social and other forms of destitution typically mark the birth of nations and so it is not surprising that they should be forcefully expressed. Still, it is not these facts alone that adequately capture the importance of this recurrent trope in the Constituent Assembly debates and elsewhere. The facts, while true, are, after all, selective.¹⁹

The idea of crisis is also implicit in another resonant aspect of constitutional founding moments. They typically feature sharp contrasts in much the way Hobbes had starkly distinguished the commonwealth through the morbid imagery with which he described the state of nature. Here words often need the support of images. In the founding of constitutions this is conspicuously the case. They are often spoken as constituting a drama and they typically rely on dramatic images and metaphors to service their monumental purposes. They are conceived and projected through the iconography of darkness and light, night and dawn, past and future, subjugation and rebirth, chaos and order, and despair and hope. These metaphors extend across contexts that include those marked by an obvious revolution and widespread social upheaval, such as the French Revolution, to those where the constitutional founding occurred in a settled field of extant practice, such as in the Indian case. The fact that this stylised vocabulary and iconography, ritualised and, despite being burdened by clichéd overuse, has serviced such a vast range of examples, provokes an obvious question: what spurs such disparate moments to be so reliant on the sharpness of stark contrast and what are the stakes in these profuse distinctions?

The answer to this question touches on something deeper than the mere aesthetics of constitutions and the moments linked with their conception and adumbration. Initially, and above all else, constitutions need to clear the ground for a future set of experiences. The contrasts that are implicit in the metaphors they trade in are linked with distinctive narratives and constitutional visions and ultimately linked with the contested nature of modern politics. Such narratives dislodge rival modes of imaging collective life, institutional arrangements, and norms of governance. They displace and replace memories and practices, and are

thus freighted with issues relating to culture and embedded forms of social existence. The starkness of the contrasts that the founding of constitutions rely on, and deploy, are the metaphorical and textual precursors to the grand and expansive project of remoulding of experience and giving it a distinctly political and national cast.

But, as with so many dramatic gestures, there is an anxiety and nervousness implicit in them—in part concealed, in part revealed—often by the sheer audacity of their proclamations. ‘We, the people’, that collective pronoun that putatively authorises so many constitutions, including the Indian one, does so from an uncertain and proleptic position. It knows itself to be only an artefact of the very thing it professes to be creating, and hence, as it were, an embryo professing the fullness of its own maturity. Similarly the nation on whose behalf the constitution speaks and whose identity it claims to secure is not yet unified as a nation in the appropriate sense; the State and the government that the constitution authorises are not yet stable entities; the offices and authorities it articulates are provisional place holders imbued only with high expectations; the principles that it articulates are abstract, and not yet backed by precedent or interpretive clarity; and the history that it professes to demarcate itself from still crowds in on the present. The dramatic masks what is provisional and promissory.

It is therefore not surprising that, in the grand ritual scenes that mark the founding of constitutions and the assemblies that issue them, there are also less noted theatrics that suggest the urgent need to secure the validation and recognition of others. It is all part of the complex process by which that which is new and imbued with intentions is draped in the appearance of validating and established authority. In the case of the Indian Constituent Assembly this happened immediately. Within what must have been the first minute following the convening of the Constituent Assembly in the Constitution Hall on 9 December 1946 the Chairman, Sachchidananda Sinha, read out to the assembly three messages of acknowledgement and felicitation from the Acting Secretary of State for the United States, Dean Acheson, the Foreign Minister of China, Wang Shih Chieh, and from the Australian government. This resulted in the first expressions of cheers and applause in the Constituent Assembly.

The moment of celebratory grandiosity, national self-assertion, and distinctiveness also required a particular kind of applause, which could only be secured through the echo and recognition of others. No doubt nationalism had its particularistic and culturally specific aspects, but at least among its more thoughtful advocates, figures such as Nehru, Ambedkar, and Fanon, nationalism also always articulated an idea whose transformative political and spiritual

energies were thoroughly universal. The claim of independence, not unlike that of imperial authority and imperial subjection, had to be vindicated by a referent beyond itself. This and much else the national State shared with the Empire.

It seems fitting to that general moment that Nehru, speaking as a profoundly thoughtful participant and observer, and again while drawing on a host of sharp metaphoric contrasts, should have said, ‘standing on this sword’s edge of the present between this mighty past and the mightier future, I tremble a little and feel overwhelmed by this mighty task ... I do not know but I do feel that there is some strange magic in this moment of transition from the old to the new, something of that magic which one sees when night turns to day.’²⁰ Perhaps Nehru trembled because there was the knowledge that the night would assuredly return, that the past was not quite past, that the emergent rested substantially on noble intentions and prophecy, and that the project of national self-creation, notwithstanding all the professions of self-certainty and destiny, required the emollient of a magical elixir.

How is one to make sense at an abstract level, rather than at a merely contextual level, of such insistently grave perorations? Why does the nation, as it comes to self-consciousness, not just in India but elsewhere too, swaddle itself in such mournful garb and dire apprehensions of strife and conflict?²¹ More is at stake here, and an abstract perspective tells us something beyond what can be gleaned from the historical and contextual orientation.

IV. THE NARRATIVE OF UNITY

As an existential contention the narrative of anarchy, civil war, and stark contrast is closely linked with the need for unity with an unequivocal centre of sovereign power. In the modern era nobody articulated the rippling stakes of this more forcefully than Hobbes. The ultimate purpose of the social contract for Hobbes was to articulate the multitude into a singular entity—‘This done, the multitude so united in one person is called a *Commonwealth*.’²² Such unity had to be buttressed by the narrative of anarchy and crisis as its counterpoint. The narrative in effect served to delegitimise all alternative claims to authority as satisfying the first virtue of a political order, namely peace and security; and equally, it made that narrative a permanent feature of the political order’s continued legitimacy. The very idea of sovereignty as the source of the political identity had to be undergirded by a constant reminder of their intimacy and proximity to their antithesis, namely anarchy, chaos, and death. The significance

of this postulate, and its status as a quasi-metaphysical imperative, can be seen in the fact that no set of historical or extant conditions exempts a society from the implications of its implicit threat. Peace and security required the mediation of the State. They could not be left to the contingent resolutions offered by other social options. As the post-9/11 world has made vivid, the concern with security operates as a kind of permanent backdrop for every future eventuality, neutralising culture, society, or ethics from having an alternative claim to their redress.

Whatever the social, ethnic, cultural, geographical, or other forms of diversity and unity that might characterise a collection of individuals, they must, in addition, be forged into ‘a people’ with a distinctive political self-conception or collective identity. A central feature of that political identity—even if it involves a shared and founding allegiance to certain ‘inalienable rights’ and abstract normative principles as the American act of ‘separation’ did—is a sense of awareness that they constitute ‘one body’ with a shared vulnerability. The forging of a distinct political identity, even in a text such as the American Declaration of Independence in which the appeal to normative principles was so conspicuous, explicitly stipulated the need ‘to provide new guards for their future security’ and to ‘have full power to levy war, conclude peace, contract alliances, establish commerce, and to do all other acts and things which independent states may of right do’.²³ The Declaration did not just indicate a desire to defect from George III’s Empire; it was a document that professed the formation of something separate, singular, and unified—bound together in part by a shared insecurity along with the means to contend with that predicament. Hobbes signals the significance of this metamorphosis of individuals into ‘one body’ by invoking the gravity of the biblical term ‘Covenant’, thereby associating the formation of the Commonwealth with a new communion and a radically transformed ontological condition. Locke, though his language was less dramatic, was equally explicit—‘it is easy to discern, who are, and who are not, in political society together. Those who are united into one body, and have a common established law and judicature to appeal to ...’²⁴ In brief, the unity and the diversity of the social, be it the bonds of family, religious orders, professional guilds, territorial, and functional forms of association such as towns and villages, none of these can serve as a substitute for the unity of the political.

Both Hobbes and Locke anticipate a history in which the formation of modern political societies was linked, as both cause and effect, with nationalism and its cognate patriotism and the thought that each member was communally linked with every other member; and that the nature of this link was especially poignant

because the issue of the security, defence, and preservation of the corporate body of the people was always at risk. One might say, in this tradition, security, self-preservation, and political unity are literally obsessions in that no amount of attending to them fully assuages the anxiety they represent. Even with thinkers like Rousseau and Kant, who endorsed a federative ideal, there was no relaxing on the importance of patriotism, notwithstanding the civic accent they placed on it. Related to this idea was the emphasis which political societies placed on territorial and other kinds of boundaries, which were to be rigid and not porous. Hegel was summarising the broad orientation of modern political thought and practice when he wrote: 'Individuality is awareness of one's existence as a unit in sharp distinction from others. It manifests itself here in the state as a relation to other states, each of which is autonomous *vis-a-vis* the others.'²⁵ And finally the idea points to the thought that in political society there must be a central source of power, even if that power is limited or checked by contesting divisions and established norms for the transfer of power.

From a constitutional perspective nations have to articulate themselves as singular political entities. It points to the crucial significance of the singular collective pronoun, 'We, the people', as authorising the constitutional project. In terms of constitutional salience, unity is understood not as a social or civilisational category, but rather as something that refers to a political form. Unity, as Carl Schmitt pointed out, was the essential and permanent precondition and aspiration of the modern form of the state.²⁶

In many ways, the generative crucible of modern constitutions and modern politics turns on the metaphor and the idea of destruction and creation. As a coupling it is the font of that particular disposition by which power—in particular political power—becomes, or at least projects itself as, the singular and redemptive energy of a society. This is especially conspicuous in the case of foundational moments, but also is so often evident in more routinised politics, which, increasingly, invoke the dramaturgy of a revolutionary pretext. Many of the major themes of modern politics—the concern with power, the unity of the State and the nation, social justice, and national recognition—rely on contrasts of which destruction and creation are the starkest expressions.

The idea that political power emerges from the site of destruction or that it should need such an image for its self-generation is revealing of the nature of political power itself. At a broad level it points to the fact that power has a strained, if not antithetical, relationship to the past. In constituting itself through an act of clearing it is markedly different from social authority, which as Weber emphasised, typically relied on continuity as its mode of self-authorisation and

legitimacy. This is a theme that informs the Indian Constituent Assembly, though often with ironic touches. The assembly, as is well known, was full of speeches and references to India's glorious and multifarious pasts. One can recall Nehru's many invocations of India's five thousand years of history and traditions (which revealingly he often characterises through the metaphor of weight, thereby also suggesting burden), or Dr Radhakrishnan's frequent references to India's ancient republican traditions, or the countless other occasions in the assembly when the civilisational lustre of India was mentioned, usually with a triumphal pride. And yet—and this is the irony—the dominant temper of mind in the assembly was revolutionary, in which the challenge was to build a new society on the ruins of the old. It was this thought that guided the Assembly from its start to its conclusion, and for which the State and political power was deemed to be the necessary instrument. The metaphor of building, of creating something new, runs through the Constituent Assembly's deliberations. It is striking that even some of the native princes in the Constituent Assembly concurred with this sentiment. When, for example, Nehru in the resolution regarding 'Aims and Objects' invokes, with commendation, the American, French, and Russian Revolutions it is because, as he says, they 'gave rise to a new type of State'.²⁷ For that new State to have the stature and power requisite for the crafting of a new society, the past had to, quite literally, be past. It could survive only as something on which the State could do its work, as though it were an inherited one-dimensional coda, but not as a living force that infused the present. This is how Nehru, for example, typically conceptualises the relationship of the past and the State. In the *Discovery of India*, at one point Nehru paints two images of India: the first is dotted with innumerable villages, towns, and cities teeming with the masses; the second image is of the snow-capped Himalayas and the valleys in Kashmir 'covered' as he says 'with new flowers and a brook bubbling and gurgling through it'.²⁸ And then, in a remarkably self-conscious admission of the romantic and revolutionary's preference for blank slates and unpopulated places, for geography over history, he says: 'We make and preserve the pictures of our choice, and so I have chosen this mountain background rather than the more normal picture of a hot, subtropical country.'²⁹ One way of conceptualising the enduring challenge of the Indian State is to say that it has always attempted to stop the past from tearing the soul of the nation apart, with power as its principal instrument in this therapeutic endeavour.

V. HISTORY AND THE FUTURE

A decisive axis on which constitutions wager their authority is temporal. They typically pit the past and the future against each other. They deploy the text of the constitution as though it were a dam, by which the flow of the past could be held back or redirected and the elevation of the future repositioned at another plane. This is what is required for clearing the ground for a new mode of thinking and organising the administration of power. A crucial feature of that mode of thought, for which constitutions supply an essential tool, is that they must, from the outset, be oriented towards the future. Constitutions must sanction a mode of imagining and acting which, through its abstractness, can anticipate a future set of intentions and hence a capacious field for the exercise of power. Power in this sense always has an anticipatory mode of address. James Wilson, speaking at the Philadelphia Convention, put the matter with succinct clarity: ‘We should consider that we are providing a Constitution for future generations, and not merely for the peculiar circumstances of the present.’³⁰

Nehru spoke in a similar vein in his famous inaugural address on the night of 14 August 1947. He was preparing the nation for an experiment in a temporal abstraction. The only register in which the nation could be spoken of was the future and the vision associated with it. It was a moment when, as he said, ‘we step out from the old to the new, when an age ends’ and when ‘the future beckons to us’.³¹ The fact that the Constitution was to realise a beckoning from the future is understandable; but it was equally, and more vexingly, burdened with the challenge of bringing an age to an end and drawing a curtain on the past. Such pronouncements are linked, through drama and metaphor, with softening the conundrum that attaches to all constitutional founding moments—that is, of supplying a foundation to that which purports to be a foundation. Notwithstanding the warrant of history, legislative precedent, and, in the Indian case, the hugely significant fact of becoming an independent nation, it is only the future that could stand as the foundation of the Constitution. Ultimately, constitutions wager on being able to create in the future the conditions through which justice, morality, order, and a regime of giving and accepting reasons become real and serve as norms.

In the Indian and more broadly post-colonial context, the relationship of power to history is fraught with imperial associations. In the nineteenth century, every major expression of European political thought had made history the evidentiary ground of political and even moral development. In Hegel, Marx, and JS Mill, notwithstanding their differing accounts of historical development,

history was the register through which alone a society's political condition and political future could be assessed. Hegel's articulation of the state as the embodiment of a concrete ethical rationality represented the realisation of a journey of Reason that originated in the distant recesses of the East. Marx's vision of a proletarian future had its explanatory and political credence in overcoming the contrarian forces that fetter and spur historical movement. Mill's ideal of a liberalism that secured the conditions for the flourishing of individuality again explicitly rests on having reached a point of civilisational progress '... when mankind have become capable of being improved by free and equal discussion'.³²

These arguments had a specifically imperial inflection. In Mill, who was by far the most influential liberal advocate of the Empire, the argument went broadly along the following lines: political institutions such as a representative democracy are dependent on societies having reached a historical maturation, or, in the language of the times, a particular level of civilisation. But such civilisational maturation was differentially achieved. That is, progress in history itself occurs differentially. Hence, those societies in which the higher accomplishments of civilisation had not occurred plainly did not satisfy the conditions for a representative government. Under such conditions, liberalism, in the form of the Empire, serviced the deficiencies of the past for societies that had been stunted through history. This, in brief, was the liberal justification of the Empire. Its normative force rested squarely on a claim about history. It is what Dipesh Chakrabarty has called the 'waiting room' version of history.³³ The idea was that societies, such as India, had to wait until they were present in contemporary time or what amounts to the same timing in contemporary history. They had to wait because their history made it clear that they were not 'as yet' ready for political self-governance. The denial of an autonomous political realm was the debt paid by the present on behalf of a deficient and recalcitrant past.

The nationalist response to this historically anchored waiting room model was to agree with the idea and the logic of argument but to disagree with the particulars of its application. Here, as elsewhere, Gandhi is the exception because his conception of civilisation and its cognate progress were never historically driven. When Gandhi speaks of civilisation, it is invariably as an ethical relationship that an individual or community has with itself, with others, and with its deities.³⁴ Whatever else this does, it cuts through any reliance on history as the register from which alone progress can be read, evaluated, and directed. But the more typical nationalist response, including among the social reformers of the nineteenth century, was to concur with the claim that progress

was historical, but to demur on the point that India was not 'as yet' ready. The nationalist claim instead was that India was in fact ready, that it had paid its debt on behalf of a 'backward' past through two centuries of tutelage. Its claim to political autonomy was simply the other side of the claim that it was present in contemporary time and thus freed from the residual vestiges of historical time.

VI. THE SOCIAL QUESTION

But what did it mean to be freed from history? It did not mean that India was not affected or influenced by its past, or that the problems of poverty, caste, and numerous other social and economic woes were without a historical dimension. That would have been rank stupidity, and the framers of the Constitution and the members of the Constituent Assembly were not fools. Instead, the historical aspect of these problems is taken as part of their social scientific and political nature, but not as an inheritance that limited the potential of political power. All historical issues get automatically translated into the language of politics and in that translation they lose any temporal dimension of the past. History is brought to a threshold where, to recall Nehru's famous words, 'an age ends'.³⁵ The instrument through which this temporal sequestration is effected is political power. History becomes a social and contemporary fact on which politics does its work, by which I mean that history gets translated into a medium where it is available for political modification. To put the point perhaps overly starkly, the challenge of caste injustice becomes analogous to that of the building of industry or large dams. They are all challenges in which the State draws and leans on the guiding primacy of science and social science. This conception of the political is nothing if not presentist; it loses an element of temporality that one associates with notions such as inheritance. It is anchored in the amplitude of choice; everything becomes an issue of choosing by reference to the larger purposes of the nation, because the conception of politics that it belongs to is supremely about choosing and realising those purposes.

It is in this context that the concern with social issues, which is such a conspicuous feature of the Constituent Assembly debates and the Constitution, becomes relevant for two reasons. First, issues such as mass poverty and illiteracy and near-ubiquitous destitution belong to the realm of necessity because they put human beings under the pressing dictates of their bodies. To the extent that political power concerns itself with this dimension of human life (and under modern conditions it has to), it too becomes subject to a necessity. It can

only represent freedom as something prospective. Its immediate ambit is dictated by the intensity of 'mere life'. And with regard to this ambit, political power can have no limiting bounds. Under such conditions a simple logic transforms power from a traditional concern with establishing the conditions for freedom to a concern with life and its necessities. The power of the State is thus always underwritten by an elemental imperative to sustain life—the corporeal life of the citizen and the unitary and corporate life of the nation. Neither the fundamental rights which belong to citizens—with regard to which the Indian Constitution was famously expansive—nor the rights of the States and the communities that make up the federation has a warrant that is independent of the larger purposes of the nation. As [Part III](#) of the Constitution makes clear, the very enunciation of fundamental rights was immediately conjoined with the textual clarification of the ways in which such rights did not limit the power of the State in realising a broader national and political vision. Ambedkar's statement to the Constituent Assembly on 4 November 1948, made the subsidiary priority of fundamental rights perfectly explicit, '... fundamental rights are the gifts of the law. Because fundamental rights are the gift of the State it does not follow that the State cannot qualify them.'³⁶

The second aspect of the social, which explains its prominence, relates to its fundamental diversity in the Indian context. The diversity of India, of its religions, languages, castes, mores, and 'minor' traditions had been the leitmotif of colonial and nationalist ethnography and historiography dating back to Sir William Jones, Edmund Burke, James Mill, Sir Henry Maine, JR Seeley, and numerous others from the late eighteenth century onwards. It referred to a fact which variously supported the view of India's cultural and civilisational richness, her history of confederation, her *Sabhas*, *Samitis*, and *Panchayats* and the traditions of decentralised accountability; but this very diversity was taken to be in many of these narratives as the ground for India's political backwardness, her lack of national coherence, her easy resort to internecine conflict, and her fundamentally anti-modern orientation. Nationalists had, of course, also weighed in on these debates, whose stakes they knew pertained not just to their anti-imperial claims, but also to the period that was to follow. India, as both Gandhi and Nehru concurred, lived in her villages and her villages, in being worlds unto themselves, tended to live in a benign isolation from the rest of the world. For Gandhi, village India furnished the basic social integuments for resisting the lure of a vicarious existence—a feature which most troubled him about modernity. For Nehru, as a general matter, villages entrenched practices that were archaic, anti-rational, and sectarian in their prejudices. They represented everything to which his vision of the democratic nation offered a redemptive redress.

The constitutional vision, which in the main sidelined Gandhi's views, saw in the social diversity of India a profound challenge. It was variously coded as a resistance to the professed unity of the nation and as supporting the sectarian, inegalitarian, and pre-modern norms that sustained and promoted the social. But perhaps most importantly, the social, with its essential diversity, represented a resistance to the political vision which the Constitution attempted to put in place. Dr Rajendra Prasad's words to the Constituent Assembly make this amply clear. They have all the familiar contrasts and binaries. On one side stands the Constitution, the unified nation, the men of honest character and integrity, the interests of the country, the ability to control and guide it; and on the other side, the diverse languages, castes, communal differences, prejudices, and the 'various elements of life' with their 'fissiparous tendency':

After all, a constitution like a machine is a lifeless thing. It acquires life because of men who control it and operate it, and India needs today nothing more than a set of honest men who will have the interest of the country before them. There is a fissiparous tendency arising out of various elements in our life. We have communal differences, caste differences, language difference, provincial differences and so forth. It requires men of strong character, men of vision, men who will not sacrifice the interests of the country at large for the sake of smaller groups and areas and who will rise over the prejudices which are born of these differences.³⁷

This is a casting of India in the very terms that Hobbes had viewed English history in the seventeenth century in his study of the English Civil War. The social domain was divisive, the political, unifying. The constitutional vision was meant to eviscerate or, at a minimum, trump these social and fissiparous tendencies by fixing them in a unified political frame. In fact, for Ambedkar, even the idea of India's being a federation was troubling because that term suggested the existence of parts or States that had, as in the American case, come to an 'agreement' to form a federation. For Ambedkar, the constitutional vision was one in which the 'Union' was not at the mercy of any such agreement with its constituent parts:

The federation is a Union because it is indestructible. Though the country and the people may be divided into different States for convenience of administration, the country is one integral whole, its people a single people living under a single *imperium* derived from a single source.³⁸

Not surprisingly the text of the Constitution never uses the terms 'federal' or 'federation'.

For Nehru, Prasad, and others, the social diversity of India was a real, if awkward, fact, which simultaneously provoked pride in India's civilisational fecundity and plurality, and a fear in its centrifugal potential. With Ambedkar, the diversity—to the extent that it was even acknowledged—existed solely as an

administrative ‘convenience’ on the way to realising an expressly political vision. For Ambedkar, the social did not even represent what Prasad called the ‘elements of life’, because the presumption in favour of a unitary political perspective was total. It is a perspective that is revealingly (and certainly wishfully) described as appropriate to ‘a single people living under a single *imperium* derived from a single source’. Hobbes would have marvelled with envy at such propitious foundations—if only they had been true.

A corollary of this political emphasis was that individuals, notwithstanding their rights, were understood primarily as citizens—that is, as members of a predetermined, even if only prospective, political community—and not as agents of their private material or commercial interests. The imperative for unity was so acute that something as potentially fissiparous as *homo economicus* could only be allowed an existence in the shadowy penumbra outside of the national ethos.

VII. CONCLUSION

The underlying argument of this chapter is that the themes of crisis, impending disunity, and the prospect of anarchy all worked to produce a collective self-understanding in which a concern with national unity was deeply, indeed constitutionally, braided with the sanction and the amplification of political power. It is this widely shared conviction, one which I identified in its intellectual origin as Hobbesian, which I believe is the conceptual thread that ties the constitutionalism of the late 1940s with the Nehru Report of 1928 and Government of India Act of 1935, along with contemporary democratic politics and judicial activism. The only argument that challenges it comes from Gandhi and those of his ilk, who do not share the assumption of impending anarchy or crisis, and when they do are prepared to embrace its implications. The Left–Right spectrum on public policies always complements the dominant self-understanding with its belief in the primacy of political power, most often by simply refusing to offer any arguments against it and by treating it as a self-evident norm of national independence, pragmatism, and national idealism. There is in this a submerged conviction and consensus, and a correspondingly elevated faith in the State. It produces a powerful absolutism on behalf of the State, one that is, strangely—given Gandhi’s presence and stature—unmarked by contact with an opposing way of life and point of view.

One can make this point by invoking what might seem like a distant reference to Locke, though of course in many ways Locke is not so distant; his and even

more so Hobbes' spirit hovers over the Constituent Assembly like a ghostly interlocutor, not unlike the presence of Montesquieu in the Constitutional Assembly in Philadelphia. There were always two aspects to Locke's liberal arguments. The first was an implicit defence of the State as the only organ that could legitimately coerce individuals, who were deemed to be free and hence in principle relieved of social ascriptions, such as class, place, church, and guild; and who, as citizens, had a more elevated claim that linked them to the State. The second aspect of Locke's argument, which was more explicit and celebrated in the Anglo-American tradition, was a claim that limited the powers of the State by tying it to various norms of authorisation. Louis Hartz, in his classic book *The Liberal Tradition in America*, offered a famous reading in which because the familiar European feudal and social distinctions, such as class, place, church, and guild, had not taken root in America, the second of Locke's claims came to be viewed as the whole of his argument.³⁹ American liberalism, at least in its official or credal version, came to be understood as all about the limitations on the power of the State. It was anchored in a deep distrust of power—of which a distrust of the absolutist prince was just a single instance. The dominant impulse of this constitutionalism was thus to limit political power, to be suspicious of it, and to constrain its reach.

In the Indian case something of the reverse is true. It is the defence of the State as the ultimate backstop against anarchy, strife, crisis, and acute destitution that makes it the guarantor of national purposefulness and supplies the ground for its having a priority in our collective self-understanding. But for this to be possible the ground has to be cleared of recalcitrant historical debris. The State, of course, does not operate on a blank slate. It arrives on a scene freighted, as the colonial State was, with all manner of historical and social encumbrances. The Constitution was a way of conceptualising the problems of a new nation in the present and for the future, as a political project of profound and permanent urgency.

¹ Cited from Hannah Arendt, *On Revolution* (Penguin Classics 1977) 133.

² *Constituent Assembly Debates*, vol 1 (Lok Sabha Secretariat 1955) 62, 13 December 1946.

³ See Granville Austin, *The Indian Constitution: Cornerstone of a Nation* (Oxford University Press 1966); Granville Austin, *Working a Democratic Constitution: The Indian Experience* (Oxford University Press 1999); HM Seervai, *Constitutional Law of India: A Critical Commentary*, vols 1–3 (4th edn, Universal Law Publishing 1991–96).

⁴ 'A constitution [is] an organization of the offices in a state, by which the method of their distribution is fixed, the sovereign authority is determined, and the nature of the end to be pursued by the association and all its members is prescribed.' Aristotle, *Politics*, tr Ernest Baker (Oxford University Press 1946) 28–32.

See also Charles H McIlwain, *Constitutionalism—Ancient and Modern* (Cornell University Press 1940).

⁵ Alexander Hamilton, James Madison, and John Jay, *The Federalist*, ed Jacob E Cooke (Wesleyan University Press 1961) 146.

⁶ Madhav Khosla, *The Indian Constitution* (Oxford University Press 2012) xii. Joseph Raz makes this point in terms of the distinction between ‘thin’ and ‘thick’ constitutional understandings. See Joseph Raz, ‘On the Authority and Interpretation of Constitutions: Some Preliminaries’ in Larry Alexander (ed) *Constitutionalism* (Cambridge University Press 1998) 153.

⁷ I mean this claim in a broad sense. It is not meant to deny that the consensus about the state may itself be backed by a moral consensus. In fact, since the account I am offering at a very general level has a Hobbesian inflection, it is worth pointing out that for Hobbes the rationality of the state is itself underwritten by its coincidence with a moral rationality.

⁸ The idea of new nations as fragments of a European political imagination draws on the thought of Louis Hartz. See Louis Hartz, *The Founding of New Societies* (Harcourt, Brace & World 1964).

⁹ Writing in early 1947, Sir BN Rau reminded the Constituent Assembly: ‘It is pertinent to observe that we are still governed by the “transitional provisions” in [Part XIII](#) of the Government of India Act of 1935 ...’ BN Rau, *India’s Constitution in the Making* (Orient Longman 1960) 2.

¹⁰ Thus, for example, Hobbes, who offered the most influential philosophical and abstract argument for the meta-historical priority of anarchy in grounding the necessity of the State, also supported that argument as being ‘occasioned by the disorders of the present times’. Thomas Hobbes, *Leviathan* (first published 1651, Hackett 1994) 496.

¹¹ Faisal Devji gives an extremely thoughtful account of both the British thinking on this matter and Gandhi’s heretical embrace of the prospect of anarchy in Faisal Devji, *The Impossible India* (Harvard University Press 2012), ch 6.

¹² *Constituent Assembly Debates*, vol 1 (Lok Sabha Secretariat 1955) 50, 11 December 1946.

¹³ *Constituent Assembly Debates*, vol 1 (Lok Sabha Secretariat 1955) 64, 13 December 1946.

¹⁴ *Constituent Assembly Debates*, vol 1 (Lok Sabha Secretariat 1955) 68–69, 13 December 1946.

¹⁵ *Constituent Assembly Debates*, vol 1 (Lok Sabha Secretariat 1955) 87–90, 16 December 1946.

¹⁶ *Constituent Assembly Debates*, vol 1 (Lok Sabha Secretariat 1955) 81, 16 December 1946.

¹⁷ *Constituent Assembly Debates*, vol 1 (Lok Sabha Secretariat 1955) 103, 17 December 1946.

¹⁸ *Constituent Assembly Debates*, vol 11 (Lok Sabha Secretariat 1955) 993, 26 November 1949.

¹⁹ Devji ([n 11](#)), 153, quotes a letter by Lord Linlithgow to Lord Wavell with the following sentence: ‘We could not for the peace of the world allow chaos in India.’ Here, as elsewhere, Gandhi expressed a dissenting view, which was of a piece with his reluctant support of constitutionalism and the need for unity expressed around the medium of the state and political power. In 1942, during the Quit India movement, he made clear to the British that the time had come for them to leave India, even if that meant leaving the country to God and anarchy.

²⁰ *Constituent Assembly Debates*, vol 1 (Lok Sabha Secretariat 1955) 64, 13 December 1946.

²¹ As another example, the *Federalist* papers are replete with similar apprehensions. One of the most frequent complaints made by the proponents of the American Constitution against the Articles of Confederation was precisely that the latter would expose the republic to anarchy, chaos, and civil war.

²² Hobbes ([n 10](#)) 109.

²³ Declaration of Independence 1776.

²⁴ John Locke, *Two Treatises of Government*, ed Peter Laslett (2nd edn, Cambridge University Press 1967) 367.

²⁵ Georg Wilhelm Friedrich Hegel, *Hegel’s Philosophy of Right*, tr TM Knox (Clarendon Press 1945) 208.

²⁶ See Carl Schmitt on political unity: Carl Schmitt, *Roman Catholicism and Political Form* (Greenwood

Press 1996); Carl Schmitt, *Political Theology II* (Polity Press 1970) 71–72.

²⁷ *Constituent Assembly Debates*, vol 1 (Lok Sabha Secretariat 1955) 61, 13 December 1946.

²⁸ Jawaharlal Nehru, *The Discovery of India* (Penguin 2004) 56.

²⁹ Nehru ([n 28](#)).

³⁰ Max Farrand (ed) *The Record of the Federal Convention*, vol 2 (Yale University Press 1911) 125.

³¹ *Constituent Assembly Debates*, vol 5 (Lok Sabha Secretariat 1955) 4, 14 August 1947.

³² John Stuart Mill, *On Liberty*, eds David Bromwich and George Kateb (Yale University Press 2003)

81.

³³ Dipesh Chakrabarty, *Provincializing Europe* (Princeton University Press 2009) 8.

³⁴ For Gandhi's views on civilisation and history, see MK Gandhi, *Hind Swaraj* (Cambridge University Press 1997).

³⁵ *Constituent Assembly Debates*, vol 5 (Lok Sabha Secretariat 1955) 4, 14 August 1947.

³⁶ *Constituent Assembly Debates*, vol 7 (Lok Sabha Secretariat 1955) 40, 4 November 1948.

³⁷ *Constituent Assembly Debates*, vol 11 (Lok Sabha Secretariat 1955) 984–85, 26 November 1949.

³⁸ *Constituent Assembly Debates*, vol 7 (Lok Sabha Secretariat 1955) 42, 4 November 1948.

³⁹ Louis Hartz, *The Liberal Tradition in America* (2nd edn, Mariner Books 1991).

CHAPTER 4

THE INDIAN FOUNDING

a comparative perspective

HANNA LERNER

I. INTRODUCTION

THE making of the Indian Constitution offers a leading example of democratic constitution writing under conditions of deep ideational disagreement. The drafting process began in December 1946, seven months before Indian Independence, and ended with the enactment of the Constitution in January 1950. Despite grave challenges to the democratic nature of the process—beginning under conditions of limited sovereignty, partition of the country in the midst of the drafting process, great need for economic development, and immense internal diversity along ethnic, linguistic, religious, and socioeconomic lines—the Indian Constituent Assembly managed to lay down the legal foundation for the largest and one of the most stable democracies in the world.

Indian society is characterised by immense religious, ethnic, linguistic, and social diversity. Before partition of British India, 20 per cent of India's Hindu-majority population were Muslim, while other religious minorities included Christians (2.5 per cent), Sikhs (almost 2 per cent), and Buddhists, Jains, and Parsis (together comprising about 2.5 per cent). Although they made up just 12 per cent of the national population after Independence, India's Muslims constituted the world's third largest Muslim community (after Indonesia and Pakistan). In addition, India is one of the world's most ethnically and linguistically diverse countries. At Independence, India was home to nearly twenty major languages, each of which was spoken by at least one million people. The total number of less represented languages and dialects exceeded 1,600. Hindi was spoken by no more than 40 per cent of the population.¹ In addition to this vast religious, cultural, and linguistic diversity, the Indian framers faced the challenge of incorporating under the Constitution the 562 Princely States, which for the most part had their own monarchic traditions.

How to forge a common national identity in the face of unparalleled social and cultural diversity was the great task that faced India's founding fathers.

Following Independence and the partition of the country, translating this goal into the legal language of constitutional formulations was one of the central challenges for the Indian Constitution drafters.

Exploring the making of the Indian Constitution from a comparative perspective, this chapter highlights some of the significant and innovative aspects of the drafting process. In particular, it focuses on the innovative strategies of constitutional incrementalism adopted by the Indian drafters, including the deferral of controversial decisions (eg, concerning Indian's national language), ambiguity (eg, with regard to religion) and non-justiciability (the Directive Principles of State Policy). These incrementalist strategies allowed the framers to reconcile the Indian public's deep disagreements regarding the religious, national, and linguistic identity of the State with the principles of democracy.

II. POST-COLONIAL/POST-WWII CONSTITUTION MAKING

Modern constitutions, it has been observed, tend to be written in waves.² Comparative accounts of constitutional transitions provide various forms of periodisation, usually clustering processes of constitution writing and rewriting around historical events and geopolitical trends.³ These observations have recently been supported by large-N empirical studies that show how regional and temporal clustering plays an important role in triggering constitutional transitions.⁴ Empirical research is still limited in discerning between cases where a constitutional transition in one country inspires constitutional reform in a neighbouring one, and other cases of geographical and temporal clusters which may be explained by simultaneous, yet independent, responses to a similar set of conditions.⁵ Nevertheless, a brief overview of the historical waves of constitutional transitions provides a comparative context to the drafting of the Indian Constitution, and highlights the constraints under which it occurred, as well as the innovative aspects of its process.

The first wave of constitution writing is commonly attributed to the late-eighteenth-century drafting of the first modern constitutions in the American States, the United States (1787), France, and Poland (both in 1791). These constitutions are usually considered 'revolutionary',⁶ characterised by a liberal quest for representative and limited government.⁷ During the nineteenth century constitution making expanded, and included dozens of new constitutions written

in Europe in the wake of the 1848 revolutions,⁸ as well as in the newly formed States in Latin America.⁹ The twentieth century has witnessed several waves of constitution making, following the two World Wars and the breakup of the colonial empires. In Europe, a wave of new constitutions occurred in the post-World-War-I newly created, or recreated States such as Poland and Czechoslovakia, or in defeated Germany (Weimer Constitution of 1919). In the 1940s, several new constitutions had been written in countries defeated in World War II, such as Japan, Austria, Italy, and Germany, while new constitutions had also been drafted under the emerging Soviet influence in Eastern and Central Europe. Across Africa and Asia, a large wave of new constitutions had been written during the 1940s–60s, accompanying the end of British and French colonial rule (see further elaboration below). The next wave of constitution making was connected with the third wave of democratisation, beginning in the 1970s with the drafting of new democratic constitutions in Greece, Portugal, and Spain. The perception of constitutions as an instrument for democratisation continued to characterise the wave of constitutional transitions in the 1990s, which followed the fall of communism in Eastern and Central Europe, as well as the end of Apartheid in South Africa. Regime change and post-conflict reconstruction was a central feature in the most recent wave of constitution writing in early-twenty-first-century Africa (eg, Kenya, South Sudan), Asia (eg, East Timor, Thailand), and the Middle East (eg, Iraq, Afghanistan, Egypt, Tunisia). Given the relatively participatory nature of the drafting process in these countries, many of them involved intensive disputes over core ideational questions concerning the shared norms and values that should underpin their State.

The Indian Constitution was one of the first among what is commonly termed the post-colonial wave of constitution drafting. By contrast to the revolutionary constitutions of preceding centuries, post-colonial post-World-War-I constitutions were generally written under conditions of limited sovereignty. In many cases, the constitution was the outcome of negotiation between representatives of the colonial government and nationalist movements.¹⁰ Colonial rulers typically intervened in appointing the local drafters or in determining procedures for decision making or ratification of the constitution. This was the case, for example, in 1945 Indonesia, where Japanese rulers appointed the members of the Drafting Committee, and in 1947 in Sri Lanka and in 1957 in Malaysia, where a (British) colonial constitutional committee reviewed and revised the draft constitutions. Constitutions of the post-colonial wave were rarely the result of open deliberation by freely elected representatives

of 'the people'. To a large extent, post-colonial governments were modelled closely on those of the former colonial powers. Moreover, many of the independent constitutions led to the establishment of authoritarian regimes, and imposing economic and social reforms, as well as national unity, through non-democratic means.

India differed from these characteristics of its contemporaries in two important respects. First, although the drafting of the Indian Constitution was initiated under conditions of limited sovereignty, it resulted in a constitution that was perceived to express a high degree of sovereignty, both internally and externally. Like those of Indonesia and Sri Lanka, the Indian process of constitution drafting began before Independence. In March 1946, a British Cabinet Mission to India published a plan for a general framework of the soon-to-be-independent government, including a specific plan for the structure of the Constituent Assembly and its decisionmaking rules.¹¹ During July 1946, the representatives of the Constituent Assembly were elected according to the Cabinet Mission's plan. When convened in December 1946, the assembly was criticised by many as representing a 'revolution by consent'.¹² As Gandhi put it, 'it is no use declaring somebody else's creation a sovereign body'.¹³ However, the transfer of governmental power from British to Indian hands in June 1947 led to the removal of the procedural constraints that had been imposed on the assembly under the British Cabinet Mission plan. For the next two and a half years, the Indian Constituent Assembly was stronger, more confident in its status, and more united around the leadership of the Congress Party, which had increased its dominance in the assembly.

The second difference lies in the outcome of the drafting process, namely India's success in establishing a democratic order despite deep internal divisions. Like many other non-Western post-colonial or post-imperial constitutions, the Indian Constitution was written under conditions of intense disagreements concerning the religious and national vision of the newly independent State, as well as a grave need for economic development. Under such circumstances, many governments did not allow open and free deliberation or consensus-based decision making in constitutional processes. In Indonesia, for example, a democratically elected Constituent Assembly, which debated the country's permanent constitution for two and a half years, was dissolved in 1959 by a Presidential decree, which reinstated Indonesia's 1945 Constitution and established the authoritarian system of 'guided democracy'.¹⁴

Similar to the national leadership in Indonesia, Sri Lanka, and other post-colonial or post-imperial divided societies (eg, Turkey), the Indian leadership

perceived national unity and legal uniformity as a necessary condition for fostering social and economic modernisation. For Nehru, India's modernisation, industrialisation, and social reconstruction depended on a strong Union government with the capacity to implement the required national reforms. As he wrote during the years of the struggle for Independence, India's feudal land system, its social services, and education 'can be tackled only on a nationally planned basis without vested interests to obstruct the planning'.¹⁵ Yet, in contrast to Turkey and Sri Lanka, democracy was a key element in the constitutional vision held by the Indian framers. The Western model of a nation-state, based on democratic institutions elected by universal suffrage, was the model to which the Congress leadership looked. In Nehru's words, 'national unity and democracy' were the two doctrines on which the Congress Party was founded and stood most firmly.¹⁶ These principles were expressed already in pre-Independence constitutional drafts and proposals such as the 1928 Nehru Report, which defined the goal of the future constitution in terms of advancing India's unity through democratic institutions based on universal suffrage and expansive individual rights.¹⁷

After Independence the Congress Party controlled not only the Constituent Assembly, but also the government at both provincial and national levels, which made it easier for its leadership to incorporate into the Constitution elements of the party's vision for a democratic and united India. Nevertheless, partition did not resolve intercommunal tensions. Rather, it created a new national trauma and amplified the uncertainties and fears of minority groups over future decisions by a Hindu-majority government. Furthermore, alongside Nehru's multiculturalist vision of a diverse India, central leaders of the Congress Party expressed more conservative views.¹⁸

Thus, even after partition, one of the most hotly debated questions in the Constituent Assembly remained: what does it mean to be an Indian? And how should the Constitution facilitate political unity based on shared commitments and values in a society characterised by immense cultural, religious, and national diversity? As the following sections demonstrate, the Indian framers developed innovative constitutional strategies to address these concerns.

III. CONSTITUTION WRITING IN DIVIDED SOCIETIES

Constitution drafters in many multi-ethnic, multicultural, and multinational

societies have tackled the challenge of forging constitutional unity amidst internal ethnic, religious, and linguistic diversity. Scholarship on comparative constitutional design has documented a broad range of alternative institutional mechanisms intended to enhance democracy and stability in the context of deep ideational conflicts. These include various forms of federalism, devolution, consociationalism, power sharing, a variety of electoral systems, and special group rights.¹⁹ Many of these conflict resolution mechanisms have been useful tools in mitigating clashes between identity groups mostly defined along ethnic lines, and have been adopted by many post-conflict and ethnically divided societies.²⁰

However, these institutional solutions appear applicable only under particular geographical or societal circumstances, or when the conflict mostly concerns the resource distribution of the allocation of power among identity groups. They often fail to address divisions over the shared vision of the State *as a whole*, over the common norms and values for the entire population. Federal solutions, for example, have been effective when the various ethnic, national, or linguistic groups were territorially concentrated, as is the case in Belgium, Switzerland, or Canada.²¹ Indeed, in India federalism has been proven to be a successful tool in addressing linguistic diversity, when provincial borders were redrawn according to linguistic identity lines in the decade following Independence. Yet, federal arrangements have been less useful when the populations in question are geographically dispersed, for example when the division is between competing perspectives regarding the religious, national, or even linguistic identity of the State in toto. In such cases, the conflict is often over the fundamental norms and values that should guide State policies for the entire population. This is the case, for example, in Muslim-majority countries such as Egypt, Tunisia, Indonesia, and Turkey, where society is divided between people who define themselves as secular-liberal Muslims and those who define themselves as religious-conservative Muslims. Similarly, and in contrast to common scholarly views, advocates of liberal constitutionalism often fail to mitigate intense ideational disagreements over the religious or national character of the entire State.²² When society is divided between competing perceptions regarding the shared norms and values, liberal constitutionalism is not perceived by all drafters as a neutral ground for future democratic deliberation on controversial issues. Rather, it represents one side in the conflict over the values of the State—the liberal side. This is the case, for example, in the conflict over religion–State relations in Israel. Unlike religious minorities in liberal countries (eg, the Amish in the United States), the Orthodox camp in Israel does not wish to merely enjoy legal

exemptions or the protection of special group rights within a liberal constitutional framework. Rather, it seeks to impose its religious views on the State as a whole. A similar schism cuts across the Muslim–Hindu divide in India, where tensions exist between fundamentalist-religious camps and moderate-liberal camps in both religious groups. Moreover, under unstable conditions of intense internal conflicts, clear-cut constitutional decisions risk exacerbating the conflict, and may even lead to violence. The partition of British India is an excellent example of such a scenario.

After partition, the Indian drafters recognised the need for an innovative approach in light of their deep disagreements over the vision of the State. In various ideational debates, the framers refrained from making unequivocal choices. Rather, they acknowledged that the gaps between rival perspectives were unbridgeable and addressed their difficulties by adopting an incrementalist approach based on creative use of constitutional language.

IV. STRATEGIES OF CONSTITUTIONAL INCREMENTALISM

Constitutional incrementalism allowed the Constituent Assembly to circumvent potentially explosive conflicts by shifting the burden of resolving—or at least further discussing—contentious debates to the new political institutions it created. The inclusion of incrementalist arrangements in the Constitution was meant to afford the political system greater flexibility for future decisions about controversial questions, for example concerning the unification of personal law or India’s national language. Constitutional flexibility, in this context, does not refer to amendment rules or to the level of entrenchment or rigidity of the written constitutional provisions. Rather, flexibility relates to the degree to which the formal constitution limits the range of political possibilities to be decided by ordinary legislation. In other words, incrementalist constitutional formulations in the areas of religious, linguistic, or national identity defer controversial decisions on these divisive issues and thus avert fierce and even violent conflict. Further, in accommodating the competing views of ‘the people’, such formulations promote Consensual, rather than majoritarian, democracy.

Some observers have criticised such an incrementalist constitutional approach as an ideological compromise, or even a failure to achieve a more liberal constitution.²³ In contrast, this chapter contends that the permissive Indian Constitution should be viewed as a viable alternative to the paradigm of liberal constitutionalism, which dominates contemporary constitutional and political

scholarship.²⁴ The alternative model presented by the Indian framers may facilitate the adoption of democratic constitutions in emerging democracies, where conflicts over national identity or religion–State relations are at the heart of the constitutional debate.

The rest of the chapter demonstrates how the Indian framers applied three incrementalist strategies: (a) deferral of controversial decisions about the national language; (b) use of ambiguous and vague constitutional formulations concerning personal law; and (c) the inclusion of non-justiciable provision in the Constitution (the Directive Principles of State Policy). The discussion below focuses on incrementalist constitutional arrangements adopted to address controversies concerning India's religious and linguistic identity, as well as the State's economic policy. However, it is important to note that in other discussions on the role of the Constitution as a vehicle for social reconstruction, the Indian drafters adopted a more restrictive approach. The reformist function of the Constitution was most notably expressed in the context of caste inequality, as BR Ambedkar, himself a member of the untouchable caste, pushed for the inclusion of radical provisions such as the abolishment of untouchability. During the debate over the Uniform Civil Code, for example, a similarly reformist demand for the secularisation of all traditional personal law coincided with the nationalist objective of legal uniformity. However, while there was broad consensus in the assembly on the need to reduce caste inequality, there was considerable disagreement over the role of the Constitution as a vehicle for reform when it came to issues of religious or linguistic diversity. As far as these issues were concerned, using the legal powers of the Constitution to promote major social reform was more contentious, and many felt that it was necessary to wait for the gradual emergence of a broader consensus.

V. DEFERRAL

The constitutional provisions concerning the question of India's national language offer a clear example of the drafters' use of deferral as an incrementalist strategy.

The complexity of the language problem in India stems from the fact that nearly twenty major languages were spoken in India at the time of Independence.²⁵ Moreover, many of the major languages were mutually unintelligible and written in different scripts, grouped into the Dravidian languages in South India and the Indo-European (or Aryan) languages in the

North of the subcontinent. Less than 40 per cent of the population spoke Hindi, the most widespread language in the sub continent. The only language commonly used throughout India for administrative and educational purposes was English. However, opposition to the language of the ruler had been at the heart of the struggle for national Independence, and it was unthinkable that the Constituent Assembly would agree to its adoption as India's primary language. As Nehru stated during the constitutional debates, 'no nation can become great on the basis of a foreign language'.²⁶

The two main factions in the assembly debate over the national language were the representatives of the Hindi-speaking areas, mostly from north-central India, and the representatives of non-Hindi-speaking regions, particularly from the south, as well as the moderate leaders of the Congress Party. The Hindi-speaking representatives demanded that Hindi be declared the national language and that it should replace English immediately.²⁷ They claimed that a multilingual society was incompatible with Indian unity. Seth Govind Das, a Congress representative of the Central Provinces and Berar, stated, 'we want one language and one script for the whole country. We do not want it to be said that there are two cultures here.'²⁸

Representatives of non-Hindi-speaking regions contested the necessity of national linguistic homogeneity. 'Not uniformity but unity in diversity', asserted Shri Shankarrao Deo from Bombay, who was the General Secretary of the Congress.²⁹

The moderate Congress leaders, headed by Nehru himself, recognised the practical difficulties in adopting Hindi as the national language.³⁰ The majority of the population did not speak the language, and imposing Hindi on a non-Hindi-speaking, largely illiterate population was virtually impossible. It was even argued that Hindi lacked the appropriate modern vocabulary required to govern a modern State.³¹ During the assembly debate, Maulana Azad, the Muslim President of the Congress Party, and a Minister of Education in Nehru's government, stressed the central role of English as the *de facto* language of law and government.

This change [from English] should be ushered in only when a national language can be read and written in every part of the country and becomes mature enough for the expression of highly technical subjects . . . Languages are never made; they evolve. They are never given a shape; they shape themselves. You cannot shut the mouths of people by artificial locks. If you do that, you will fail. Your locks would drop down. The law of language is beyond your reach; you can legislate for every other thing but not for ordering its natural evolution. That takes its own course, and only through that course it would reach its culmination.³²

The dispute between extremists and moderates also touched upon the procedural question of how the decision on a national language should be reached. The proponents of Hindi demanded a simple majority decision, while its opponents emphasised the importance of a consensual, preferably unanimous, decision. Seth Govind Das represented the Hindi-speaking position:

We have accepted democracy and democracy can only function when majority opinion is honoured. If we differ on any issue, that can only be decided by votes. Whatever decision is arrived at the majority must be accepted by the minority respectfully and without any bitterness.³³

By contrast, SP Mookerjee (Christian Congress representative from Bengal, who later became the Governor of Bengal), pointed to the difficulty of imposing a majoritarian decision on the minority: 'If it is claimed by anyone that by passing an article in the Constitution of India one language is going to be accepted by all by a process of coercion, I say, Sir, that that will not be possible to achieve.'³⁴ Similarly, Prasad, the President of the Constituent Assembly, alerted the members to the tight link between consensus and the legitimacy of the Constitution:

Whatever decision is taken with regard to the question of language, it will have to be carried out by the country as a whole . . . The decision of the House should be acceptable to the country as a whole. Even if we succeed in getting a particular proposition passed by majority, if it does not meet with the approval of any considerable section of people in the country . . . the implementation of the Constitution will become a most difficult problem.³⁵

Ultimately, it was the pragmatic consensus-seeking approach that triumphed. On 14 September 1949, after three years of debate, the assembly overwhelmingly approved a compromise resolution, known as the Munshi–Ayyangar formula, which later became Articles 434–51 of the Indian Constitution. Instead of declaring a 'national language', Hindi was labelled the 'official language of the Union',³⁶ while English was to continue to be used 'for all official purposes'.³⁷ It was decided that this arrangement would apply for a period of fifteen years, during which time Hindi was to be progressively introduced into official use. What would happen at the end of this interim period was left undetermined, with the Constitution providing for the establishment of a parliamentary committee to examine the issue in the future.³⁸ In addition, the Constitution recognised fourteen other languages for official use (listed in the Eighth Schedule of the Constitution). The provincial governments were permitted to choose one of the regional languages or English for the conduct of their internal affairs, while English (unless Parliament would replace it with Hindi) remained the language of inter-provincial communication.³⁹

The inability of the assembly to reach broad agreement on the language issue led the framers to postpone the contentious decision. In this way, the Constituent Assembly sustained the balance between its nationalist aspirations and their pragmatic realisation.⁴⁰ On the one hand, the Indian Constitution gave formal expression to the ideal of an Indian national language. On the other hand, the final decision on how to realise this ideal was deferred. The assembly recognised that such a fundamental choice regarding the identity of the State could not be made simply by drafting a constitutional provision. But as the issue could not be ignored, the assembly opted for an ambiguous formulation that avoided making a clear pronouncement and preserved the conflicting opinions of the members within the Constitution itself. In other words, their solution was to adopt an incrementalist strategy in the hope that the issue could be resolved in the future.

Fifteen years after the enactment of the Constitution, Hindi was still not widely used by the Union government. Following a series of violent riots in non-Hindi-speaking States in the 1960s, Parliament renounced the ideal of an Indian national language. In 1965, when the fifteen-year interim period prescribed by the Constitution elapsed, the government announced that English would remain the de facto formal language of India.⁴¹

VI. AMBIGUITY

Ambiguous constitutional formulations were adopted by the drafters to address one of the most intense conflicts in the Constituent Assembly: India's religious identity. From the very beginning, the debate was twofold. It revolved around interreligious issues between the Hindu majority and Muslim and other minorities, and around intra-religious issues regarding the question of interference in religious practice. What is India's identity and to what extent is it exclusively Hindu? Should the State intervene in the religious practices of either majority or minority religions that conflict with the basic principles of equality and liberty? The Constituent Assembly vigorously debated these questions. Personal law became a focal point for both the intra-religious and interreligious debates. At the intra-religious level, the Constituent Assembly debated whether Hindu family laws should be secularised by the State or maintain their traditional and often inegalitarian practices. While Nehru viewed the reform of Hindu traditional family laws as essential to India's development and modernisation, conservative hard-liners and Hindu fundamentalists within the Congress Party objected to such reforms.⁴² At the interreligious level, the assembly was harshly

divided over the question of the Uniform Civil Code, namely whether personal law should be unified for all citizens, regardless of the individual's religious affiliation.⁴³

The debate over the Uniform Civil Code was among the most heated debates in the Constituent Assembly. The positions in the assembly were divided into two camps. On one side were members who wished to use the legal power and status of the Constitution to modify religious customs and advance secularisation and legal uniformity among all religious groups.⁴⁴ KM Munshi, for example, who later became the Minister of Food and Agriculture, called for the restriction of religion to the private sphere and the promotion of unity and societal integration on the basis of civic national identity.⁴⁵ On the other side were those who believed that a constitution should reflect the spirit of the nation as it currently was and should not impose deep social and cultural changes. Naziruddin Ahmad, a Muslim representative from West Bengal, expressed this view when he warned against radical constitutional provisions:

I have no doubt that a stage would come when the civil law would be uniform. But then that time has not yet come. We believe that the power that has been given to the state to make the Civil Code uniform is in advance of the time . . . What the British in 175 years failed to do or were afraid to do, what the Muslims in the course of 500 years refrained from doing, we should not give power to the state to do all at once. I submit, sir, that we should proceed not in haste but with caution, with experience, with statesmanship and with sympathy.⁴⁶

Ahmad supported uniformity in principle but argued against pervasive State interference in the internal affairs of religious communities. 'This is not a matter of mere idealism', he stated. 'It is a question of stern reality which we must not refuse to face and I believe it will lead to a considerable amount of misunderstanding and resentment amongst the various sections of the country.'⁴⁷ Emphasising pragmatism, Ahmad indicated the difficulty the State would face 'at this stage of our society' in asking people to give up their conception of marriage, for example, which was associated with religious institutions in many communities. He called for patience: 'I submit that the interference with these matters should be gradual and must progress with the advance of time.'⁴⁸ Ahmad stressed the importance of obtaining the consent of the communities whose religious laws would be affected by the new code: 'The goal should be towards a Uniform Civil Code but it should be gradual and with the consent of the people concerned.'⁴⁹

Ultimately, the Constituent Assembly did not make clear-cut decisions on either the intra-religious or the interreligious debates. On the intra-religious front, it avoided the constitutionalisation of a Hindu Code and transferred

decision to parliamentary legislation.⁵⁰ In the question of the Uniform Civil Code, in order to pacify India's Muslim minority, the assembly inserted an ambiguous formulation into the Constitution as part of the Directive Principles of State Policy, which were defined as non-justiciable.⁵¹ The drafters, who preferred an evolutionary rather than a revolutionary constitutional approach, passed the power to rule on the secular identity of the State back to the political arena, leaving future parliamentarians to decide whether and how to implement the recommendations set forth in the Constitution.⁵² Indeed, in the 1950s the legislature continued debating the Hindu Code and eventually split the law into four different pieces of legislation that were passed between 1955 and 1961, introducing reforms regarding issues such as marriage and divorce, inheritance laws, and adoption. By contrast, the Uniform Civil Code was never implemented. The result was the maintenance of a separate personal law system in India for each religious group and the implementation of only minor reforms in the traditional Muslim and Christian personal laws.⁵³

In addition, the Constitution is often criticised as including contradictory provisions concerning Indian religious/secular identity. For example, Article 25, which permits extensive State intervention in religious matters in the interest of social reform, conflicts with the principle of autonomy for religious institution which is one of the tenets of secularism. Similarly, alongside reformist provisions such as the abolition of the practice of untouchability,⁵⁴ the Constitution also includes recommendations for the prohibition of alcohol⁵⁵ and of cow slaughter,⁵⁶ which are 'indigenous' Hindu laws.

Yet the set of ambiguous and ambivalent provisions included in the Indian Constitution with regard to religion-State relations is valued by legal and political scholars, who claim that it should be seen as a successful attempt to craft a multidimensional system of values and principles corresponding to the intricate needs of Indian society.⁵⁷ According to Rajeev Bhargava's model of 'political secularism' or 'contextual secularism', the State is not separated from religion but rather keeps a 'principled distance' from all religions by providing equal protection and support to all religions and selectively interfering in religious practices that conflict with the State's goals of promoting equality, liberty, and socioeconomic development.⁵⁸ While supporters of this approach have emphasised the advantage of such ambiguous arrangements for the purpose of maintaining stability and democracy at the foundational stage of the State,⁵⁹ its critics have pointed to the tendency of such arrangements to perpetuate—rather than mitigate—conflicts over issues of religion and secularism, which

ultimately resulted in overburdening India's political and judicial institutions.⁶⁰

VII. NON-JUSTICIABILITY

The Directive Principles of State Policy (Part IV of the Indian Constitution) is one of the most innovative aspects of the Indian Constitution. Most of the sixteen provisions included in the Directive Principles (Articles 36–51) concern social and economic issues, usually defined in terms of positive rights, demanding action by the State, as opposed to the negative individual rights that are included in the fundamental rights part of the Constitution.⁶¹ Inspired by Article 45 of Ireland's 1937 Constitution, the provisions under the Directive Principles received a special status, defined as non-justiciable, namely these provisions are unenforceable by court.⁶²

During the discussions of the draft constitution, many in the Constituent Assembly criticised the Directive Principles as merely 'pious expressions' or 'pious superfluities'.⁶³ Others argued that the provisions included in the Directive Principles were too vague,⁶⁴ or too abstract,⁶⁵ and that they were 'inoperative'⁶⁶ or even simply 'meaningless', due to their unbinding character.⁶⁷ As one assembly member argued:

All the directive principles can be ignored by the state governments and there is no remedy for it. Even the President of the Union cannot do anything to see that the Directive Principles are observed. The Central Legislature cannot bring forward any motion for the Government which ignores these directive principles to be dismissed or some alternative being adopted.⁶⁸

While critics of the non-justiciable Directive Principles viewed them as either redundant or requiring greater enforceability mechanisms,⁶⁹ many others in the Constituent Assembly recognised the importance of [Part IV](#) as it was proposed by the Drafting Committee. Although lacking binding force, it was argued, the Directive Principles still represented the 'essence of this constitution'.⁷⁰ Members of the assembly emphasised the educational role of the Directives, which, they believed, gave India a guiding vision: 'They give us target, they place before us our aim and we shall do all that we can to have this aim satisfied.'⁷¹

In a speech defending the non-justiciable character of the Directive Principles, M Ananthasayanam Ayyangar contended that 'we incorporated them in the Constitution itself because we attach importance to them'.⁷² At the same time,

he recognised the need for wide political support in order to implement the social vision expressed by the Directive Principles and admitted the limited role of the Constitution, and of courts, in enforcing principles that do not receive wide popular support:

We cannot go on introducing various provisions here which any Government, if it is indifferent to public opinion, can ignore. It is not a court that can enforce these provisions or rights. It is the public opinion and the strength of public opinion that is behind a demand that can enforce these provisions. Once in four years elections will take place, and then it is open to the electorate not to send the very same persons who are indifferent to public opinion. That is the real sanction, and not the sanction of any court of law.⁷³

One of the most vocal advocates of non-justiciability was BR Ambedkar, the Chairman of the Drafting Committee. In several speeches throughout the debates on the Directive Principles, he argued that the Constitution was a legal tool for promoting social, economic, and religious reform. The Constitution, he stated, has two major roles. First, it has an institutional role in establishing the governmental mechanisms of the federal State: ‘Our constitution as a piece of mechanism lays down what is called parliamentary democracy.’⁷⁴ Second, the Constitution has also a foundational and educational role in presenting the vision, and core norms and values, which should underpin the State. In Ambedkar’s words: ‘The constitution also wishes to lay down an ideal before those who would be forming the government.’⁷⁵ While the Directive Principles are thus included in the Constitution as an ‘ideal’ that any government should ‘strive to bring about’, the Directives remained non-justiciable in order to allow greater flexibility for future legislatures. As Ambedkar explains:

[W]e have deliberately introduced in the language that we have used in the Directive Principles something which is not fixed or rigid . . . It is no use giving a fixed, rigid form to something which is not rigid, which is fundamentally changing and must, having regard to the circumstances and the times, keep on changing. It is, therefore, no use saying that the directive principles have no value. In my judgment, the directive principles have a great value, for they lay down that our ideal is economic democracy. Because we did not want merely a parliamentary form of Government to be instituted through the various mechanisms provided in the Constitution, without any direction as to what our economic ideal, as to what our social order ought to be, we deliberately included the Directive Principles in our Constitution.⁷⁶

VIII. CONCLUSION

The Indian Constitution has been criticised by many as lacking theoretical consistency and a coherent system of values and beliefs. The Constitution, it has

been claimed, contains internal contradictions between various provisions which represent competing principles and perspectives, such as modernity and traditionalism, social reform and social conservatism, church–State separation versus State intervention in religious affairs, and liberalism and individual rights versus communitarianism and special group rights. More generally, from a liberal constitutionalist perspective, incrementalist, or permissive constitutional arrangements are seen as normatively inferior, as they allow for the endurance of conservative and non-egalitarian policies, particularly in the religious sphere. Moreover, by blurring the distinction between higher lawmaking and normal lawmaking, to use Bruce Ackerman’s terminology,⁷⁷ ambiguous constitutional arrangements forgo the educative role that constitutions are usually expected to play at both the judicial and the societal levels.

However, the adoption of incrementalist constitutional formulations in India in areas such as personal law and national language should not be seen as a failure. Rather, it was a conscious strategy of the Constituent Assembly in light of contemporary social and political circumstances. BN Rau, the key legal advisor of the Constituent Assembly, expressed this view when he stated, ‘we have to bear in mind that conditions in India are rapidly changing; the country is in a state of flux politically and economically; and the constitution should not be too rigid in its initial years’.⁷⁸ As such, the framers’ choices reflect a constitutional approach that rejected a cohesive value system (such as the one proposed by the advocates of a uniform Indian identity) and refrained from imposing one specific set of values or traditions on minority cultural communities.

Incrementalist constitutional arrangements were adopted by constitutional drafters not only in India but also in other countries deeply divided along religious or national lines. The 1945 Constitution of Indonesia, for example, included a religious permissive formula known as *pancasila*, which defined the religious identity of the State in vague terms and included the principle of ‘belief in God’ without specifying any particular religion. Similarly, in Israel, the decision to refrain from drafting a formal constitution in 1950—which was repeated in the early 2000s—may be seen as a type of an informal permissive constitution, allowing future politicians to define State identity.⁷⁹ Most recently, ambiguous constitutional arrangements were adopted concerning issues of religious identity and gender equality in the new Constitution of Tunisia.⁸⁰

Such incrementalist constitutional arrangements reflect their authors’ understanding of the need for a consensus-based approach to questions of national identity and the State’s underlying commitments. The debates in all

these cases demonstrated the framers' realisation that in the context of a deeply fragmented polity, the expectation that the Constitution could provide a sense of unity or common identity based on clear-cut formulations was unrealistic. As this chapter illustrates, the Indian Constitution preserved within itself the competing beliefs and values of the various factions that vied to leave an imprint on the formal document. It demonstrates, in sum, how complex and segmented societies may adopt complex and segmented constitutions. In other words, the constitution of a deeply divided society may end up reflecting the conflicted identity of 'the people' in whose name it is written. While the consequences of constitutional incrementalism continue to stir public, political, and legal debates, the innovative model developed by the Indian framers should be considered a potential solution for contemporary and future constitutional debates in societies deeply divided over their national, religious, or cultural vision.

¹ Census of India, *Paper No 1: Languages 1951 Census* (India [Republic] Census Commissioner 1954) 6–7.

² Jon Elster, 'Forces and Mechanisms in the Constitution Making Process' (1995) 45 *Duke Law Journal* 364.

³ Elster ([n 2](#)); Bill Kissane and Nick Sitter, 'The Marriage of State and Nation in European Constitutions' (2010) 16(1) *Nations and Nationalism* 49; Tom Ginsburg, 'Introduction' in Tom Ginsburg (ed) *Comparative Constitutional Design* (Cambridge University Press 2013) 1–13.

⁴ Zachary Elkins, Tom Ginsburg, and James Melton, *The Endurance of National Constitutions* (Cambridge University Press 2009) 134.

⁵ Geographical and temporal clustering by no means exhausts the factors that affect constitutional transitions. Other factors that have been documented or measured by recent comparative studies include, for example, regime change, interstate and intrastate conflicts, territorial change, economic crisis, foreign constitutional models, transnational legal and political trends, as well as factors internal to the constitutional document itself, such as its structure, length, or even specific provisions such as amendment rules and forms of government. For a few recent examples of this literature, see Ginsburg ([n 3](#)); Denis J Galligan and Mila Versteeg (eds) *Social and Political Foundations of Constitutions* (Cambridge University Press 2013); Elkins ([n 4](#)); Jennifer Widner, *Proceedings, Workshop on Constitution Building Processes* (Princeton University Press 2007).

⁶ Claude Klein and Andras Sajo, 'Constitution-Making: Process and Substance' in Michel Rosenfeld and Andra Sajo (eds) *Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012) 419–41.

⁷ Kissane and Sitter ([n 3](#)) 50.

⁸ Priscilla Robertson, *Revolutions of 1848* (Princeton University Press 1968).

⁹ For a chronology of constitution writing around the world, see <<http://comparativeconstitutionsproject.org/chronology/>>, accessed October 2015.

¹⁰ Goran Hyden and Denis Venter, 'Making in Africa: Political and Theoretical Challenges' in Goran Hyden and Denis Venter (eds) *Constitution-Making and Democratization in Africa* (Africa Institute of South Africa 2002) 5–6; Sunil Khilnani, Vikram Raghavan, and Arun K Thiruvengadam (eds) *Comparative Constitutionalism in South Asia* (Oxford University Press 2013).

¹¹ Members of the Constituent Assembly were to be appointed by the provincial legislative assemblies, which were elected in 1946 under the Government of India Act 1935. Due to various tax, property, and educational requirements, it is estimated that only 15–28% of the Indian population participated in these elections. Shibani Kinkar Chaube, *Constituent Assembly of India: Springboard of Revolution* (2nd edn, Manohar Publishers & Distributors 2000) 45.

¹² Dhirendranath Sen, *Revolution by Consent?* (Saraswati Library 1947).

¹³ Cited in Granville Austin, *The Indian Constitution: Cornerstone of a Nation* (Oxford University Press 2000) 7.

¹⁴ MC Ricklefs, *A History of Modern Indonesia Since 1200* (4th edn, Stanford University Press 2008).

¹⁵ Jawaharlal Nehru, *The Unity of India: Collected Writings 1937–1940* (L Drummond 1948).

¹⁶ Jawaharlal Nehru, *The Discovery of India* (Oxford University Press 1989) 384.

¹⁷ Report of the Committee appointed by the All India Conference to Determine the Principles of the Constitution for India, 1928, in Ravinder Kumar and Hari Dev Sharma (eds) *Selected Works of Motilal Nehru*, vol 6 (Vikas Publishing 1995) 27.

¹⁸ Christophe Jaffrelot, *The Hindu Nationalist Movement in India* (Columbia University Press 1996).

¹⁹ For an overview of the literature, see John McGarry, Brendan O’Leary, and Richard Simeon, ‘Integration or Accommodation? The Enduring Debate in Conflict Regulation’ in Sujit Choudhry (ed) *Constitutional Design for Divided Societies: Integration Or Accommodation?* (Oxford University Press 2008) 41–88.

²⁰ For case studies, see Choudhry ([n 19](#)).

²¹ James Tully and Alain G Gagnon (eds) *Multinational Democracies* (Cambridge University Press 2001).

²² Nathan Brown, ‘Reason, Interest, Rationality, and Passion in Constitution Drafting’ (2008) 6(4) *Perspectives on Politics* 675.

²³ Anuradha Dingwaney Needham and Rajeswari Sunder Rajan (eds) *The Crisis of Secularism in India* (Duke University Press 2007).

²⁴ Keith E Whittington, ‘Constitutionalism’ in Keith E Whittington, R Daniel Kelemen, and Georgy A Caldeira (eds) *The Oxford Handbook of Law and Politics* (Oxford University Press 2008) 281.

²⁵ In comparison, other multilingual federations presented much less complicated problems. Pakistan and Switzerland have only three major languages, while in Canada there are only two. On multilingual democracies, see Ugo M Amoretti and Nancy Bermeo (eds) *Federalism and Territorial Cleavages* (Johns Hopkins University Press 2004).

²⁶ *Constituent Assembly Debates*, vol 9 (Lok Sabha Secretariat 1986) 1410, 13 September 1949.

²⁷ *Constituent Assembly Debates*, vol 9 (Lok Sabha Secretariat 1986) 1328, 12 September 1949.

²⁸ *Constituent Assembly Debates*, vol 9 (Lok Sabha Secretariat 1986) 1328, 12 September 1949.

²⁹ *Constituent Assembly Debates*, vol 9 (Lok Sabha Secretariat 1986) 1433, 14 September 1949.

³⁰ For a comprehensive study of Nehru’s approach to India’s linguistic conflicts, see Robert D King, *Nehru and the Language Politics of India* (Oxford University Press 1997).

³¹ *Constituent Assembly Debates*, vol 9 (Lok Sabha Secretariat 1986) 1433, 14 September 1949.

³² *Constituent Assembly Debates*, vol 9 (Lok Sabha Secretariat 1986) 1457, 14 September 1949.

³³ *Constituent Assembly Debates*, vol 9 (Lok Sabha Secretariat 1986) 1327, 12 September 1949.

³⁴ *Constituent Assembly Debates*, vol 9 (Lok Sabha Secretariat 1986) 1389, 13 September 1949.

³⁵ *Constituent Assembly Debates*, vol 9 (Lok Sabha Secretariat 1986) 1312, 12 September 1949.

³⁶ Constitution of India 1950, art 343.

³⁷ Constitution of India 1950, art 343.

³⁸ Constitution of India 1950, art 343.

³⁹ A related debate, concerning the reorganisation of the provinces along linguistic border lines, was settled by Article 3, which provided that Parliament would be able to redraw state boundaries by a simple majority vote. In 1955, Parliament established a States Reorganisation Commission, and the boundaries of India's States were eventually redrawn in conformity with linguistic lines. Paul R Brass, *Language, Religion and Politics in North India* (Cambridge University Press 1974); Juan L Linz, Alfred Stepan, and Yogendra Yadav, '*Nation-State*' or '*State-Nation*'? *Comparative Reflections on Indian Democracy* (Johns Hopkins University Press 2011) ch 3.

⁴⁰ Sunil Khilnani, *The Idea of India* (Farrar, Straus and Giroux 1999) 175.

⁴¹ Brass ([n 39](#)) 123.

⁴² Reba Som, 'Jawaharlal Nehru and the Hindu Code: A Victory of Symbol over Substance?' (1994) 28 *Modern Asian Studies* 165.

⁴³ *Constituent Assembly Debates*, vol 7 (Lok Sabha Secretariat 1986) 540–52, 23 November 1948.

⁴⁴ *Constituent Assembly Debates*, vol 7 (Lok Sabha Secretariat 1986) 548–49, 23 November 1948.

⁴⁵ *Constituent Assembly Debates*, vol 7 (Lok Sabha Secretariat 1986) 548, 23 November 1948.

⁴⁶ *Constituent Assembly Debates*, vol 7 (Lok Sabha Secretariat 1986) 542–43, 23 November 1948.

⁴⁷ *Constituent Assembly Debates*, vol 7 (Lok Sabha Secretariat 1986) 543, 23 November 1948.

⁴⁸ *Constituent Assembly Debates*, vol 7 (Lok Sabha Secretariat 1986) 542, 23 November 1948.

⁴⁹ *Constituent Assembly Debates*, vol 7 (Lok Sabha Secretariat 1986) 542, 23 November 1948.

⁵⁰ Som ([n 42](#)).

⁵¹ Constitution of India 1950, art 44: 'The state shall endeavor to secure for the citizens a uniform civil code throughout the territory of India.'

⁵² Jaffrelot ([n 18](#)) 102–04.

⁵³ Narendra Subramanian, 'Making Family and Nation: Hindu Marriage Law in Early Postcolonial India' (2010) 69(3) *Journal of Asian Studies* 771–98.

⁵⁴ Constitution of India 1950, art 17.

⁵⁵ Constitution of India 1950, art 47.

⁵⁶ Constitution of India 1950, art 48.

⁵⁷ Marc Galanter, 'Secularism, East and West' in Rajeev Bhargava (ed) *Secularism and Its Critics* (Oxford: Oxford University Press 1998) 234–67.

⁵⁸ Rajeev Bhargava (ed), *Secularism and Its Critics* (Oxford University Press 1998); Rajeev Bhargava, 'What is Indian Secularism and What is it For?' (2002) 1(1) *India Review* 1.

⁵⁹ Gary Jacobsohn, *The Wheel of Law: India's Secularism in Comparative Constitutional Perspective* (Princeton, NJ: Princeton University Press 2006). Robert L Hardgrave, 'India: The Dilemmas of Diversity' (1993) 4(4) *Journal of Democracy* 54.

⁶⁰ Needham and Rajan ([n 23](#)).

⁶¹ In addition, the Directive Principles included one provision that concerned a religious issue—art 44 on the Uniform Civil Code—as discussed above.

⁶² While both the Irish art 45 and the Indian [Part IV](#) are defined as non-justiciable and concern mainly social and economic issues, there are some significant differences between the two constitutional arrangements. First, the Irish Directives were included in one Article, compared with sixteen Articles in the Indian case, generally characterised by greater detail and specification. Second, the Irish Directives are defined in rather narrow terms, as 'general guidance of the Oireachtas', while in the Indian case the Directives are defined in art 37 in more foundational terms as 'fundamental in the governance of the country'. Third, in the Irish case a specific State organ is explicitly in charge of implementing the Directives: The Oireachtas ('The application of those principles in the making of laws shall be the care of the Oireachtas exclusively'), while in the Indian case the duty to apply the principles included in the Directives are generally assigned to the State.

⁶³ *Constituent Assembly Debates*, vol 7 (Lok Sabha Secretariat 1986) 225, 5 November 1948 (Naziruddin Ahmad); *Constituent Assembly Debates*, vol 7 (Lok Sabha Secretariat 1986) 473, 19 November 1948 (Kazi Syed Karimuddin); *Constituent Assembly Debates*, vol 7 (Lok Sabha Secretariat 1986) 478, 19 November 1948 (KT Shah); *Constituent Assembly Debates*, vol 7 (Lok Sabha Secretariat 1986) 539, 23 November 1948 (B Das).

⁶⁴ *Constituent Assembly Debates*, vol 7 (Lok Sabha Secretariat 1986) 244, 5 November 1948 (Kazi Syed Karimuddin).

⁶⁵ *Constituent Assembly Debates*, vol 7 (Lok Sabha Secretariat 1986) 251, 5 November 1948 (PS Deshmukh).

⁶⁶ *Constituent Assembly Debates*, vol 7 (Lok Sabha Secretariat 1986) 491, 19 November 1948 (Hussain Imam).

⁶⁷ *Constituent Assembly Debates*, vol 7 (Lok Sabha Secretariat 1986) 473, 19 November 1948 (Kazi Syed Karimuddin); *Constituent Assembly Debates*, vol 7 (Lok Sabha Secretariat 1986) 418, 15 November 1948 (KT Shah): ‘The “Directives” are, in my opinion, the vaguest, loosest, thickest smoke-screen that could be drawn against the eyes of the people, and may be used to make them believe what the draftsmen never intended or meant perhaps.’

⁶⁸ *Constituent Assembly Debates*, vol 7 (Lok Sabha Secretariat 1986) 491, 19 November 1948 (Hussain Imam).

⁶⁹ *Constituent Assembly Debates*, vol 7 (Lok Sabha Secretariat 1986) 305, 8 November 1948 (Begum Aizaz Rasul).

⁷⁰ *Constituent Assembly Debates*, vol 7 (Lok Sabha Secretariat 1986) 277, 6 November 1948 (Thakur Das Bhargava).

⁷¹ *Constituent Assembly Debates*, vol 7 (Lok Sabha Secretariat 1986) 277, 6 November 1948 (Thakur Das Bhargava). See also speech by SV Krishnamurthy Rao, suggesting that the Directive Principles should appear immediately after the preamble, as they represent ‘the objective principles of the Union’. *Constituent Assembly Debates*, vol 7 (Lok Sabha Secretariat 1986) 382, 9 November 1948.

⁷² *Constituent Assembly Debates*, vol 7 (Lok Sabha Secretariat 1986) 475, 19 November 1948.

⁷³ *Constituent Assembly Debates*, vol 7 (Lok Sabha Secretariat 1986) 475, 19 November 1948.

⁷⁴ *Constituent Assembly Debates*, vol 7 (Lok Sabha Secretariat 1986) 494, 19 November 1948.

⁷⁵ *Constituent Assembly Debates*, vol 7 (Lok Sabha Secretariat 1986) 494, 19 November 1948.

⁷⁶ *Constituent Assembly Debates*, vol 7 (Lok Sabha Secretariat 1986) 494, 19 November 1948.

⁷⁷ Bruce Ackerman, *We the People: Foundations* (Harvard University Press 1991).

⁷⁸ BN Rau, *India’s Constitution in the Making* (Orient Longman 1960) 360–66.

⁷⁹ Hanna Lerner, ‘Permissive Constitutions, Democracy and Religious Freedom in India, Indonesia, Israel and Turkey’ (2013) 65(4) *World Politics* 609.

⁸⁰ Nadia Marzouki, ‘Dancing by the Cliff: Constitution Writing in Post-Revolutionary Tunisia 2011–2014’ in Asli Bali and Hanna Lerner (eds) *Constitution Writing, Religion and Democracy* (Cambridge University Press, forthcoming).

PART II

NEGOTIATING
CONSTITUTIONALISM

CHAPTER 5

CONSTITUTIONAL INTERPRETATION

CHINTAN CHANDRACHUD^{*}

I. INTRODUCTION

How do you interpret the world's lengthiest codified Constitution? The Indian Supreme Court shoulders the daunting responsibility of fleshing out meaning from the text that governs 1.2 billion people, in twenty-nine States, speaking twenty-two constitutionally recognised languages (not to mention hundreds of dialects) and practising virtually every mainstream religion of the world. It is perhaps unsurprising, then, that the Supreme Court has had plenty of 'interpreting' to do over the years. From 1950 to 2009, the Court sat in benches of five or more judges to decide substantial questions of law involving the interpretation of the Constitution on 1,532 occasions.¹ This chapter seeks to provide an analytical snapshot of the Supreme Court's interpretive methodology, focusing on how the Court has dealt with questions of permanence and change, fidelity, and dynamism—all of which are central to the functioning of a constitutional democracy.

Constitutional interpretation bears an intricate relationship with constitutional change more generally. Interpretive theories are often justified by how easy or difficult it is to amend a constitution. The formal process of amending a constitution gives rise to inferences about the legitimate agent of constitutional change, as well as the most convenient vehicle for such change. Most provisions of the Indian Constitution can be amended with a two-thirds majority in Parliament.² Amendments affecting federal issues require, in addition, the ratification of at least half of the State legislatures.³ In practice, the Indian Constitution has been amended very frequently—on average, more than once a year. In spite of having been around for close to a quarter of the time of the US Constitution, it has been formally amended about four times more frequently than that Constitution.⁴

The structure and composition of a court have an important bearing on its interpretive approach.⁵ The Indian Supreme Court does not sit *en banc*, but instead in separate benches or panels of judges. Article 145(3) of the

Constitution requires all substantial questions of law involving interpretation of the Constitution (an expression that is not defined by the text) to be decided by benches of no less than five judges (known as ‘constitutional benches’). The Court sees safety in numbers, because larger benches of the Court bind smaller benches,⁶ and a judgment of the Court can only be overruled by a bench of a larger size. The Chief Justice plays the leading role in setting rosters and making decisions about bench composition.⁷

This chapter argues that the interpretive approaches of the Supreme Court can be expounded through three historical phases. In the first phase, the Court relied heavily on textualism, reading the Constitution word for word, without reflecting on its overall structure and coherence. In the second phase, the Court’s interpretive approaches were more eclectic, focusing not only on the text of specific constitutional provisions, but also on the structure and themes embodied within the Constitution more broadly. During both of these phases, most significant interpretive decisions were entrusted to constitutional benches and were the product of careful reasoning. In the third phase, however, the Court moved to an approach that I describe as ‘*panchayati* eclecticism’. To some extent, it relinquished its responsibility to give reasons. Sitting in benches of two or three judges, the Court (or more fittingly, its smaller ‘sub-courts’) started deciding cases based on self-conceptions of its own role, resulting in the adoption of a variety of internally inconsistent interpretive approaches, and often producing incoherent constitutional jurisprudence.

The changes in the Supreme Court’s interpretive outlook were glacial, making it difficult to cleanly separate these three phases from one another. The first phase, and in particular, the second phase, saw many outliers and dissents from dominant approaches to interpretation. The third phase has not been dominated by any single method of interpretation—in fact, its distinctiveness lies in the result-oriented approach adopted by the Court, making interpretation of constitutional text instrumental to the Court’s desired result. So although the first two phases can be situated more comfortably into global paradigms of constitutional interpretation, the third phase is more conducive to an indigenous framework of analysis.

II. HOW TO READ CONSTITUTIONS

A codified constitution is a nation’s founding document, which not only constitutes the nation, but also establishes the rules for its governance.⁸ The

principal difference between nations with a codified constitution and those with an uncoded constitution is that in the case of the former, the basic rules of the game have been entrenched by insulating them from the control of ordinary legislative majorities. Constitutions are framed at a high level of abstraction, enabling those that work them some room for manoeuvre in coping with unforeseen challenges.⁹ Even the Indian Constitution—which originally contained 395 Articles and 8 Schedules, and now comprises over 450 Articles and 12 Schedules, and provides levels of detail that are unusual in the marketplace of constitutional texts¹⁰—consists of many provisions that are framed in highly abstract terms. Aside from fairly straightforward provisions about matters such as age limits¹¹ and terms of office,¹² constitutional provisions generally demand some form of value-laden interpretation by courts.¹³

Constitutional interpretation is the product of two meta-judgments. First, what is the legitimate source of the constitution's authority? Possible responses could rely on the credentials of the body that framed the constitution, the fact that the constitution was accepted as a legitimate pre-commitment at its founding, or that the constitution is still accepted as a social fact by the people it governs. Second, based on the source of the constitution's authority, what are the tools and techniques that can be relied upon in order to expound constitutional meaning? So, for example, is it permissible to cite the views of individual framers of the constitution, Constituent Assembly debates, or dictionaries to understand the implications of a broadly worded equality clause?

Philip Bobbitt identifies six approaches to constitutional interpretation: historical (or originalist), textual, prudential, doctrinal, structural, and ethical.¹⁴ The historical approach leans heavily upon what a particular constitutional provision would have meant to its framers. The focus is on the subjective intent of the framers, and how they would have wished the constitutional provision to operate within the confines of a particular case. It equates constitutional authority with consent. The argument runs somewhat like this: '[t]he Framers of the Constitution proposed a compact to limit the power of government; the people signified their agreement to that compact by their ratification of the Constitution, and that agreement is what gives the Constitution its authority.'¹⁵ There are many different strands of originalism,¹⁶ but its intuitive appeal lies in the fact that it claims to offer a method of interpretation that is objective.

Textualism also focuses on the specific words of a constitutional provision, but requires interpreters to consider the 'present sense' of the text, rather than the meaning of the text at the time that it was enacted.¹⁷ As Justice Scalia of the US Supreme Court notes, textualists look for an 'objectified' intent from the

language of the provision.¹⁸ On the other hand, the prudential approach focuses on the use of pragmatic logic in the shaping of constitutional doctrine, and generally has traction in periods of emergency and unrest.¹⁹ The doctrinal approach considers the constitutional text as only a limited piece of the evidence required to interpret the constitution, forming part of a line of precedents expounding upon the meaning of the constitutional provision.²⁰

Both structural and ethical approaches rely on inference rather than on close reading of text. Structural arguments rely on the structures of government set up by the constitution, whereas ethical approaches appeal to aspects of cultural ethos that are reflected in the constitution. One version of structuralism, which Amar labels as ‘intratextualism’, requires interpreters to read a particular phrase or expression in the context of a different part of the constitution containing the same, or a similar, phrase.²¹ Structuralist arguments are appealing because they treat the constitution as an organic whole, rather than as a collection of autonomous provisions that are isolated from their natural environment.

These interpretive approaches are useful in classifying the different ways in which courts may choose to construe a constitutional provision that forms the subject of dispute. However, courts rarely rely on one of these approaches exclusively. The real picture is far more messy, reflecting the adoption of a fusion of different interpretive approaches, perhaps with different levels of emphasis. Most Supreme Court judgments are expected to be heavily precedent-laden, which means that the doctrinal approach undergirds the other approaches adopted by the Court. Further, a rhetorical tool that judges often rely upon is to argue that all interpretive approaches point to the same conclusion.²² This kind of argument is meant to satisfy all interpretive camps, through the Court’s refusal to unreservedly align itself with any of them (or conversely, its willingness to express limited support for all of them).

III. PHASE ONE: TEXTUALISM

In its early years, the Supreme Court adopted a textualist approach, focusing on the plain meaning of the words used in the Constitution. *AK Gopalan v State of Madras*²³ was one of the early decisions in which the Court was called upon to interpret the fundamental rights under [Part III](#). The case was a *habeas corpus* petition filed by the leader of the Communist Party of India, who had been detained under preventive detention legislation.²⁴ He claimed that the legislation

was inconsistent with Articles 19 (the right to seven freedoms), 21 (the right to life), and 22 (the protection against arrest and detention) of the Constitution. The Supreme Court was faced with deciding two important interpretive questions. First, Article 21 provided that '[n]o person shall be deprived of his life or personal liberty except according to procedure established by law'. What did the expression 'procedure established by law' mean? It could either have meant any procedure that was validly enacted into primary legislation by Parliament (which would result in Article 21 being a safeguard only against executive action), or could include a substantive component, resembling the 'due process' clauses of the US Constitution.²⁵ Secondly, what was the interrelationship between Articles 19, 21, and 22 of the Constitution, which, at first glance, appeared to cover similar ground?

Constitutional history had something to say on these questions. On the first question, there was plenty of evidence to suggest that the framers had adopted the phrase 'procedure established by law' instead of 'due process of law' to avoid the American *Lochner*-era experience.²⁶ On the second question, evidence from the report of the Drafting Committee of the Constituent Assembly suggested that Article 21 was intended to cover separate territory from Article 19. The judgments of the majority and minority agreed that this history was irrelevant in construing the constitutional provisions.²⁷ Kania CJ, for the majority, adopted a black-letter approach, construing the constitutional text based on its plain meaning. He held that the expression 'procedure established by law' must mean, based on its ordinary interpretation, the procedure prescribed by the statutory law of the State.²⁸ On the second question, he decided that Articles 19, 21, and 22 covered entirely different subject matter, and were to be read as separate codes. This textualist approach was unsurprising, given that the judges were trained in British interpretive traditions.²⁹ In Britain, the use of legislative history to construe statutory provisions was, until the House of Lords' decision in *Pepper v Hart*,³⁰ avoided on the conviction that doing so would violate parliamentary privilege.³¹ In contrast, Fazl Ali J and Patanjali Sastri J preferred structuralism over historicism and textualism, pointing out that the scheme of [Part III](#) of the Constitution suggested the existence of a degree of overlap between Articles 19, 21, and 22.

Amongst the most controversial questions in Indian constitutional jurisprudence has been whether there are any limitations on Parliament's power to amend the Constitution, especially fundamental rights. As I stated earlier, Article 368 enables the Union Parliament, by two-thirds majority, to amend the Constitution. Amendments to fundamental rights under [Part III](#) do not require

the ratification of States. Article 13(2) provides that '[t]he State shall not make any law which takes away or abridges the rights conferred by this Part [the chapter on fundamental rights] and any law made in contravention of this clause shall, to the extent of the contravention, be void'. The Constitution was amended eight times in its first ten years. A question that frequently arose was whether the word 'law' in Article 13(2) included constitutional amendments. If it did, then the chapter on fundamental rights would be rendered immune from amendment.

This question arose tangentially before five-judge benches of the Supreme Court, first in *Sri Sankari Prasad Singh Deo v Union of India*,³² and later, in *Sajjan Singh v State of Rajasthan*.³³ In *Sankari Prasad*, the Court adopted an avowedly textualist approach, finding that any intended limitations on the power to amend fundamental rights would have been clearly expressed in the text of Articles 13(2) and 368. As Patanjali Sastri J noted:

We find it, however, difficult, in the absence of a clear indication to the contrary, to suppose that they [the framers] also intended to make those [fundamental] rights immune from constitutional amendment ... the terms of Article 368 are perfectly general and empower Parliament to amend the Constitution, without any exception whatever.³⁴

This statement resembles Justice Scalia's notion of 'objectified intent',³⁵ or what Dworkin labels as 'semantic intentions'³⁶—gleaning the intentions of the framers from the words used (and not used) in the Constitution. Gajendragadkar CJ adopted a similar semantic intentions-based textualist approach in *Sajjan Singh*, holding that if the framers had intended to restrict future amendments to [Part III](#), they would have made a specific provision manifesting that intention. He also categorically rejected an ethical approach to interpreting Article 368, noting that it was illegitimate to construe that provision 'on any theoretical concept of political science'.³⁷ Other judges, however, were not equally convinced. Hidayatullah J and Mudholkar J expressed scepticism about whether the power to amend the Constitution implied a carte blanche to amend fundamental rights. Their scepticism was also framed in textualist arguments. Hidayatullah J turned the prevailing argument on its head by stating that Article 368 *did not say* that every provision of the Constitution could be amended with a two-thirds majority.³⁸ Mudholkar J failed to see why the word 'law' in Article 13(2) could not be read to include constitutional amendments.³⁹

Following amendments to the Constitution seeking to protect land reform measures from judicial scrutiny, the same question arose before an eleven-judge bench of the Supreme Court in *Golak Nath v State of Punjab*.⁴⁰ On this occasion, the majority on the Court reversed its position on the amendability of

fundamental rights. However, the approaches to constitutional interpretation remained largely the same: textualist arguments attracted significant traction in the majority and the minority opinions. The arguments did not centre on how to interpret the Constitution: all the judges seemed to agree that textualism was the pre-eminent approach. Rather, differences between the majority and the minority hinged on what the outcome of a legitimate textualist interpretation would be.

In the majority, Subba Rao J held that the open-ended definition of the word ‘law’ under Article 13(3) rendered the term wide enough to include constitutional amendments. Further, since the marginal note to Article 368 described the Article as only setting out the ‘procedure for amendment’ of the Constitution, Parliament’s power to amend the Constitution did not emanate from that provision.⁴¹ Therefore, Parliament’s power to amend the Constitution was subject to [Part III](#). Judges in the minority drew different inferences from the same pieces of constitutional text. Wanchoo J held that the words of Article 368 made it clear that it not only specified the procedure, but also established the power for Parliament to amend any provision of the Constitution.⁴² Bachawat J held that since Article 368 allowed Parliament to amend any provision of ‘this Constitution’, it authorised amendment of ‘each and every part’ of the Constitution.⁴³ Ramaswamy J adopted an argument resembling that of Gajendragadkar CJ in *Sajjan Singh*, noting that if the framers conceived of limitations to the amending power, they would have expressly said so in Article 368.⁴⁴

Consistent with previous practice, the Supreme Court consciously avoided relying too much on the views of the framers in the Constituent Assembly Debates. Whereas Wanchoo J held that the Court ‘cannot and should not’ look into those debates,⁴⁵ Subba Rao J took a softer position, agreeing to consider them only to reinforce conclusions that were evident from a plain reading of the constitutional text.⁴⁶

Other judgments during this phase manifested similar textualist inclinations. In *MSM Sharma v Sri Krishna Sinha*,⁴⁷ the Court was called upon to decide the precise nature of the relationship between parliamentary privileges and the freedom of speech. The case arose in the context of a notice for breach of privilege issued against a journalist for publishing parts of a speech, made in the Bihar Legislative Assembly, that were expunged from the record. Articles 19(1) (a) (‘All citizens shall have the right—to freedom of speech and expression’) and 194(3) (‘the powers, privileges and immunities ... shall be such as may from time to time be defined by the Legislature by law, and, until so defined, shall be those of the House of Commons of the Parliament of the United Kingdom’) were

ostensibly in conflict. Das CJ held that the freedom of speech, which was a general provision, would yield to parliamentary privilege, which was a special provision.⁴⁸ In his view, if the framers wished to subject parliamentary privileges to the freedom of speech, they would have included express language to that effect in Article 194(3).⁴⁹ This was in spite of the curious outcome produced by textualist interpretation—that so long as the legislature chose not to define them, privileges would override the freedom of speech, but as soon as it broke away from the privileges of the House of Commons by enacting legislation, they would yield to the freedom of speech.⁵⁰

Throughout this phase, the Supreme Court adopted a form of interpretation that was familiar to British legal training.⁵¹ The Court considered this interpretive methodology as a virtue in itself, and was not dictated by outcomes. As the case law interpreting Articles 13 and 368 shows, the reluctance of judges to lean heavily upon historical, structural, or ethical arguments was the product of genuine conviction about the legitimacy of textualist interpretation, rather than a reverse-engineered approach that was outcome-oriented.

A more sceptical reading of the Supreme Court's jurisprudence during this phase might be offered—could it be said that cases such as *Gopalan* and *MSM Sharma* show that the Court was pro-State (rather than textualist) in its interpretive outlook? *Golak Nath*, in which the Court used textualist arguments to clip the wings of the government, rebuts this claim. The Court's turnaround on the amendability of fundamental rights in that case was not coupled with, as Sathe claims, 'a major change in its interpretive methodology'.⁵² Major changes in constitutional doctrine took place within the framework of a steady interpretive outlook. Empirical evidence also negates this sceptical reading. In the first seventeen years of its functioning, the Supreme Court struck down legislation in 128 (or approximately one-quarter) of the 487 cases in which it was challenged.⁵³ At 40 per cent, the government's loss rate in cases before the Supreme Court was particularly high.⁵⁴ This was a quite remarkable record for a Court still seeking to establish its legitimacy in a newly independent democracy.

IV. PHASE TWO: STRUCTURE-DOMINATED ECLECTICISM

In the second phase, the Supreme Court began exploring other methods of interpretation. Although textualism continued to appeal to the judges, it was gradually overtaken by structuralism, and occasionally supplemented by other

methods of interpretation, such as ethicalism. The leading case of *Kesavananda Bharati v State of Kerala* demonstrates this shift in interpretive methodology.⁵⁵ In the context of further amendments to the Constitution in the tussle between the Supreme Court and Parliament over the validity of land reform legislation, the Court was once again tasked with considering the scope of Parliament's power to amend the Constitution. This time, the decision was entrusted to a thirteen-judge bench, which was legally capable of overruling *Golak Nath*. Eleven separate opinions were delivered. As is well known, the majority on the Court is understood to have held that Parliament can amend any provision of the Constitution (including fundamental rights),⁵⁶ so long as it does not alter, abrogate, or destroy the 'basic structure' or 'essential features' of the Constitution—an open-ended catalogue of features that lies within the exclusive control of the Court.

What this chapter is interested in is not so much the outcome of *Kesavananda*, but the manner in which the judges arrived at it. Textualist arguments continued to hold sway, both for the judges who subscribed to the 'basic structure' notion and for those who held that there were no substantive limitations on Parliament's amending power. Khanna J's judgment, which commentators consider as the clinching opinion,⁵⁷ is framed in textualist terms. He pointed out that the word 'amendment' in Article 368 necessarily implied that the Constitution, post-amendment, would continue to subsist without a loss of identity. The following extract bears this out:⁵⁸

The words 'amendment of this Constitution' and 'the Constitution shall stand amended' in Article 368 show that what is amended is the existing Constitution and what emerges as a result of amendment is not a new and different Constitution ...

He also categorically rejected appeals to structuralist interpretation, observing that the notion of implied limitations on Parliament's power of amendment was not based on an express provision of the Constitution, and thus should be regarded as 'essentially nebulous'.⁵⁹ But Ray J relied on those very words of Article 368 to hold that no provision of the Constitution was beyond the reach of Parliament.⁶⁰ Chandrachud J similarly held that the language of Article 368 offered intrinsic evidence that the word 'amendment' was not used in an insular sense, but was intended to have a wide amplitude.⁶¹ Other judges drew inferences from the absence of any express limitations in Article 368. Palekar J held that if the framers considered it necessary to exempt any part of the Constitution from amendment, they would have done so in Article 368 itself, as was done in Article V of the US Constitution.⁶² Beg J refused to acknowledge

any distinction between ‘more basic’ or ‘less basic’ parts of the Constitution, arguing that no such limitation was provided for in the text.⁶³

Nonetheless, the shift towards structuralist interpretation was clearly discernible. Shelat J and Grover J held that the word ‘amendment’ in Article 368 needed to be construed with reference to the scheme of the Constitution as a whole. Sikri CJ relied on intra-textualist argument, highlighting that the word ‘amend’ was employed to mean different things in different provisions of the Constitution—its real content could only be gleaned with reference to the structure of the Constitution. Still others, such as Hegde and Mukherjea JJ, relied on both textual⁶⁴ and structural⁶⁵ arguments in support of their conclusions.

Soon after the judgment in *Kesavananda Bharati*, a national emergency was declared by the ruling Congress government to quell opposition and protect the political office of Prime Minister Indira Gandhi, after her election to Parliament was set aside on the basis that she had engaged in corrupt practices.⁶⁶ Opposition leaders were detained en masse, and the right to move courts for the enforcement of fundamental rights under Articles 14 (the right to equality), 19 (the right to freedom), 21 (the right to life), and 22 (the right against arbitrary arrest and detention) had been suspended. In *ADM Jabalpur v Shivakant Shukla*,⁶⁷ the Supreme Court was tasked with deciding the politically charged question of whether detainees could challenge their detention in *habeas corpus* proceedings. In a partial retreat to textual interpretation, the majority held that there was no right of personal liberty that existed above and beyond that specified in the Constitution. However, Khanna J (who had adopted a textualist interpretation in *Kesavananda Bharati*), in a dissent likened to that of Lord Atkin in *Liversidge*,⁶⁸ embraced an ethical approach by stating that the right to life and personal liberty existed even in the absence of Article 21. Even though there was a textual basis for the same argument,⁶⁹ Khanna J chose to focus on the ethical argument, which would have been immune from a clarificatory constitutional amendment overturning the judgment—a phenomenon that was ubiquitous at the time.

The strides towards structuralist interpretation made in *Kesavananda* were consolidated by a five-judge bench of the Supreme Court in *Minerva Mills v Union of India*.⁷⁰ Parliament sought to overturn the basic structure doctrine by adding the following sub-clauses to Article 368:

(4) No amendment of this Constitution ... made or purporting to have been made under this article ... shall be called in question in any court on any ground.

(5) For the removal of doubts, it is hereby declared that there shall be no limitation whatever on the constituent power of Parliament to amend by way of addition, variation or repeal the provisions of this Constitution under this article.⁷¹

If a purely textualist understanding of the basic structure doctrine had been adopted, this amendment would have been decisive. By clarifying that the word ‘amendment’ was not restricted to altering the non-essential features of the Constitution, the substratum of the doctrine could be considered as having been eliminated. However, the Court made a critical move in favour of structuralist justifications for the basic structure doctrine.⁷² Chandrachud CJ struck down the amendment on the basis that the limited power to amend the Constitution was itself a basic feature, which Parliament had no power to transform into an unlimited amending power.⁷³ Bhagwati J observed that if Parliament could enlarge its limited amending power into an unlimited one, then it would be ‘meaningless to place a limitation on the original power of amendment’.⁷⁴ Under challenge in *Minerva Mills* was also a constitutional amendment⁷⁵ seeking to insulate laws enacted in furtherance of the Directive Principles of State Policy under [Part IV](#) of the Constitution from judicial review, on the basis that they violated Articles 14, 19, and 31. The Court adopted a similarly structuralist approach to interpreting this amendment, holding that Articles 14, 19, and 21 constituted a ‘golden triangle’ of rights that preserve the dignity of the individual, and that the amendment impermissibly sought to negate two sides of that triangle.⁷⁶

The clause-by-clause interpretation of fundamental rights by the majority in *Gopalan* was also called into question in what is commonly known as the bank nationalisation case.⁷⁷ Later, the Supreme Court categorically rejected the *Gopalan* approach in favour of a structuralist one in *Maneka Gandhi v Union of India*,⁷⁸ which involved a challenge to a statutory provision under which the passport of the former Prime Minister’s daughter-in-law was impounded for political reasons. [Part III](#) of the Constitution was conceived as a cohesive bill of rights rather than a miscellaneous grouping of constitutional guarantees. Beg CJ held:

Articles dealing with different fundamental rights ... do not represent entirely separate streams ... They are all parts of an integrated scheme in the Constitution. Their waters must mix to constitute that grand flow of unimpeded and impartial justice ...⁷⁹

This structuralist conceptualisation of fundamental rights had profound implications, because the State would no longer be able to claim the refuge of the limitation clause of a single fundamental right. Even if it did so, it would still need to establish why other overlapping, interrelated rights remained sufficiently unaffected.

The Court in *Maneka Gandhi* also made it clear that ‘procedure established by

law' for the purposes of the right to life did not only provide a guarantee of procedural due process, but also included a substantive component. It held that even a procedure provided for by way of primary legislation would need to be 'fair, just and reasonable, not fanciful, oppressive or arbitrary'⁸⁰ and should be 'carefully designed to effectuate, not to subvert, the substantive right itself'.⁸¹ This was coupled with a wide reading of the phrase 'personal liberty',⁸² which opened the door to the inclusion of a wide range of unenumerated rights under Article 21. Article 21 was incrementally interpreted to include the rights to privacy,⁸³ pollution-free air,⁸⁴ reasonable accommodation,⁸⁵ education,⁸⁶ livelihood,⁸⁷ health,⁸⁸ speedy trial,⁸⁹ and free legal aid.⁹⁰ In many of these cases, non-justiciable Directive Principles were read into the right to life, paving the way for the Supreme Court to play an unprecedented role in the governance of the nation.

During this phase, the Supreme Court decided three important cases on the interpretation of constitutional provisions dealing with appointments to the higher judiciary. Article 124(2) provides that Supreme Court judges will be appointed by the President (on the advice of the Union government) after consultation with such of the judges of the Supreme Court and of the High Courts in the States as the President may deem necessary, and in the case of all appointments other than that of the Chief Justice, the Chief Justice shall always be consulted. Article 217(1) contains a similar provision for the appointment of High Court judges. *SP Gupta v Union of India*⁹¹ arose out of writ petitions filed by advocates of the Supreme Court and various High Courts challenging, inter alia, the validity of a government circular concerning appointments of High Court judges. On the question of whether the petitioners satisfied the rules of standing before the Supreme Court, Bhagwati J adopted an ethical approach to interpreting Article 32, noting that the rules made by the Court prescribing the procedure for filing writ petitions in pursuance of Article 32 could not be read literally. The procedure was a 'handmaiden of justice', and the cause of justice could 'never be allowed to be thwarted by any procedural technicalities'.⁹² In a confirmation of the jurisprudence enabling public interest litigation petitions to be filed in the Supreme Court and High Courts,⁹³ Bhagwati J held that any member of the public could file a petition for the enforcement of rights of a person or class of persons that was unable to approach the Court for relief. This appeal to broad notions of justice stood in contrast with the Court's reading of Articles 124(2) and 217(1). The Court accorded primacy to the opinion of the Union government in the process of judicial appointments, based on a literal interpretation of the word 'consultation'. 'Consultation', in the Court's

understanding, only required ‘taking into account’ and ‘giving due weight’ to the opinion of the consultees.⁹⁴ However, when any difference of opinion arose amongst the constitutional functionaries, the final word would rest with the Union government. Any other reading of these provisions would amount to ‘bending the language of the Constitution’.⁹⁵

Over a decade later, however, the ‘bending’ of the language of Articles 124(2) and 217(2) was effectuated. In *Supreme Court Advocates-on-Record Association v Union of India*,⁹⁶ which is known as the second judges case, a nine-judge bench abandoned the literal interpretation of these provisions. Verma J held that the true meaning of the provisions needed to be discerned from the broader scheme and structure of the Constitution. In this broader constitutional context, the word ‘consultation’ was meant to signify a limitation on the power of the President to appoint judges.⁹⁷ This case prompted a major shift of power in the process of judicial appointments, and led to the establishment of collegiums (consisting of senior judges) for the appointment of Supreme Court and High Court judges.⁹⁸ The third judges case, which was understandably precedent-heavy, reinforced this interpretation of the constitutional provisions.⁹⁹ The move towards structuralism was clearly manifested in the Supreme Court’s judgments in the second and third judges cases.

Other important judgments of the Supreme Court during this phase also demonstrate the shift towards structuralism, but without deserting other methods of interpretation. Article 356 empowers the President to make a proclamation assuming President’s rule over a State in which there is a ‘failure of constitutional machinery’. In *SR Bommai v Union of India*,¹⁰⁰ probably the Supreme Court’s most important judgment on federalism, the Court was tasked with determining the scope of Article 356. It interpreted Article 356 bearing in mind the scheme and essential features of the Constitution, including democracy and federalism.¹⁰¹ The basic structure doctrine played an important role in the Court’s decision, as the Court held that the President could dismiss a State government on the basis that it was likely to act contrary to the basic features of the Constitution.¹⁰² Having said that, it also appealed to the language of Article 356 in delineating the scope for judicial review of Presidential proclamations.¹⁰³

In *Indra Sawhney v Union of India*,¹⁰⁴ better known as the ‘Mandal Commission’ case, the Court interpreted Article 16(4) of the Constitution, dealing with reservations in public employment for backward classes of citizens. Structuralist arguments played an important role in the decision, with the Court reasoning that Article 16(4) was not an exception to the other equality clauses,

but was in fact a facet of them.¹⁰⁵ Both were considered part of the same scheme established by the framers of the Constitution and were therefore read homogeneously.¹⁰⁶ Textualist arguments propelled the Court's conclusion that the use of the phrase 'backward class of citizens' in Article 16(4), in comparison with the narrower phrase 'socially and educationally backward classes of citizens' in Article 15(4), meant that the former was intended to be a more inclusive provision than the latter.¹⁰⁷ Both of these interpretive assessments were confirmed through references to the Constituent Assembly Debates.¹⁰⁸

So, in the second phase, the Supreme Court increasingly began to rely upon the structuralist approach to interpretation. The move towards structuralism was gradual, and even *Kesavananda Bharati*, which is considered a watershed moment in India's constitutional history, did not cleanly break from the past—many of the arguments emanating from the bench remained staunchly textualist. Ethical and historical interpretive approaches also began to find resonance in Supreme Court judgments from time to time. What is common between the first two phases of the interpretive story in the Supreme Court is that significant decisions involving the interpretation of the Constitution were entrusted to constitutional benches, comprising five or more judges, and were carefully (even if incorrectly) reasoned. There was limited scope for precedential confusion, since matters which had been decided by constitutional benches and which demanded reconsideration were referred to larger constitutional benches. Doctrinal disagreements played out *within* multiple opinions of the same judgment, rather than *amongst* different judgments.

V. PHASE THREE: *PANCHAYATI ECLECTICISM*

In the third phase, the Supreme Court's interpretive philosophy turned far more result oriented than it had ever been. The Court often surrendered its responsibility of engaging in a thorough rights reasoning of the issues before it. Two factors underpinned this institutional failure. First, the changing structure of the Court, which at its inception began with eight judges, grew to a sanctioned strength of thirty-one judges. It began to sit in panels of two or three judges, effectively transforming it into a polyvocal¹⁰⁹ group of about a dozen 'sub-Supreme Courts'. Even though Article 145(3) requires all substantial questions of law involving interpretation of the Constitution to be decided by constitutional benches, this requirement was ignored in practice.¹¹⁰ There

appears to be little guidance on what questions could be considered as ‘substantial’, although the Court’s only general criterion—that the question should not have been ‘finally and authoritatively decided’¹¹¹—was also overlooked. Judges on smaller benches have felt little obligation to engage with judgments by benches of the same size. There is also a natural tendency for judges on smaller benches to be less well informed, since they have access to a limited range of perspectives from their colleagues.¹¹² Larger bench decisions are more likely to represent the collective opinion of the Court,¹¹³ and promote consensus building in decision making. The greater likelihood of dissenting opinions in larger benches encourages judges to engage in robust rights reasoning so as to present their opinion as the most plausible one emanating from the bench. Second, the Court began deciding cases based on a certain conception of its own role—whether as social transformer, sentinel of democracy, or protector of the market economy. This unique decisionmaking process has sidelined reason giving in preference to arriving at outcomes that match the Court’s perception.

These two factors, resulting in a failure to articulate reasons, have rendered the process of interpretation as instrumental to the particular sub-Supreme Court’s view of the situation. The failure to give reasons has in fact contributed not only to methodological incoherence, but also to serious doctrinal incoherence and inconsistency across the case law. This can be best described as *panchayati eclecticism*,¹¹⁴ with different benches adopting inconsistent interpretive approaches based on their conception of the Court’s role, and arriving at conclusions that were often in tension with one another. The imagery that *panchayati eclecticism* is meant to invoke is that of a group of wise men and women (or, applying the analogy, sub-Supreme Courts), taking decisions based on notions of fairness that are detached from precedent, doctrine, and established interpretive methods.

Let us consider a few examples. In the space of a few weeks in 2013, the Supreme Court decided three important cases on electoral reform inconsistently, producing awkward constitutional jurisprudence. These cases were decided in the context of what is commonly known as the ‘criminalisation of politics’, referring to the fact that a significant proportion of parliamentarians face criminal charges.¹¹⁵ None of these significant cases were decided by constitutional benches. Article 326 provides that elections to the Lower House of Parliament and State legislative assemblies should be on the basis of adult suffrage and:

[E]very person who is a citizen of India and who is not less than eighteen years of age ... and is not

otherwise disqualified under this Constitution or any law made by the appropriate Legislature on the ground of non-residence, unsoundness of mind, crime or corrupt or illegal practice, shall be entitled to be registered as a voter ...

Section 62(5) of the Representation of the People Act 1951 (RPA) denies prisoners the right to vote and section 4 of the same statute stipulates that in order to be a member of the Lower House of Parliament or a State Legislative Assembly, a person must be registered as an 'elector' for a parliamentary or State constituency.

In *Chief Election Commissioner v Jan Chaudhary*,¹¹⁶ an NGO contended that since prisoners were deprived of the right to vote, they could not be considered as 'electors' and should automatically be disqualified from standing for elections during periods of incarceration. A two-judge bench of the Supreme Court affirmed this contention. One of the key reasons for this decision was that the Court considered the right to vote as a statutory endowment that is conferred (and equally, revoked) by the ordinary legislative process. It cited the Patna High Court's observation that it had 'no hesitation in interpreting the Constitution and the Laws framed under it, read together, that persons in the lawful custody of the Police also will not be voters, in which case, they will neither be electors'.¹¹⁷ This was a highly textualist reading of Article 326, focusing on the fact that it permits denial of the right to vote on the basis of illegal practices. A structuralist reading could have produced a very different outcome (one that was, as we shall see later, inconsistent with the Court's conception of its role). After all, India's status as an inclusive, participatory democracy forms part of the basic scheme of the Constitution, and it is questionable whether excluding a large class of people from the vote is consistent with that scheme.¹¹⁸

The next electoral case was *Lily Thomas v Union of India*,¹¹⁹ in which a two-judge bench interpreted constitutional provisions concerning the disqualifications for membership of Parliament and the State legislatures. Section 8(4) of the RPA gives sitting legislators a period of three months before disqualification operates, enabling them to appeal against their conviction. This statutory provision was challenged on the basis that it contravened Articles 102(1) and 191(1), dealing with the disqualifications for membership of Parliament and the State legislatures. Patnaik J adopted a highly textualist reading of the provisions, stating that their language made it clear that the disqualifications for sitting legislators and those who planned to contest elections had to be coextensive.¹²⁰

At issue before a three-judge bench of the Supreme Court in the third electoral case¹²¹ was whether the rules governing the casting of 'none-of-the-above'

votes, which in effect denied such votes of the benefit of secret ballot, violated the freedom of speech and expression. Sathasivam CJ's opinion was replete with references to the structure and scheme of the Constitution, of which free and fair elections is a cornerstone.¹²² He struck down the relevant rules on the basis that the right to cast a 'none-of-the-above' vote—which he mistakenly equated with a negative vote¹²³—was an essential part of the right to expression of a voter in a parliamentary democracy, which had to be recognised and given effect in the same manner as the right to cast a regular vote.¹²⁴

These three decisions produced an internally inconsistent and confusing electoral jurisprudence. On the one hand, the right to vote is a statutory privilege, which can be given and taken away by ordinary legislative majorities. On the other hand, the right to secrecy in voting and the right to cast a negative vote are treated as fundamental rights based on the structure of the Constitution, and are immune from the ordinary political process. Franchise can be denied to a large section of society (as per *Jan Chaukidar*), electoral disqualifications can be imposed liberally—albeit uniformly (as per *Lily Thomas*)—but those who have the vote must be able to cast an anonymous negative vote (*à la People's Union for Civil Liberties*).

In each of the three electoral cases, the Supreme Court ascribed a very specific role to itself—that of an institution which was entrusted with 'cleaning' the political process. This emerges quite clearly from the following observations:

For democracy to survive, it is essential that the best available men should be chosen as people's representatives for proper governance of the country. This can be best achieved through men of high moral and ethical values, who win the elections on a positive vote. Thus in a vibrant democracy, the voter must be given an opportunity to choose none of the above (NOTA) button, which will indeed compel the political parties to nominate a sound candidate. This situation palpably tells us the dire need of negative voting.¹²⁵

So, in order to fit into their version of the Court's decisionmaking role, three benches of the Supreme Court relied on different interpretive approaches (in two cases, textualism and in the third, structuralism) and produced doctrinally inconsistent jurisprudence. Sophisticated reasoning about the rights issues at stake before the Court, including whether it was proportionate to deny the vote to all prisoners or permissible to distinguish between sitting parliamentarians and future parliamentarians, became the unfortunate casualty of the Court's self-conception.

Two judgments delivered by two-judge benches of the Supreme Court on the rights of sexual minorities reflect similar concerns. In *Suresh Kumar Koushal v Naz Foundation*,¹²⁶ the Court decided an appeal against the Delhi High Court's

judgment reading down section 377 of the Indian Penal Code 1860, which criminalised voluntary ‘carnal intercourse against the order of nature’. The Delhi High Court’s decision¹²⁷ rested on the claim that section 377, in the form that it was, violated Articles 14, 15, and 21 of the Constitution, because it discriminated on the ground of sexual orientation, targeted homosexuals as a class, and was contrary to constitutional morality. The Supreme Court reversed the Delhi High Court on the basis that section 377 uniformly regulated sexual conduct and did not, on its face, discriminate against sexual minorities. The Supreme Court also seemed to impose a numerical *de minimis* threshold for the enforcement of fundamental rights through public interest litigation—observing, quite astonishingly, that only a ‘miniscule fraction of the country’s population’ could be classified as lesbian, gay, bisexual, and transgender (LGBT).¹²⁸

About four months later, the Supreme Court decided *National Legal Services Authority (NALSA) v Union of India*.¹²⁹ The question before it was whether the right to equality required State recognition of *hijras* (broadly, Indian male-to-female transgender groups) and transgenders as a third gender for the purposes of public health, welfare, reservations in education and employment, *etc.* The two opinions in the case adopted contrasting interpretive techniques to arrive at the conclusion that the Constitution mandated the recognition of a third gender. Radhakrishnan J approached the issue from a textualist perspective, noting that the fundamental rights at issue used the words ‘person’ or ‘citizen’, which were gender neutral and applied equally to transgenders.¹³⁰ He also contradicted the *de minimis* notion for the enforcement of fundamental rights articulated in *Koushal*.¹³¹ This opinion shows that it is a mistake to conflate textualism with aliberalism—indeed, remarkably liberal judgments may have textualist underpinnings. Sikri J, on the other hand, approached the case from a dynamic, prudential perspective, arguing that the Constitution would need to stimulate changes in social attitudes by requiring the recognition of transgenders as a category separate from males and females.¹³² The Constitution, in his view, is a living organism that is sensitive to social realities.

Koushal and *NALSA* again show how panel composition in the third phase has produced awkward constitutional jurisprudence. The present state of the law appears to be that although the criminal prohibition on carnal intercourse (including transgender intercourse) is consistent with the fundamental rights to life and equality, the State’s failure to recognise a third gender violates those very same rights. Transgenders can putatively claim a violation of constitutional guarantees when they are denied separate public toilets, but cannot do so if they are arrested or questioned for engaging in non penile-vaginal intercourse.

Interpretive philosophies also remained quite palpably result oriented. In *Koushal*, the Supreme Court conceived of its role as a majoritarian court that deferred to the democratic will. This conception led the Court to ignore important counter-majoritarian considerations, including section 377's effect on sexual minorities and the cogency of the statutory provision's separate categorisation of 'carnal intercourse against the order of nature'. The Court's formalistic and deferential readings of Articles 14, 15, and 21 stood in contrast with established precedent.

The structuralist approach to interpretation continued to remain popular during this phase. For instance, in 2010, a three-judge bench of the Supreme Court decided the question of whether narco-analysis, brain mapping, and polygraph tests were contrary to the right against self-incrimination under Article 20(3), which provides that '[n]o person accused of any offence shall be compelled to be a witness against himself'.¹³³ One of the issues that arose before the Court was what the limits of this constitutional provision were—clearly, not every such test would involve someone who had been 'accused of a criminal offence'. Balakrishnan CJ highlighted the importance of the interrelationship between the right against self-incrimination under Article 20(3) and the right to life under Article 21, affirming that even in cases where a person was not accused of an offence, the guarantees of substantive due process under Article 21 (following *Maneka Gandhi*) would still need to be complied with.¹³⁴ The right against self-incrimination was also a component of personal liberty under Article 21, and would come into play when an individual was liable to face non-penal consequences that lay outside the scope of Article 20(3).¹³⁵ Based on this structuralist reading of the constitutional provisions, the Court held that involuntary administration of narco-analysis, brain mapping, and polygraph tests, whether in the context of a criminal investigation or otherwise, would be unconstitutional.

However, other two-judge or three-judge decisions relied upon a variety of interpretive techniques to read the Constitution, often without any justification. In *Pradeep Chaudhary v Union of India*,¹³⁶ the Court was asked to interpret Article 3, which requires the President to consult relevant State legislatures before a bill to alter the boundaries of a State can be introduced in Parliament. There were two options available to the Court. It could either have construed such consultation in a thin sense, requiring the State legislature to be given a formal chance to express its views, or done so in a thick sense, requiring the views expressed by the State legislature to be taken into account, in one way or another, by Parliament. The Court opted for the former, relying upon a textualist

reading of Article 3. Sinha J held that consultation in this case would not mean concurrence, and that Parliament would in no way be bound by the views of the State legislature.¹³⁷ The Court failed to justify the reason for which ‘consultation’ would not have the much thicker meaning attributed to it in the context of judicial appointments. In fact, ascribing a thicker meaning based on a structuralist interpretation would have better accorded with the overall scheme of the Constitution, of which federalism is an essential component.¹³⁸

Even during this phase, however, there were some important (and more carefully reasoned) constitutional bench decisions adopting a fusion of different interpretive techniques to read different parts of the Constitution.¹³⁹ In *IR Coelho v State of Tamil Nadu*,¹⁴⁰ the Court followed on from the structuralist interpretation of fundamental rights in *Kesavananda, Minerva Mills*, and other cases, holding that the insertion of statutes into the Ninth Schedule to the Constitution (which is meant to immunise legislation from fundamental rights challenges) would nonetheless be subjected to the ‘basic structure’ doctrine.

Following the Congress Party-led United Progressive Alliance’s victory in the national elections of 2004, the President (on the advice of the Union government) removed four State governors from office, who under Article 156(1) of the Constitution held office ‘during the pleasure of the President’. A five-judge bench of the Supreme Court was tasked with deciding whether, and in what circumstances, this was permissible.¹⁴¹ The Court cited Constituent Assembly Debates to arrive at two conclusions: first, that the framers adopted the ‘doctrine of pleasure’ route (rather than impeachment or inquiry) for the removal of Governors, and second, that it was assumed that withdrawal of pleasure resulting in removal of the Governor would be on valid grounds (though the framers found no need to enumerate them). This historical approach was supplemented by an intra-textualist argument, since the Court discerned what the ‘pleasure of the President’ meant under Article 156, by referring both to offices that are held during pleasure, and offices that are not held during pleasure, in different parts of the Constitution.¹⁴²

The Supreme Court’s judgment in *GVK Industries v Income Tax Officer*¹⁴³ was distinctive because it offered a rare glimpse of studied self-assessment by the Court about its interpretive philosophy.¹⁴⁴ At issue before a five-judge bench was whether Parliament had the power to legislate in respect of causes occurring outside India under Article 245, which provides that ‘[n]o law made by Parliament shall be deemed to be invalid on the ground that it would have extra territorial operation’. Explaining its structuralist interpretive outlook, the Court

observed:¹⁴⁵

[The] Constitution [may be viewed] as [being] composed of constitutional topological spaces ... Within such a constitutional topological space, one would expect each provision therein to be intimately related to, gathering meaning from, and in turn transforming the meaning of, other provisions therein ...

This ‘topological space’ theory was then applied to arrive at the conclusion that Article 245 did not empower Parliament to make laws for any territory outside India, because the other provisions of that topological space referred to laws made ‘for the whole or any part of the territory of India’ alone. The Court also cited textual¹⁴⁶ and historical¹⁴⁷ arguments to confirm its analysis.

Overall, the features of the Supreme Court’s interpretive judgments in the third phase are captured by the expression *panchayati* eclecticism: small benches deciding ‘big’ cases, a lack of emphasis on reason giving, jurisprudentially inconsistent or awkward decisions, and a variety of interpretive techniques—both within and amongst the Court’s judgments—that were often instrumental to the Court’s self-conception of its role. Some of these features were also conspicuous in an important judgment delivered by the Supreme Court at the time that this chapter was being finalised. The Court—relying on its self-conception as a sentinel of democracy—invoked the basic structure doctrine to strike down a constitutional amendment seeking to revise the judicial appointments process.¹⁴⁸

VI. CONCLUSION

In many ways, the Indian Supreme Court’s approaches to constitutional interpretation have assimilated global interpretive trends. Within most judgments of the Supreme Court, there has not been one interpretive technique, but many, and judges have often relied on the strategy of claiming that all interpretive routes lead to the same destination. Tracking the worldwide move towards the ‘judicialisation of politics’,¹⁴⁹ the Supreme Court’s shift away from textualism has been accompanied by an increase in judicial power (recall the second and third judge cases) or an expansion of the scope of judicial review (think of *Kesavananda*, *Maneka Gandhi*, and *Bommai*).¹⁵⁰ The exponential growth of judgments interpreting the Constitution has led to increasingly precedent-laden

and doctrine-heavy decisions, that sometimes lose sight of the document that is being interpreted (although this development has been undercut by small-bench, sub-Supreme Court decision making in recent years).

Yet, the Supreme Court's interpretive outlook has been distinctive in many ways, particularly compared to that of the US Supreme Court. Judges have not been tied down to particular philosophies, and have manifested the flexibility to reconsider their interpretive approaches. Khanna J's move from textualism (in *Kesavananda*) to ethicalism (in *ADM Jabalpur*) and Chandrachud J's move from textualism (in *Kesavananda*) to structuralism (in *Minerva Mills*) offer good examples. One of the reasons for this flexibility may be that constitutional interpretation has generally remained a subconscious (and sometimes, even instrumental) enterprise in the Supreme Court. With some notable exceptions (like *GVK Industries*), there has been very little serious self-reflection from the bench about interpretive methodology. Further, unlike in the United States, where the move away from textualism was justified by the *difficulty* of formal amendment, in India, the *ease* of formal amendment prompted the shift towards interpretive approaches that profess fidelity to the structure of the Constitution. Finally, the Supreme Court's unique system of bench composition combined with differing conceptions of its own role have produced an idiosyncratic, result-centric style of constitutional interpretation in recent years—with many small, sub-Supreme Courts adopting inconsistent approaches that produce incoherent jurisprudence.

^{*} I am grateful to Tarunabh Khaitan, Nick Robinson, and the editors for comments. All errors are mine.

¹ Nick Robinson and others, 'Interpreting the Constitution: Supreme Court Constitutional Benches Since Independence' (2011) 46(9) Economic and Political Weekly 27. However, as I explain later, the Supreme Court has increasingly decided important questions of constitutional interpretation sitting in benches of two or three judges, which means that the total number of *judgments* involving important questions of constitutional interpretation would far exceed this figure.

² Constitution of India 1950, art 368(2).

³ Constitution of India 1950, art 368(2). Some constitutional provisions (eg, art 2) are unentrenched, and can be amended by a simple parliamentary majority. However, these provisions expressly state that they are not to be considered as 'amendments to the constitution' for the purposes of art 368, the Constitution's amendment clause.

⁴ At the time of writing, the US Constitution is 227 years old and has been amended twenty-seven times (of these, the first ten amendments are collectively the Bill of Rights and are generally considered part of the moment of constitutional creation). The Indian Constitution is 64 years old and has been amended a hundred times. Of course, the number of amendments is only a partial indicator of the extent of change brought about by the formal amending process. A single formal amendment may effect greater constitutional change than several formal amendments put together.

⁵ The nature of the link between the structure of a court and its interpretive methodology is considered

later in the chapter.

⁶ This holds true irrespective of the number of dissents, which means that dissenting opinions are effectively devalued. See Chintan Chandrachud, 'The Supreme Court's Practice of Referring Cases to Larger Benches: A Need for Review' (2010) 1 SCC Journal 37.

⁷ Nick Robinson, 'Structure Matters: The Impact of Court Structure on the Indian and US Supreme Courts' (2013) 61 American Journal of Comparative Law 173.

⁸ Keith E Whittington, *Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review* (University Press of Kansas 1999) 6.

⁹ James Allan, 'Constitutional Interpretation v. Statutory Interpretation: Understanding the Attractions of Original Intent' (2000) 6 Legal Theory 109, 120.

¹⁰ For instance, the composition of municipalities (art 243R) and the appointment of district court judges (art 233). These are matters of detail which one would expect to find in statutes. Contrast this with Britain, where many constitutional matters are found in ordinary statutes. See Tarunabh Khaitan, '“Constitution” as a Statutory Term' (2013) 129 Law Quarterly Review 589.

¹¹ See eg, Constitution of India 1950, art 124(2).

¹² See eg, Constitution of India, art 56(1).

¹³ However, it is a mistake to assume that courts enjoy (or indeed, should enjoy) exclusive authority to determine the meaning of constitutional provisions. See generally, Mark Tushnet, *Taking the Constitution Away from the Courts* (Princeton University Press 2000).

¹⁴ See Philip Bobbitt, *Constitutional Fate* (Oxford University Press 1982); Philip Bobbitt, *Constitutional Interpretation* (Blackwell 1991).

¹⁵ Robert Post, 'Theories of Constitutional Interpretation' (1990) 30 Representations 13, 21.

¹⁶ Aileen Kavanagh, 'Original Intention, Enacted Text and Constitutional Interpretation' (2002) 47 American Journal of Jurisprudence 255, 257.

¹⁷ Bobbitt ([n 14](#)) 7.

¹⁸ Antonin Scalia, *A Matter of Interpretation* (Princeton University Press 1997) 17.

¹⁹ Bobbitt ([n 14](#)) 17.

²⁰ Post ([n 15](#)) 20.

²¹ Akhil Reed Amar, 'Intratextualism' (1999) 112 Harvard Law Review 747.

²² Mark Tushnet, 'The United States: Eclecticism in the Service of Pragmatism' in Jeffrey Goldsworthy (ed) *Interpreting Constitutions: A Comparative Study* (Oxford University Press 2007) 48.

³⁴ Sri Sankari Prasad Singh Deo ([n 32](#)) [18].

²³ AIR 1950 SC 27.

²⁴ The Preventive Detention Act 1950.

²⁵ However, see the third alternative offered by Tripathi: PK Tripathi, *Spotlights on Constitutional Interpretation* (NM Tripathi 1972) 22–23.

²⁶ *Lochner v New York* 198 US 45 (1905).

²⁷ *AK Gopalan v State of Madras* AIR 1950 SC 27 [21] (Kania CJ), [71] (Fazl Ali J).

²⁸ Kania CJ also criticised US experience with substantive due process—see Sujit Choudhry, 'Living Originalism in India? “Our Law” and Comparative Constitutional Law' (2013) Yale Journal of Law and the Humanities 1.

²⁹ SP Sathe, 'India: From Positivism to Structuralism' in Jeffrey Goldsworthy (ed) *Interpreting Constitutions: A Comparative Study* (Oxford University Press 2007) 231.

³⁰ [1992] UKHL 3.

³¹ The same rationale, however, would not necessarily operate *vis-à-vis* a constitution-making process.

³² AIR 1951 SC 458.

³³ AIR 1965 SC 845.

- ³⁵ Scalia ([n 18](#)) 17.
- ³⁶ Ronald Dworkin, ‘Comment’ in Scalia ([n 18](#)) 117.
- ³⁷ *Sajjan Singh* ([n 33](#)) [29].
- ³⁸ *Sajjan Singh* ([n 33](#)) [45]. Tripathi’s argument that Hidayatullah J’s judgment betrays ‘decimating disregard’ for the ‘plain text’ of the Constitution is therefore overstated: Tripathi ([n 25](#)) 95.
- ³⁹ *Sajjan Singh* ([n 33](#)) [60].
- ⁴⁰ AIR 1967 SC 1643.
- ⁴¹ *Golak Nath* ([n 40](#)) [25].
- ⁴² *Golak Nath* ([n 40](#)) [77].
- ⁴³ *Golak Nath* ([n 40](#)) [207].
- ⁴⁴ *Golak Nath* ([n 40](#)) [330].
- ⁴⁵ *Golak Nath* ([n 40](#)) [91].
- ⁴⁶ *Golak Nath* ([n 40](#)) [21].
- ⁴⁷ AIR 1959 SC 395.
- ⁴⁸ *MSM Sharma* ([n 47](#)) [27].
- ⁴⁹ *MSM Sharma* ([n 47](#)) [26].
- ⁵⁰ See the dissenting opinion of Subba Rao J in *MSM Sharma* ([n 47](#)) [43].
- ⁵¹ Further examples are: *Janardhan Reddy v State of Hyderabad* AIR 1951 SC 217; *Sri Venkataramana Devaru v State of Mysore* AIR 1958 SC 255; *Kavalappara Kottarathil Kochunni v State of Madras* AIR 1960 SC 1080.
- ⁵² Sathe ([n 29](#)) 243.
- ⁵³ George H Gadbois, Jr, ‘Indian Judicial Behaviour’ (1970) 5(3) *Economic and Political Weekly* 149, 153.
- ⁵⁴ Gadbois ([n 53](#)) 153.
- ⁵⁸ *Kesavananda Bharati* ([n 55](#)) [1427].
- ⁷¹ Constitution (Forty-second Amendment) Act 1976, s 55.
- ⁷⁹ *Maneka Gandhi* ([n 78](#)) [202].
- ⁵⁵ (1973) 4 SCC 225.
- ⁵⁶ There is a discord between what the judges in *Kesavananda Bharati* said and what they were understood to mean by subsequent benches. See Chintan Chandrachud, ‘Declarations of Unconstitutionality in India and the UK: Comparing the Space for Political Response’ *Georgia Journal of International and Comparative Law* (2015) 43 *Georgia Journal of International and Comparative Law* 309.
- ⁵⁷ Vivek Krishnamurthy, ‘Colonial Cousins: Explaining India and Canada’s Unwritten Constitutional Principles’ (2009) 34 *Yale Journal of International Law* 207, 225.
- ⁵⁹ *Kesavananda Bharati* ([n 55](#)) [1448].
- ⁶⁰ *Kesavananda Bharati* ([n 55](#)) [939].
- ⁶¹ *Kesavananda Bharati* ([n 55](#)) [2049].
- ⁶² *Kesavananda Bharati* ([n 55](#)) [1241].
- ⁶³ *Kesavananda Bharati* ([n 55](#)) [1821].
- ⁶⁴ *Kesavananda Bharati* ([n 55](#)) [651].
- ⁶⁵ *Kesavananda Bharati* ([n 55](#)) [654].
- ⁶⁶ See Granville Austin, *Working a Democratic Constitution: A History of the Indian Experience* (Oxford University Press 2003) ch 5.

⁶⁷ (1976) 2 SCC 521.

⁶⁸ *Liversidge v Anderson* [1942] AC 206 (HL).

⁶⁹ The textual grounding for Khanna J's conclusion could be found in art 372(1), which preserved laws in force before the commencement of the Constitution. Khanna J did invoke this constitutional provision, but did so quite clearly only as a means of subsidiary support for his argument: *ADM Jabalpur* ([n 67](#)) [535].

⁷⁰ (1980) 3 SCC 625.

⁷² Even in the Indira Gandhi election case, which preceded *Minerva Mills*, the basic structure doctrine was partly grounded in textualist justifications. *Indira Nehru Gandhi v Raj Narain* (1975) Supp SCC 1 [135] (Ray CJ), [175] (Khanna J).

⁷³ *Minerva Mills* ([n 70](#)) [17].

⁷⁴ *Minerva Mills* ([n 70](#)) [88].

⁷⁵ Constitution (Forty-second Amendment) Act 1976, s 4.

⁷⁶ *Minerva Mills* ([n 70](#)) [74] (Chandrachud CJ).

⁷⁷ *Rustom Cavasjee Cooper v Union of India* (1970) 1 SCC 248.

⁷⁸ (1978) 1 SCC 248.

⁸⁰ *Maneka Gandhi* ([n 78](#)) [48] (Chandrachud J).

⁸¹ *Maneka Gandhi* ([n 78](#)) [82] (Krishna Iyer J).

⁸² *Maneka Gandhi* ([n 78](#)) [5] (Bhagwati J).

⁸³ *Gobind v State of Madhya Pradesh* (1975) 2 SCC 148.

⁸⁴ *Subhash Kumar v State of Bihar* (1991) 1 SCC 598.

⁸⁵ *Shantistar Builders v Narayan Khimalal Totame* (1990) 1 SCC 520.

⁸⁶ *Mohini Jain v State of Karnataka* (1992) 3 SCC 666.

⁸⁷ *Olga Tellis v Bombay Municipal Corporation* (1985) 3 SCC 545.

⁸⁸ *State of Punjab v Mohinder Singh Chawla* (1997) 2 SCC 83.

⁸⁹ *Husainara Khatoon (IV) v Home Secretary, State of Bihar* (1980) 1 SCC 98.

⁹⁰ *MH Hoskot v State of Maharashtra* (1978) 3 SCC 544.

⁹¹ (1981) Supp SCC 87.

⁹² *SP Gupta* ([n 91](#)) [17].

⁹³ See *Husainara Khatoon (IV)* ([n 89](#)); *Sunil Batra (II) v Delhi Administration* (1980) 3 SCC 488; *Upendra Baxi v State of Uttar Pradesh* (1983) 2 SCC 308.

⁹⁴ *SP Gupta* ([n 91](#)) [30] (Bhagwati J).

⁹⁵ *SP Gupta* ([n 91](#)) [1] (Bhagwati J).

⁹⁶ (1993) 3 SCC 441.

⁹⁷ *Supreme Court Advocates-on-Record Association* ([n 96](#)) [112] (Pandian J).

⁹⁸ For commentary, see Abhinav Chandrachud, *The Informal Constitution: Unwritten Criteria in Selecting Judges for the Supreme Court of India* (Oxford University Press 2014).

⁹⁹ *Special Reference No 1 of 1998* (1998) 7 SCC 739.

¹⁰⁰ *SR Bommai v Union of India* (1994) 3 SCC 1. Examples of other judgments adopting the structuralist interpretive approach are: *Chief Justice of Andhra Pradesh v LVA Dixitulu* (1979) 2 SCC 34 [44, 65, 67, 78, 79]; *Video Electronics v State of Punjab* (1990) 3 SCC 87 [20, 21, 24]; *Ajit Singh (II) v State of Punjab* (1999) 7 SCC 209 [18]–[19].

¹⁰¹ *SR Bommai* ([n 100](#)) [96] (Sawant J).

¹⁰² Sudhir Krishnaswamy, *Democracy and Constitutionalism in India: A Study of the Basic Structure*

Doctrine (Oxford University Press 2011) 128.

¹⁰³ *SR Bommai* ([n 100](#)) [212]–[227] (Ramaswamy J).

¹⁰⁴ (1992) Supp (3) SCC 217.

¹⁰⁵ *Indra Sawhney* ([n 104](#)) [742] (Jeevan Reddy J), [566] (Sahai J).

¹⁰⁶ *Sathe* ([n 29](#)) 238.

¹⁰⁷ *Indra Sawhney* ([n 104](#)) [796]–[797] (Jeevan Reddy J), [358] (Kuldip Singh J).

¹⁰⁸ *Indra Sawhney* ([n 104](#)) [772]–[777] (Jeevan Reddy J), [362] (Kuldip Singh J). But see this clarification made by Jeevan Reddy J: ‘we must clarify that we are not taking these debates or even the speeches of Dr. Ambedkar as conclusive ... members may have expressed several views, all of which may not be reflected in the provision finally enacted’. *Indra Sawhney* ([n 104](#)) [772].

¹²⁵ *People’s Union for Civil Liberties* ([n 121](#)) [51].

¹⁰⁹ Robinson ([n 7](#)).

¹¹⁰ Nick Robinson and others have pointed out that the percentage of constitutional benches on the Supreme Court dipped from 45.6% in the period between 1950 and 1954 to 6.4% in the period between 2005 and 2009: Nick Robinson and others ([n 1](#)) 28. See also TR Andhyarujina, ‘Restoring the Supreme Court’s Exclusivity’ *The Hindu* (Chennai, 31 August 2013).

¹¹¹ *State of Jammu and Kashmir v Thakur Ganga Singh* AIR 1960 SC 356 [8]; *People’s Union for Civil Liberties v Union of India* (2003) 4 SCC 399 [28]–[32].

¹¹² Alexandra Sadinsky, ‘Redefining En Banc Review in the Federal Courts of Appeals’ (2014) 82 *Fordham Law Review* 2001, 2030.

¹¹³ Sadinsky ([n 112](#)) 2029–30.

¹¹⁴ I owe this term to Tarunabh Khaitan.

¹¹⁵ Devesh Kapur and Pratap Bhanu Mehta, ‘The Indian Parliament as an Institution of Accountability’ (2006) United Nations Research Institute for Social Development, Democracy, Governance and Human Rights Programme Paper No 23.

¹¹⁶ (2013) 7 SCC 507.

¹¹⁷ *Jan Chaukidar* ([n 116](#)) [6].

¹¹⁸ Chintan Chandrachud, ‘Prisoner Voting Rights in India’ *UK Constitutional Law Blog* (8 August 2013) <<http://www.law.cam.ac.uk/people/research-students/chintan-chandrachud/6006>>, accessed October 2015.

¹¹⁹ (2013) 7 SCC 653.

¹²⁰ *Lily Thomas* ([n 119](#)) [28].

¹²¹ *People’s Union for Civil Liberties v Union of India* (2013) 10 SCC 1.

¹²² *People’s Union for Civil Liberties* ([n 121](#)) [37, 39, 47, 56].

¹²³ Madhav Khosla, ‘Hot Button’ *The Caravan* (New Delhi, 1 November 2013).

¹²⁴ *People’s Union for Civil Liberties* ([n 121](#)) [39].

¹²⁶ (2014) 1 SCC 1.

¹²⁷ *Naz Foundation v Government of NCT* (2009) 160 DLT 277.

¹²⁸ *Suresh Kumar Koushal* ([n 126](#)) [40].

¹²⁹ (2014) 5 SCC 438.

¹³⁰ *NALSA* ([n 129](#)) [61], [82].

¹³¹ *NALSA* ([n 129](#)) [53].

¹³² *NALSA* ([n 129](#)) [125], [127].

¹³³ *Selvi v State of Karnataka* (2010) 7 SCC 263.

¹³⁴ Selvi ([n 133](#)) [140].

¹³⁵ Selvi ([n 133](#)) [143].

¹³⁶ (2009) 12 SCC 248.

¹³⁷ Pradeep Chaudhary ([n 136](#)) [23].

¹³⁸ See Arghya Sengupta and Alok Prasanna Kumar, 'Interpreting a Federal Constitution' *The Hindu* (Chennai, 4 February 2014).

¹³⁹ Examples other than those set out in the text that follows are: *State of Punjab v Devans Modern Breweries* (2004) 11 SCC 26 [271]–[272] (historicism) [307–10, 344] (prudentialism); *Raja Ram Pal v Speaker, Lok Sabha* (2007) 3 SCC 184 (Raveendran J) (structuralism) (Sabharwal CJ) (historicism); *Re Special Reference No. 1 of 2012* (2012) 10 SCC 1 [108], [112]–[113] (textualism).

¹⁴⁰ (2007) 2 SCC 1.

¹⁴¹ *BP Singhal v Union of India* (2010) 6 SCC 331.

¹⁴² *BP Singhal* ([n 141](#)) [26]–[31].

¹⁴³ (2011) 4 SCC 36.

¹⁴⁴ Passing references by the Supreme Court about the Constitution's status as a 'living organism' or a 'living document', without further consideration, are common. See eg, *Zee Telefilms Ltd v Union of India* (2005) 4 SCC 649 [35]; *Secretary, State of Karnataka v Umadevi* (2006) 4 SCC 1 [51].

¹⁴⁵ *GVK Industries* ([n 143](#)) [40]–[41].

¹⁴⁶ *GVK Industries* ([n 143](#)) [75].

¹⁴⁷ *GVK Industries* ([n 143](#)) [82].

¹⁴⁸ *Supreme Court Advocates-on-Record Association v Union of India* 2015 SCC OnLine SC 964.

¹⁴⁹ Ran Hirschl, 'The Judicialization of Politics' in Gregory A Caldeira, R Daniel Kelemen, and Keith E Whittington, *The Oxford Handbook of Law and Politics* (Oxford University Press 2008) 119–41.

¹⁵⁰ The judicialisation of politics is not a necessary outgrowth of structuralism itself, and many explanations are available for the increasing influence of courts in political and public policy questions.

CHAPTER 6

LAW, POLITICS, AND CONSTITUTIONAL HEGEMONY

the Supreme Court, jurisprudence, and demosprudence

UPENDRA BAXI*

I. INTRODUCTION

‘CONSTITUTIONAL hegemony’—the justified true belief that constitutional interpretation has a social effect and is politically important, if not also decisive—is an essentially contested concept often conflated with interpretational judicial hegemony. However, the supermajorities in the legislature and the relatively autonomous executive also interpret the constitutional text and the intent. Constitutional interpretation is undertaken by the civil society, market, media, armed opposition insurgent groups, and other non-state actors. Hegemony is the name that we give to the salient contemporaneous viewpoint. A study of Indian constitutional interpretation from the perspective of all these actors alone can give a full view of constitutional hegemony in action.¹

An abiding message of Antonio Gramsci, who invented the term social theory, has been that any account of hegemony has to be tentative and partial; the hegemonic is an attempt to describe the appearance of (not the actual production of) political consent or consensus. How that appearance is constructed and achieved is a real problem in studying hegemony. Liberal constitutional theory insists on the ‘separation of powers’, which counsels that the ‘rule of law’, being best attained by distributing powers among the legislature, executive, and the judiciary, is just one important mythical device for securing constitutional hegemony.

Three forms of *prudence*, or bodies of thought, determine the province of constitutional hegemony: these are *legisprudence* (the principles or theory of legislation that take it beyond the contingency of politics), *jurisprudence* (that determine the principles, precepts, standards, doctrines, maxims of law, and the concept of law), and *demosprudence* (judicial review process and power that enhance life under a constitutional democracy). How the three bodies of wisdom, these ‘different multiplicities’ (as Tully called constitutional pluralism),

have played out in the making and working of the Indian Constitution, especially through the dynamics of the Supreme Court of India, is a question worth pursuing, but we mainly explore here demosprudence of the Indian Supreme Court (the Court, hereafter). The task is limited, but historical contexts are large as well as shifting and the social meanings of the original 1950 Constitution are indeed all but legible. In particular, I revisit the notion of adjudicatory leadership and rework the notion of demosprudence in the context of the Supreme Court of India and the changing relation between jurisprudence and demosprudence.

My argument is simple: the Court now is inclined towards demosprudence, though its early jurisprudence was also tinged with it. Demosprudence is a novel conception and was introduced in American literature by Lani Guinier,² though namelessly practised by the Court since its inception. Guinier is concerned with the phenomenon, rare in US judicial history, of oral dissent: the argument is that ‘oral dissents, like the orality of spoken word poetry or the rhetoric of feminism, have a distinctive potential to root disagreement about the meaning and interpretation of constitutional law in a more democratically accountable soil’.³ Ultimately, ‘they may spark a deliberative process that enhances public confidence in the legitimacy of the judicial process’ as oral dissents ‘can become a crucial tool in the ongoing dialogue between constitutional law and constitutional culture’.⁴ Professor Guinier moves to the more general argument about ‘demosprudence’ as ‘a democracy-enhancing jurisprudence’.⁵

Unlike traditional jurisprudence, demosprudence is not concerned ‘primarily with the logical reasoning or legal principles that animate and justify a judicial opinion’; rather it is ‘focused on enhancing the democratic potential of the work of lawyers, judges, and other legal elites. Demosprudence through dissent attempts to understand the democracy-enhancing potential implicit and explicit in the practice of dissents’.⁶ It ‘describes lawmaking or legal practices that inform and are informed by the wisdom of the people’.⁷

We are here not concerned with instructive criticisms of the US judicial history,⁸ the possible extensions of the term in the comparative constitutional studies-type subjects,⁹ or its rich potential for the UN agencies¹⁰ and the question how far Guinier embraces both legisprudence and demosprudence. Rather, when we focus on the Supreme Court of India, we are struck with the fact that it discovered demosprudence much before the term was invented by American constitutional scholars!

As innovated by the Indian Supreme Court, demosprudence speaks to us severally. It serves as a marker of the emergence of a dialogic adjudicative leadership between/amidst the voices of human and social suffering. The Court

does not merely relax the concept of standing but radically democratises it; no longer has one to show that one's fundamental rights are affected to move the Supreme Court or the High Courts, but it remains sufficient that one argues for the violations of the worst-off Indian citizens and persons within India's jurisdiction. Other-regarding concern for human rights has now become the order of the day and this concern has prompted a creative partnership between active citizens and activist Justices. New human rights norms and standards not explicitly envisaged by the original constitutional text stand judicially invented.

II. THE SUPREME COURT OF INDIA

The makers of the Indian Constitution envisaged the Supreme Court of India as an apex *adjudicative bureaucracy*, a final arbiter of the 'doings' of other courts in the hierarchy, not as an institutional political actor. They conferred vast jurisdiction¹¹ but contemplated a modest role for the Court: it remains responsible and empowered to secure a centralised production of *juristic* meaning of the Indian Constitution yet the production of its *social* meaning—the tasks of governance, development, and redistributive justice—lay entirely within legisprudence—the province and function of the elected public officials.

The world's largest ever written constitution is an unparalleled exercise in verbosity. It provides a 'flexible' democratic constitution with liberal powers for its amendment; the 395 Articles of the Constitution (not mentioning various clauses and sub-clauses) stand divided into twenty-three Parts (each comprising several chapters and expanded further by subsequent constitutional amendments), and detailed further now in twelve Schedules, not to speak of over 100 amendments—a huge exercise in the elaboration of parliamentary (and even executive) supremacy. Indeed, the text scales some extraordinary ludic heights in specifying that 'unless the context otherwise requires', the terms 'article', 'clause', 'part', 'schedule' mean what the Constitution so designates (Article 366); and Article 367 goes even further to say that a foreign State means a State other than India; that laws include ordinances; more importantly, it subjects constitutional interpretation to the colonial General Clauses Act (as from time to time amended by Parliament)! The futility of overwriting the constitutional text stands belied by Indian experience and development.

A most overworked and understaffed Apex Court exercises overarching powers of paper over (now twenty-eight) High Courts' determinations in civil and criminal matters (Articles 132–34), further reinforced by Article 136

residual jurisdiction, liberally exercised, empowering the Court to grant at its discretion an appeal by way of special leave ‘from any judgment, decree, determination, sentence or order passed or made by any court or tribunal in the territory of India’. Understandably, then, even dated statistics tell their own story—it had as of July 2009, 53,000 pending cases (as compared with the overall pendency of 400,000 before High Courts and 20.7 million before district and local courts).

Many structural and procedural features contribute to the situation of unwarranted delays in judicial appointments; unprincipled bench size given its vast jurisdiction, the Court today comprises thirty-one Justices (from an initial count of eight Justices in 1950) servicing today about 1.2 billion Indian citizens; with the iron law of superannuation (age of 65 years) further aggravated by the average tenure of individual Justices at the Court being about two–three years. Further, very few Indian Chief Justices of India had the constitutional luck to serve the Court for long periods. Supreme Court Justices stand elevated from (now twenty-eight) State High Courts (with a retiring age limit of 62 years). The Court rarely sits as a ‘full Court’; most of the work is done by two/three-judge benches or panels constituted by the Chief Justice of India; often a panel of five Justices (named the ‘constitutional bench’) is resorted to; and at times larger benches of seven or nine Justices stand empanelled to resolve conflicts over prior precedents. Fragmented and fluctuating bench structures accentuate the loss of institutional cohesion in myriad ways.¹² Yet, some quantitative methods provide fresh starts in understanding the summit judicial conduct.¹³ Asymmetries in the bench–bar relationships further signify the fact that the Court remains relatively powerless in controlling its own proceedings. Despite any attempt at regulating the practices of frequent adjournments, prolix argumentation (often lasting for weeks, even months) still remains the ‘disorder’ of the day! The national adjudicative time thus remains at the sufferance of a politically fractionalised Supreme Court Bar, resting on an egregiously erroneous assumption that adjudicative reforms assault the independence of the Indian legal profession.

In the Indian context, jurisprudence, as placing some substantial demands of adjudicatory discipline, remains a casualty; the discipline of *stare decisis* suffers a tissue rejection; often, smaller benches act without respect for larger bench decisions. Diversity of concurring opinions, even functioning as disguised partial dissents, and the practices of retroactive explanation of what a particular Justice meant in an earlier decision¹⁴ make difficult the discovery of the law declared by the Court as binding on all courts (and other judicial authorities: Article 141).

And yet the Court produces demosprudence and jurisprudence, making adjudicatory leadership (a better notion than judicial activism) an enormously complex task, directing attention to ‘organisational’ and ‘hermeneutic’ leadership and the ‘political’ (as sites of constitutional striving by the Court producing changing meanings of rights, development, governance, and justice)—in sum ‘India’s living Constitution’.¹⁵ At stake also remain the shifting bases of the legitimation of the Court as political institution, assuming fully the responsibility for the co-governance of the nation.

III. ORGANISATIONAL ADJUDICATORY LEADERSHIP

Organisational leadership is my way of identifying the Court’s assumption of self-directing powers. The Court in a remarkable feat seized the power to appoint Justices and transfer (High Court) Justices in 1993 by holding in the ‘Judges Case’¹⁶ that the constitutional requirement of ‘consultation’ meant the same thing as ‘concurrence’ of the CJI; it then proceeded to subject the primacy of the CJI by inventing a collegium of the five seniormost (including the CJI) deciding with unanimity, whose say on judicial appointments will be final.¹⁷

This adjudicative feat stands notably ‘justified’ in *Subhas Sharma v Union of India*, a three-judge bench decision, addressing the virtue of a ‘*non-political judiciary*’ as ‘crucial to our chosen political system’, ‘the *vitality* of democratic process’, the ‘ideals of social and economic *egalitarianism*’, the ‘imperatives of a *socioeconomic transformation* envisioned by the Constitution as well as *the rule of law* and the great values of *liberty and equality*’.¹⁸ This normative overkill does not fully withstand analytical scrutiny.¹⁹

Attempts at a National Judicial Commission do not cure the opacity of judicial elevations. Even those—including some distinguished incumbent CJI and some superannuated Justices, the active grapevine constituted by some incumbent Justices as well as by the leaders of highly politicised and fractal leadership of the Indian Bar—who criticise the functioning of the judicial collegium do not want a return of the days when a Union Law Minister might repeat his story of having ‘judges in his pockets’. The Ninety-Ninth Amendment to the Constitution, which introduced a new system for appointments in place of the collegium, was recently struck down by the Supreme Court as violating of the basic structure the Constitution.²⁰

Further, a constitutional custom that elevates the seniormost judge of the

Court as the Chief Justice, thus removing the vice of political patronage, stands judicially endorsed. Indira Nehru Gandhi explicitly breached the custom during the Emergency Rule (1975–76) by superseding the seniority rule, and this raised considerable public discussion concerning her justification of an inchoate doctrine of ‘committed judiciary’. However, the custom also means some spectacularly short tenures of Chief Justices (at times from eighteen days to a few months!). Concerns about social diversity and plurality in the composition of the Court have frequently emerged, and more subtle forms of court packing have ensured that women Justices on the Court remain as few as possible and that a woman Justice may be available as the Chief Justice,²¹ though a constitutional custom as regards the elevation of Muslim and Dalit Justices seems to have evolved.

IV. HERMENEUTIC ADJUDICATORY LEADERSHIP (HAL)

HAL is centrally involved in resolving the tangle of the self-organisation of the Court. Should we for that reason alone collapse the two is a question worth considering; organisational leadership addresses much wider contexts than judicial elevations (for example, the Court has acted as a pay commission for ‘subordinate’ judiciary). Organisational leadership involves HAL and yet is distinct, because HAL directs interpretive energies beyond the institution of the judiciary itself or its self-directed collective composition to governance itself.

The Court has now assumed the power of co-governance of the nation and enshrined it in the basic structure doctrine. Socially responsible criticism (SRC) may no longer pose a concern jurisprudentially—that is by recourse to some pre-existing conceptions about the judicial role and function. Rather, SRC (the commentariat which functions as a new proletariat) ought to address the quality of demosprudence, the issue of how Justices talk about and listen to the worst-off peoples and strive to realise (in Hannah Arendt’s difficult terms) ‘the right to have rights’.²² Who do the Justices listen to when they refer to ‘people’ or the ‘demos’? Are they better listening posts in a plebiscitary democracy than the legislators?

Clearly, the earlier rules of jurisprudence no longer apply. *Stare decisis*, for all its indeterminacies, was an engine for the growth of common law jurisprudence; the Indian demosprudence bids ‘adieu’ to it even in terms of daily jurisprudence of the Court, let alone the realm of social action litigation (SAL). The ‘gravitational force’ (to deploy Ronald Dworkin’s term) of precedent no longer

governs the demosprudence of the Court; the construction of demos is not precedent-minded but regards the doing of justice or mitigation of injustice as its prime task.

Is this aversion to precedent by the Court both jurispathic and jurisgenerative (to use Robert Cover's distinction)? How far may it refuse to follow any institutional rule or discipline laid down by other institutions of co-governance and how far may it reshape these? And if the Court is thought of in the immortal image of Goswami J as the last recourse for the 'bewildered and oppressed' Indian humanity, may it find liberation or conformity to judicial self-discipline (jurisprudence) as a way of attaining the best for the worst off (demosprudence)? And how far may its successful demosprudence erase the public memory of the fact that even when the Court presents itself in the image of a new social movement, it must also remain at the end of the day an assemblage of State sovereignty/suzerainty? We need to answer some hard questions both of constitutional demosprudence and jurisprudence in order to retain the promise of constitutionalism in all its senses.

No bright lines between *legal* and *constitutional* interpretation seem to exist now. Nor do the complex genealogies of constitutional and legal cultures: if 'civil' law cultures classify private and public law, its common law counterpart often articulates the traditions of constitutional common law. Whereas the continental cultures celebrate a strict discipline of the 'proportionality' test, common law constitutionalism leans towards 'balancing' competing and conflicting interests. The Indian experience offers a more complex and ambivalent instance.

The Court is, of course, a State ideological and coercive apparatus, and an aspect of the State. It has sustained overall not just the colonial laws (such as the Official Secrets Act and the offence of sedition entailing forms of official love for duly elected governments), but has also upheld against human rights-based challenges some dragnet and Draconian post-Independence, frankly 'neo-colonial', laws.²³ The Court now downgrades '*legalism*' (an ethical virtue of following rules even when they produce undesirable results); and '*restraintivism*' (even when they have the power, they should not enter the 'political thicket') as tools for judging. Instead, it frankly resorts to '*pragmatism*' (even as they expand the scope of their power, Justices ought to respect some institutional limits and act always with regard to the overall acceptability and effectiveness of their decisions) and '*activism*' (Justices ought to so act as to protect and promote human rights and constitutional conceptions of justice).

Confronted with a mélange of socially and culturally grounded expectations, the Court has not as fully as it may engaged women, sexual minorities, children,

and First Nations as taking rights seriously as human rights. Even so, and increasingly since the 1960s, the Court has tended to assume the aspect of a new social movement, especially via SAL; further, it has also emerged as a discursive platform for governance transparency, bordering on an enunciation of constitutional right against corruption in high places. Thus the Court today assumes full judicial powers of directing and monitoring State investigative and enforcement agencies such as the CBI (Central Bureau of Investigation) and the constitutionally established CVC (Central Vigilance Commission). SAL has survived legislative supermajorities in the past and has grown because of coalitional forms of national governance (although now, with the sixteenth Parliament, this trend has been interrupted).

The Court goes beyond these; for example straddling the conventional distinctions of judicial activism/restraint, it invents a contrast between juristic activism/restraint, relatively unknown to the received wisdom of Anglo-American prescriptions of judicial role and function. Styles of ‘juristic activism’²⁴ comprise a genre in which Justices elaborate future decisional pathways without applying judicial reasoning in an instant case to its own specific outcome. For example, *Olga Tellis v Bombay Municipal Corporation*²⁵ enunciates the future of a new constitutional right to shelter for Mumbai pavement-dwellers, though in the instant result condemning them to acts of executive discretion to uproot them from their necessitous habitats! This disrupts a ‘universal’ notion of the very idea of judgment as marking the unity of judicial reasoning and result; yet, at the same time, it also births the practices of ‘suggestive jurisprudence’. To offer an example, the anxious murmur articulated by Hidayatullah J, in *Sajjan Singh v State of Rajasthan*, while sustaining the Seventeenth Amendment, led to a radical transformation of Indian constitutionalism.²⁶ He there said that the Constitution did not intend [Part III](#) rights to be mere ‘playthings’ of ‘majorities’, paving the way for the momentous decision in *IC Golak Nath v State of Punjab* (immunising these rights from the runaway viral powers of constitutional amendment)²⁷ and the 1973 *Kesavananda Bharati v State of Kerala* (hereinafter *Kesavananda*)²⁸ decision that judicially rewrote Article 368 powers of constitutional amendments, subjecting it fully either to the practices of eventual judicial endorsement or to the power to declare amendments as ‘unconstitutional’.

Kesavananda in some wafer-thin ‘majority’ outcomes via a thousand-page decision, riven with some indecipherable putative concurring and dissenting plurality of opinions, still enunciates the doctrine of the Indian Constitution personality subject to constitutional judicial power. The reach of amendatory

power may no longer offend the ‘basic structure’ of constitutional governance or its ‘essential features’—severally described as ‘democracy’, ‘equality’, ‘federalism’, ‘rule of law’, ‘secularism’, and ‘socialism’. The decisional core, of course, remains the notion of judicial power as an essential feature—a core that results in a co-sharing with Parliament of constituent power by the apex Justices. Initially politically opposed, today this articulation of adjudicatory leadership no longer remains an affair of contentious politics, even fully echoed in many a South Asian adjudicature, notably Bangladesh, Nepal, and Pakistan.²⁹

The *Kesavananda* constitutional ‘bootstrapping’ interestingly further strengthens its constitutional and political legitimation; its basic structure doctrine now extends beyond the implied limits on the amendatory powers; thus in *SR Bommai v Union of India* the Court outlaws the Presidential powers to suspend or dissolve duly elected State legislatures under Article 352.³⁰ Further still, it now even transforms the basic structure doctrine into a canon of constitutional interpretation reaching out almost fully to judicial deliberation/invigilation of the quotidian exercises of State legislative and executive/administrative powers.³¹

V. THE POLITICS AND THE LAW OF CONSTITUTIONAL AMENDMENTS

The Article 368 powers and procedures of constitutional amendment were all too frequently deployed in the Nehruvian era (1950–64) marked by ascendancy of parliamentary supremacy with a constitutionally unbecoming hostility towards adjudicatory leadership. Some early amendments led no doubt to a superior understanding of Indian constitutionalism; thus the very First Amendment expands the [Part III](#) equality rights as empowering the State to pursue percentile quota-based reservations (affirmative action policies) for the millennially disadvantaged Indian citizenry, especially in terms of admission to State-aided educational institutions and government employment. Thus, in turn, arises a new sphere for adjudicative leadership in pursuit of the tasks of ‘complex equality’ or ‘competing equalities’. Parenthetically, all I may say here is the following: (a) the Court legitimates demands of social justice (group-differentiated equality), yet remains anxious about horizontal equality of all eligible citizens; (b) it overall limits the scope of differential treatment as not exceeding 50 per cent of the Indian population; (c) it thus seeks to exclude ‘creamy layers’ (the already

constitutional haves from capturing distributive monopolies to the disadvantage of the actually worst-off citizen-peoples, both in terms of ‘equality of opportunity’ and ‘equality of outcomes’. Hermeneutic leadership of the Court offers a complex realm, in some notable ways different from US jurisprudence—a theme that there is not room to pursue in this chapter.

Unlike its US counterpart, the Indian First Amendment, far from enshrining the ontological robustness of the right to freedom of speech and expression, marks an era of ‘reasonable restrictions’ enacted on various grounds, including even the ‘friendly relations with foreign states’. Judicial acquiescence with these also marks various interpretive styles that question the ‘reasonableness’ of the power to prescribe ‘restrictions’ on fundamental rights. Summarily put, it evolves various standards of strict constitutional scrutiny to ‘balance’ competing constitutional policy considerations that may otherwise entirely ‘trump’ [Part III](#) rights.

In the low-intensity constitutional warfare over Article 31 private property rights, only a few Justices took an ideological hard line on the notion of private property as the very foundation of freedom and human rights; rather, as K Subba Rao J insisted, the issue was ‘Statism’, which may govern India as if rights did not matter.³² More consistently here emerges a form of constitutional legalism underscored with the conviction that the Justices should have the final say in interpreting the Bill of Rights.

The collision over Article 31 property rights occurs variously. Briefly, Parliament amends the Constitution by deleting the word ‘just’ from the phrase ‘just compensation’ hoping that the Court may not be able to further insist on market value plus solarium. In response, the Court maintains that the word ‘compensation’ may only signify ‘just compensation’. A further amendment replaces the term ‘compensation’ altogether by simply saying ‘any amount’ as ‘determined’ by an appropriate legislation. The Court strikes back by saying that the word ‘determination’ carries with it the constitutional burden of principled compensation for takings!

Was the Court far wrong in suggesting that basic constitutional rights may not be taken away or abrogated under the title of distributive justice? If this puts the matter too widely, was it too far wrong in insisting that the State may not acquire castles for a bag of cashews, or palaces for a handful of peanuts? In a wise move, the Court did indeed relax its insistence market value compensation by accepting instead that systematic under-compensation for takings must at least be based on some showing of principled determination.³³ Moreover, the Court acquiesced for a long time with the ouster of its jurisdiction by the Ninth Schedule: and

furthermore the Fourth Amendment (1955) yields to the Court's leadership via the principle of market value compensation for the State taking of land 'under personal cultivation'. Did all this achieve or accelerate any serious-minded pursuit of agrarian reforms? Empirical studies of the political economy of the reforms suggest otherwise.³⁴ All this lays the groundwork for shaping a subsequent epic struggle over the scope and legitimacy of constitutional amendments.

In moving the First Amendment, Nehru was quick to say that constitutional legalism was an act of theft of the Constitution and to justify the Ninth Schedule—listing agrarian reform laws from judicial papers—even when manifestly violative of [Part III](#) rights—as a way of preventing this 'magnificent edifice' from being 'purloined' by lawyers and judges. Hidayatullah J (among India's most gifted Justices) said memorably that 'ours is the only constitution that needs protection against itself!' This Schedule was used in the Emergency days (1975–76) to protect other laws, including dragnet security legislation, from judicial paper. Incidentally, it was as late as 2009 in *IR Coelho v State of Tamil Nadu* that the Court assumed the power to invalidate the entries in the Schedule.³⁵

Indira Nehru Gandhi, the third Prime Minister of India, ascended to high political power, marking India's major experimentation with State finance capitalism—in effect nationalising banks and insurance service industries. The constitutional rationale was articulated under her leadership via the Twenty-fourth and Twenty-fifth Amendments. The latter in 1971 introduced Article 31C—a provision that sheltered fulfilment of [Part IV](#) rights if the takings law stood accompanied by a statement that it furthered the pursuit of these rights. The Court may not ever question the law 'on the ground that it *does not give effect to such policy*'.³⁶ The *Kesavananda* Court invalidates this amendment on the ground that it may shield 'colourable' exercise of such a power.

This summary narrative at least suggests entailments of some Foucauldian labours as yet not in sight, whether in qualitative (doctrinal) or quantitative (institutional) Indian or expatriate studies of constitutional jurisprudence. The latter genre does not always do greater service to constitutional legalism, Indian style.³⁷ There is a constitutional necessity prescribing that a constitutional 'amendment' may only proceed via a law made by Parliament, rather than by referenda or the convening of a new Constituent Assembly. As legislation, it may remain subject to the constitutional power of the Court; the 'heroic' Twenty-fourth Amendment contests this perspective by insisting that constitutional amendments articulate 'constituent power'; put differently, the

expressions of legislative will, not amenable at all to acts of HAL. In *Kesavananda*, the Indian State even argued that the amendatory power may thus constitute an economy of excess in which it may reconstitute the constitutional idea of India from a ‘republic’ into a ‘monarchy’; a federal to a ‘unitary’ form of governance; and a ‘secular’ form to a ‘theocratic’ one. The Court returns this ‘compliment’ by insisting upon an order of basic structure limitations on the amendatory power and in turn presenting itself as a coequal regime of adjudicatory constituent power.³⁸

In any event, *Kesavananda* inaugurates a new Constitution of India, if only because it now marshals a new political consensus that the Court may act as a coequal branch of the State. I do not quite know how far, and if at all, the Indian ways of plebiscitary competitive party politics may have evolved differently outside of Indian adjudicatory leadership, with and since *Kesavananda*. Going far beyond some staple studies of ‘juristocracy’ (led eminently by Ran Hirschl), the question is whether this daring articulation of the Basic Structure doctrine merely marks an affair of judicial Will to Power or much better serves a profound difference for the future of Indian constitutionalism and of human rights. Whatever the response, demosprudence has already arrived in the battle for judicial final say on all constitutional matters.

VI. THE RIGHTS REVOLUTION: THE SAL DEMOSPRUDENCE

Indira Nehru Gandhi—whose rise to supreme power was marked by India’s triumph in the creation of Bangladesh and her socialist agendum that ushered in an era of State finance capitalism—also ushered in (via the nationalisation of banking and insurance industries) the only explicit act of constitutional authoritarianism in the internal emergency. The trigger for this was provided by the Allahabad High Court decision to ‘unseat’ her as a Member of Parliament for finding her ‘guilty’ of ‘corruption’.³⁹ Her response was a Thirty-Ninth Constitutional Amendment that rendered this decision as void and all pending appeals against it as fully infructuous. At the height of constitutional dictatorship, the Court in *Indira Nehru Gandhi v Raj Narain* invalidated this amendment;⁴⁰ yet in the infamous *Additional District Magistrate, Jabalpur v Shivakant Shukla* (and world-celebrated dissent by HR Khanna J) four leading Justices of the Court proceeded to uphold a complete and total denial of the venerated right to *habeas corpus*, even against arrests based on mistaken

identity.⁴¹

This low point of hermeneutic leadership was soon to be reversed in the early post-Emergency period (1977–80). Thus began the long itinerary of a normative judicial restoration, even a revolution, by way of cathartic and populist acts of revival of an autonomous apex court. This short period marks an extraordinary articulation of adjudicative leadership. Above all, via *Maneka Gandhi v Union of India*,⁴² the Court amended Article 21 right to life and liberty as assurances of substantive due process specifically excluded by the Constitution's authors. Since the late 1980s, a different but related rights revolution has unfolded, that I insist on calling the juridical invention of SAL as against PIL (public interest litigation) with a view to highlighting its distinctive Indian origins and characteristics.

In and via SAL, the Court has democratised access to constitutional remedies as a basic human right. SAL began as an epistolary jurisdiction (where rightless people or their next of kin, the human rights and social activists, write letters to the Court, which are regarded as writ petitions) and may appear before the Court as petitioners-in-person. Since the Court is itself not a fact-finding authority, it has devised the method of 'socio-legal inquiry commissions' to establish facts and make recommendations, on which it proceeds to issue interim orders and directions (a kind of continuing mandamus). It has further developed a new partnership of learned professions with social and human rights movements and investigative print and electronic journalism.

Overall, all this has inaugurated a new form of constitutional litigation but also developed judicial powers of superintendence over governance institutions and constrained them for the most part to observe their statutory obligations and respect towards constitutional/human rights, thus also expanding judicial power and prowess over national policy agenda.⁴³

In so doing the Court has shifted the bases of legitimation of adjudicative power by invoking a notion that high judicial power is not just merely an affair of 'governance' comity among the leading State-formative apparatuses, but rather has insisted that all forms of public power should be read as constituting a code of 'public trust'. In turn, this fiduciary notion of judicial power has deeply questioned the notion that elected public officials may justify their everyday acts of power and policymaking on the grounds of electoral mandate; rather, these remain liable to adjudicative deliberation. Some major decisions of the Court have directly appealed to the people of India from whose acquiescence the Court itself derives some extraordinary quotient of judicial power—forms of 'judicial populism'⁴⁴ question some core notions of representative democratic

governance, without entirely devaluing these. In the process, all this has not merely enhanced the role of the Indian State High Courts, but also the relative autonomy of constitutional agencies such as the Election Commission of India and associated human rights institutional networks.

In the spheres of normative leadership, the Court devised ways of monitoring and disciplining the runaway exercises of constitution-amending powers, initially solely entrusted to Parliament and the executive, via the invention of the doctrine of the basic structure and essential features of the Constitution. Soon enough the original limits of this doctrine confining the Court's jurisdiction only to constitutional amendments proliferated as a canon of constitutional construction, thus further disciplining the sway of executive and legislative powers. No longer, then, do the conventional theoretical/ideological narratives of 'separation of powers' confine the performance of the Court.

Thus, in a few decisions, the Court has engaged in explicit legislation; for example, it has laid down a fully fledged judicial legislation concerning sexual harassment in the workplace, and the unconscionable practices of campus violence ('ragging'). These explicitly detailed judicial legislative acts are nominally subject to any eventual national legislation, whose conformity with such acts also remains a matter for judicial power. Further the creeping jurisdiction of the Court is now directed to some acts of national policymaking, such as the protection of the environmental commons; national rivers water-sharing arrangements; disaster management; rehabilitation and recompense for those Indian citizens affected by developmental projects.

There is further evidence of this daring adjudicatory leadership: the Court has not merely restored rights deliberately excluded by the Constituent Assembly of India (such as the right to a speedy trial, bail, and adequate legal representation), but more crucially has created a right to substantive 'due process'; in this way, it has further read into the right to life and liberty (Article 21) an unending regime of enunciation of human rights to livelihood, shelter and housing, food and nutrition, education, health, and environmental well-being; in sum, for the past twenty five years the Court has been steadily converting human *needs* into human *rights*. In the process, it has also mutated the discourse of judicially unenforceable (as originally enacted) Directive Principles, mostly by incorporating these into Article 21 as now interpreted (importing substantive due process).

In the area of affirmative action for socially disadvantaged groups, the Court has insisted that the identification of beneficiaries be based on scientific studies—the overall quota (mostly for educational and State employment) should not exceed 50 per cent—and provided for the exclusion of creamy layers among the

disadvantaged peoples. More recently, in a further pursuit of SAL power and process, the Court has welcomed mass media sting exposés to render corruption in high public places as a violation of constitutional morality, human rights, and the fiduciary obligations of decent democratic administration.

VII. SOCIALLY RESPONSIBLE CRITICISM

These complex patterns of adjudicatory leadership have not gone unchallenged both within and outside the Court. Almost at every step of this development, dissident Justices have contested the emergence of judicial supremacy in the governance of the nation and the partially concurrent Justices have issued stern cautions on what is thought to be extravagant assertion of judicial power. Yet, over time, and with some residue of internal dissension, most such judicial actors have shed their initial ambivalence—an unsurprising phenomenon given the judicial Will to Power.

Some leading lawyers, and academics, who admirably condense the Court's decisional law into treatises on constitutional law, have persistently questioned the expanding realms of adjudicative leadership. Many leading law and political theory scholars continue to address the 'anti-majoritarian' aspect of judicial power.⁴⁵ On the other hand, activist academics, while critical of this or that decisional trend, overall embrace the fiduciary notion of the judicial role, as do specific agenda-driven human rights and social action movements. For the 24/7 hyper-globalising news and views mass media and the related commentariat (that now functionally displaces the proletariat) ad hoc criticism of Indian judicial action remains a lucrative business. Overall, the problem of judging the judges emerges in the public, rather populist, deliberative sphere, as always inviting the question of *socially responsible forms of criticism*.

The bases of SRC are often unarticulated. Nor is any distinction made between *episodic* and *structural* criticism, even critique. I do not insist on the binary; who can in these halcyon days of postmodernism? But I do suggest that the ways in which we deconstruct these do matter. If structural change is a long-term affair, for example, we may not criticise the courts for not changing the structures of power or domination by a single line of decisions; indeed, then the question is not so much what judicial power does (or does not do) but it is the ways in which the courts are mobilised by insurgent actors and the ways in which the outcomes are incrementally used. Talking about outcomes is also to take seriously the problem of 'symbolic' and 'instrumental' outcomes and

impact studies.⁴⁶ What ‘structural’ critique may learn from the ‘episodic’—the triumphal narratives of the successful and the disappointments of the losing party—is also as yet an open question.

In a form of adjudication governed by the principle of parliamentary ‘sovereignty’ the basic structure doctrine seems out of place. The winner-takes-it-all principle postulates that the judicial innovation of SAL ‘hope-and-trust’ jurisdiction (notably by Justice PN Bhagwati) is misplaced. Judges as directing executive policy or as shaping a legislative one are seen to trespass upon ‘separation of powers’. Administrative law developments are often criticised on this ground. Some adjudge the rising judicial sovereignty as undemocratic in principle, as it lowers the bar of representative intuitions. The wider point, of course, is that adjudicative leadership should not ignore State differentiation; the Court is best seen as working through such institutions, rather than singularly or alone.

Even when meriting further discussion, the suggestion that scholarly critics of courts state their own ideology in broad daylight and articulate the general principles animating their critique seems a legitimate one. SRC is a species, if you like, of *careful* criticism of judicial performance and the ways in which judges, lawyers, and jurists think.

The varied response of Parliament/executive to adjudicatory leadership has moved from initial outcries of judicial usurpation to grudging accommodation. This is partly due to the fact that, ever since its inception, leading political actors have gone to the Court for judicial and constitutional protection of their basic rights against their incumbent adversaries. Even a bare glance at the parties in the leading decisions of the Court reads like a ‘who’s who’ of Indian politics. No matter how Justices may proceed to decide constitutional contentions, the outcome becomes a politically appropriable resource. *Bush v Gore* may provide a rare moment of adjudicative politics in the United States Supreme Court;⁴⁷ in contrast, the Indian Supreme Court would be simply unimaginable this way! Do the questions then confronting the Indian Supreme Court provide a different context, marking the distinction between judicial role and function in developing constitutional democracies and some bicentennial forms of constitutional adjudication? This in turn frames the contestation between a historical (and therefore abstractly universalising) view of what may be said after all to be the province and function of apex courts and the historically new formations of post-colonial (and now, of course, post-socialist) constitutional justicing.

VIII. TOWARDS A CONCLUSION: DEMOSPRUDENCE?

How the Court shapes and reshapes the demos is an all-important question. Perhaps, the earlier Justices, during 1950–73, did not regard themselves as social entrepreneurs and constitutional activists, preoccupied as they were with laying the foundations of judicial review, a model of rule of law, and of adjudication, and guided the colonial lawyering into a constitutional profession. In so doing they were not unmindful of the wider question of social legitimation of the Constitution; however, the early Indian Justices thought and acted primarily as *legalists* rather than as *legatees* of constitutional democracy. The scene and scenario since 1973 is very different: in the main it has been an era of substantive due process.

The distinctive political role carries with it the loss of constitutional legal certainty. For example, this is shown dramatically in the decisions in *Lily Thomas v Union of India*⁴⁸ and *Suresh Kumar Koushal v Naz Foundation*.⁴⁹ *Lily Thomas* cancelled a 60-year-plus tradition of doing politics in India by reversing the settled principle of innocent until proven guilty, and *Koushal* denied substantive due process to sexual minorities by the failure to reverse a legislative precedent of even longer standing.⁵⁰ On the side of organisational leadership, the Court's own ambivalence in sexual harassment situations by retired judges has given the impression that even then substantive due process is hard and male in nature!

That a substantive due process court may err and be inconstant is scarcely a novel finding. That such a court may fail the fundamental human rights of sexual minorities, be unmindful of the constitutional presumption of innocence, set limits to right to information about the judiciary, and tolerate sexual harassment by judges is a matter of deep concern. Yet any verdict on demosprudence is premature; is it true to say that in the absence of collective judicial self-discipline and in the full absence of a degree of judicial consistency, substantive due process may amount neither to jurisprudence nor to demosprudence?

* Aspects of this theme also been developed in the Professor AR Blackshield Lecture and LM Sinhgvi Memorial Lecture, delivered on 21 October 2014 and 17 November 2014, respectively.

¹ First offered in Upendra Baxi, 'Public and Insurgent Reason: Adjudicatory Leadership in a Hyper-Globalizing World' in Stephen Gill (ed) *Global Crises and the Crisis of Global Leadership* (Cambridge University Press 2011) 167–79.

² Lani Guinier, 'Foreword: Demosprudence through Dissents' (2008) 122(4) *Harvard Law Review* 6; Lani Guinier, 'Courting the People: Demosprudence and Law/Politics Divide' (2009) 89 *Boston University Law Review* 539; Lani Guinier and Gerald Torres, 'Changing the Wind: Notes Toward a Demosprudence

of Law and Social Movements' (2014) 123 Yale Law Journal 2740.

³ Guinier, 'Foreword' ([n 2](#)) 14.

⁴ Guinier, 'Foreword' ([n 2](#)) 14.

⁵ Guinier, 'Foreword' ([n 2](#)) 15. See also Guinier, 'Changing the Wind' ([n 2](#)).

⁶ Guinier, 'Foreword' ([n 2](#)) 16.

⁷ Guinier, 'Foreword' ([n 2](#)) 15–16.

⁸ Gerald Rosenberg, 'Romancing the Court' (2009) 89 Boston University Law Review 563; Linda C McClain, 'Supreme Court Justices—Empathy and Social Change: A Comment on Lani Guinier's *Demosprudence Through Dissent*' (2009) 89 Boston University Law Review 589. But see Robert Post, 'Law Professors and Political Scientists: Observations on the Law/Politics Distinction in the Guinier/Rosenberg Debate' (2009) 89 Boston University Law Review 581.

⁹ See the remarkable analyses of the South African Constitutional Court in Brian Ray, 'Demosprudence in Comparative Perspective' (2010) 47 Stanford Journal of International Law 111.

¹⁰ Christian List and Mathias Koenig-Archibugi, 'Can There Be a Global Demos? An Agency-Based Approach' (2010) 38(1) Philosophy and Public Affairs 76.

¹¹ Thus, the Court stands endowed with wide-ranging powers to protect and enforce fundamental rights parcelled out as judicially enforceable civil and political rights ([Part III](#)). Non-justiciable social and economic rights described as the Directive Principles of State Policy ([Part IV](#)) are constituted as paramount obligations of the State in the making of laws and public policies. Further, the [Part III](#) rights remain subject to various forms of plenary powers of Parliament to impose 'reasonable restrictions' based on specific grounds stated therein. Following the advice of Justice Felix Frankfurter, and the realities of the partition of British India, art 21, right to life and personal liberty, was made subject to 'procedure established by law', exempted from adjudicative scrutiny under any approach to substantive due process. Thus, art 22 enacted expansive powers of preventive/pre-trial detention, understandable in the moment of origin, which still rendered the states of exception as a constitutional norm. Art 356 authorising the Union executive (by a Presidential order) to suspend or dissolve State legislatures and the extensive (though now much amended) art 352 powers to proclaim states of emergency on the grounds of 'external aggression' and 'internal disturbance' exemplify the centralising trend.

¹² See George H Gadbois, Jr, *Judges of the Supreme Court of India: 1950–1989* (Oxford University Press 2011); Abhinav Chandrachud, *The Informal Constitution: Unwritten Criteria in Selecting Judges for the Supreme Court of India* (Oxford University Press 2014); [Nick Robinson, 'Judicial Architecture and Capacity'](#) (chapter 19, this volume).

¹³ Madhav Khosla, 'Addressing Judicial Activism in the Indian Supreme Court: Towards an Evolved Debate' (2009) 32 Hastings International and Comparative Law Review 55; Madhav Khosla, *The Indian Constitution* (Oxford University Press 2012).

¹⁴ Upendra Baxi, 'The Travails of Stare Decisis in India' in AR Blackshield (ed) *Legal Change: Essays in Honour of Professor Julius Stone* (Butterworths 1984) 34; A Lakshminath, *Judicial Process: Precedent in Indian Law* (Eastern Book Company 2009).

¹⁵ Zoya Hasan, E Sridharan, and R Sudershan (eds), *India's Living Constitution: Ideas, Practices, Controversies* (Anthem Press 2005); Granville Austin, *The Indian Constitution: Cornerstone of a Nation* (Oxford University Press 1966); Granville Austin, *Working a Democratic Constitution* (Oxford University Press 2000).

¹⁶ *Supreme Court Advocates-on Record Association v Union of India* 1993 (4) SCC 441.

¹⁷ *Special Reference No 1 of 1998* 1998 (7) SCC 739.

¹⁸ *Subhash Sharma v Union of India* (1991) Supp (1) SCC 574 [29] (emphasis added).

¹⁹ For example, the early Court (1950–69) *legislates* an entire corpus of constraints via judicial power of administrative action and executive power of rule making under 'delegated legislation, birthing some spectacular post-colonial developments in administrative law/jurisprudence; *develops* standards of strict

constitutional scrutiny over the powers of preventive detention constitutionally authorized by Article 22; *enhances* judicial power concerning Parliamentary powers to impose “reasonable restrictions” on [Part III](#) enshrined fundamental (civil and political) rights; *articulates* principles governing the Constitution’s federal distribution of legislative powers between the States and the federal government; *stipulates* what is, and is not, a reasonable restriction’ on fundamental rights.

²⁰ *Supreme Court Advocates-on-Record-Association v Union of India* 2015 SCC OnLine SC 964.

²¹ Upendra Baxi, ‘Valedictory Speech, The Way Ahead’, High Level Committee on Gender Justice, 15 December 2013 (mimeo).

²² See Allison Kesby, *The Right to Have Rights: Citizenship, Humanity, and International Law* (Oxford University Press 2012); Peg Birmingham, *Hannah Arendt and Human Rights: The Predicament of Common Responsibility* (Indiana University Press 2006).

²³ Ujjwal Singh, *The State, Democracy and Anti-Terror Laws in India* (Sage Publications 2007); Shaylshri Sankar, *Scaling Justice: India’s Supreme Court, Social Rights, and Civil Liberties* (Oxford University Press 2009).

²⁴ Upendra Baxi, ‘Introduction’ in KK Mathew *Democracy, Equality, and Freedom* (Eastern Book Company 1973).

²⁵ (1985) 3 SCC 545.

²⁶ *Sajjan Singh v State of Rajasthan* AIR 1965 SC 845.

²⁷ *Golak Nath v State of Punjab* AIR 1967 SC 1643.

²⁸ *Kesavananda Bharati v State of Kerala* (1973) 4 SCC 225.

²⁹ See Upendra Baxi, ‘Constitutional Interpretation and State Formative Practices in Pakistan’ in MP Singh (ed) *Comparative Constitutional Law: Festschrift in Honor of Professor PK Tripathi* (Eastern Book Company 2011) 201–46; Upendra Baxi, ‘Modelling “Optimal” Constitutional Design for Government Structure: Some Debutante Remarks’ in Sunil Khilnani, Vikram Raghavan, and Arun K Thiruvengadam (eds) *Comparative Constitutionalism in South Asia* (Oxford University Press 2013) 23–44; SP Sathe, *Judicial Activism in India: Transgressing Borders and Enforcing Borders* (Oxford University Press 2003). See generally, Sudhir Krishnaswamy, *Democracy and Constitutionalism in India: A Study of the Basic Structure Doctrine* (Oxford University Press 2009); Rajeev Dhavan, *The Supreme Court of India and Parliamentary Sovereignty* (Sterling Publishers 1976).

³⁰ (1994) 3 SCC 1.

³¹ *SR Bommai* ([n 30](#)).

³² TV Subba Rao, *Constitutional Development in India: Contribution of Justice K. Subba Rao* (Deep and Deep 1992).

³³ See Upendra Baxi, ‘*State of Gujarat v Shantilal*: A Requiem for Just Compensation?’ (1969) 9 Jaipur Law Journal 28.

³⁴ See Upendra Baxi, ‘“The Little Done, The Vast Undone”: Some Reflections on Reading Granville Austin’s *The Indian Constitution*’ (1967) 9 Journal of the Indian Law Institute 323.

³⁵ *IR Coelho v State of Tamil Nadu* AIR 2007 SC 861; Kamala Sankaran, ‘From Brooding Omnipresence to Concrete Textual Provisions: IR Coelho Judgment and Basic Structure Doctrine’ (2007) 49 Journal of the Indian Law Institute 240; Pathik Gandhi, ‘Basic Structure and Ordinary Laws: Analysis of the Election Case & the Coelho Case’ (2010) 4 Indian Journal of Constitutional Law 47.

³⁶ Constitution of India 1950, art 31C (emphasis added).

³⁷ Quantitative analyses largely study *outcomes*, rarely *trends*; very helpful in predicting individual judicial conduct, they do not tell us much about the Court as whole; these do not take account of what Justices *think* and what the law *ought* to be. Qualitative studies have their own limitations; but for that reason alone are not useless, as often alleged.

³⁸ Put starkly, this means that the Court remains the final arbiter of constitutional amendments—put in

Kelsenite terms as a singular juristic community that may presuppose the Grundnorm as a postulate of governance by and large efficacious: see J Bernstorff, *The Public International Law Theory of Hans Kelsen* (Cambridge University Press 2010), who presents Hans Kelsen as an *iusnaturalist* thinker.

³⁹ See, for background information, Prashant Bhushan, *The Case that Shook India* (Vikas Publishing 1978).

⁴⁰ (1975) Supp SCC 1.

⁴¹ (1976) 2 SCC 521.

⁴² (1978) 1 SCC 248.

⁴³ See Sandra Freedman, *Human Rights Transformed: Positive Rights and Positive Duties* (Oxford University Press 2008).

⁴⁴ Upendra Baxi, *The Indian Supreme Court and Politics* (Eastern Book Company 1980).

⁴⁵ Notably, Pratap Bhanu Mehta; see his 'Passion and Constraint: Courts and the Regulation of Religious Meaning' in Rajeev Bhargava (ed) *Politics and Ethics of the Indian Constitution* (Oxford University Press 2008) 311; 'The Rise of Judicial Sovereignty' (2007) 18 *Journal of Democracy* 70; 'The Inner Conflict in India's Constitution' in Hasan et al ([n 14](#)) 179.

⁴⁶ See *Lily Thomas v Union of India* (2013) 7 SCC 653; *Suresh Kumar Koushal v Naz Foundation* (2014) 1 SCC 1. See also Upendra Baxi, 'Naz 2: A Critique' (2014) 49(6) *Economic and Political Weekly* 12. See as to impact studies, Upendra Baxi, 'Who Bothers about the Supreme Court: The Impact of Supreme Court Decisions' (1982) 24 *Journal of the Indian Law Institute* 848.

⁴⁷ 531 US 98 (2000).

⁴⁸ *Lily Thomas* ([n 46](#)).

⁴⁹ *Suresh Kumar Koushal* ([n 46](#)).

⁵⁰ Upendra Baxi, 'Modelling "Optimal" Constitutional Design for Government Structure: Some Debutante Remarks' in Sunil Khilnani, Vikram Raghavan, and Arun K Thiruvengadam (eds) *Comparative Constitutionalism in South Asia* (Oxford University Press 2013) 23–44.

CHAPTER 7

CONSTITUTIONAL IDENTITY

GARY JEFFREY JACOBSON

I. INTRODUCTION

As constitutions go, India's has been around for a long time. Sixty-four years may not seem so very long—the American counterpart, after all, has been with us for 227 years—but when one considers that the average lifespan of constitutions is nineteen years,¹ a document that has governed a nation since 1950 may have earned the right to be viewed as durable—perhaps even venerable. If, as this chapter presumes, constitutions possess an identity, the Indian Constitution will have had a longer period of time to acquire and develop one than comparable documents in a clear majority of the world's nations. As we shall see, a constitution's continuity over time is important to the inquiry of this chapter; for the same reason that a person's identity is not fixed in the distinctive makeup of the infant who first emerges from the womb, the identity of a constitution is only imperfectly knowable through the provisions promulgated upon its framing and adoption.

Still, those provisions can hardly be ignored, and indeed they are the most obvious source for commencing an examination of constitutional identity. Even if a document avoids self-identification through explicit textual pronouncement—be it in a preamble or some other declaratory section—evidence for establishing a preliminary account of its identity must surely be connected to specific textual commitments, as in the way that a constitution configures its regime of rights. But what if this configuration is not particularly distinctive, such that its resemblance to other constitutions turns out to be more striking than its particularity? For example, in one exhaustive study of the evolution of global constitutionalism it was found that 'constitutions share a substantial and growing generic component ... [that] casts doubt upon the notion that constitutions are unique statements of national identity and values'.² From this the authors conclude that with respect to the expressive function of constitutions, '[p]erhaps they should be considered expressions not of national identity, but of membership in the global community or a constitutional family'.³ Or it might

even suggest that ‘national identity is itself becoming increasingly globalized and less distinctive’.⁴

Plausible as such inferences might be, they are unsustainable absent a more searching exploration of specific constitutional orders. That the generic component of constitutional development is increasingly evident in linguistic, textual convergence is significant, but in itself it cannot be the basis for denuding constitutions of their particular identities. Hence in what follows I accept Walter Murphy’s wise counsel to avoid ‘conflating the political values and arrangements under which a people live with the values and arrangements that a constitutional document specifies’.⁵ Thus, ‘no constitutional document long remains coextensive with the constitutional order’.⁶ Or as Andras Sajo has argued, ‘The text itself has only limited potential for forging identity. A legally binding document is but a first step on the long and winding road from a political design for collective identity to a socially embedded institution that actually fosters such identity.’⁷ What is required is some independent empirical demonstration that the text is in fact mainly consistent with constitutional experience. This argues for withholding judgments about identity until confirmation that the codified rules and principles of the document actually resonate in the practices and culture of the body politic. A constitution’s language may indicate a commitment on the part of its authors, and conceivably its subsequent interpreters, to establish a constitutional identity, but until corroborated in the accumulated practice of a constitutional community, the goal, however noble, will remain unfulfilled. Who would say, for example, that the constitutional identity of the former Soviet Union was discernible within the folds of its governing charter?

Drawing upon this more capacious rendering of the constitution, the chapter’s first section presents a brief conceptual orientation to the problem of its identity, focusing on its preservative function. A constitution acquires an identity through experience; this identity neither exists as a discrete object of invention, nor as a heavily encrusted essence embedded in a society’s culture, requiring only to be discovered. Rather, identity emerges *dialogically* and represents a mix of political aspirations and commitments that are expressive of a nation’s past, as well as the determination of those within society who seek in some ways to transcend that past. Yet if this suggests, as it should, a dynamic understanding of constitutional identity, the practical purpose to which the concept is frequently put—resisting radical change—entails a more static view that, as will be evident in the Indian case, complicates the task of comprehending its specific meaning.

The idea of constitutional identity has received ample consideration in Indian

constitutional jurisprudence. Thus the Supreme Court has been unusually self-conscious in its elaboration of the concept. The Court has done so mainly by developing the controversial doctrine of ‘basic structure’, in which it has designated a number of constitutional features to be of such importance that it would be prepared to challenge any action perceived as a threat to their existence, including an amendment to the Constitution. On the other hand, there has been less consideration given—among theorists generally and also judges in India—to the concept of identity as a dynamic factor in constitutional development. A theory of constitutional identity that cannot account for significant departures from constitutional continuity is an incomplete theory. What has been said of the identities that make up a nation’s social order can be said of its constitutional identity as well:

Collective identities constitute the most basic components of any social order and are products of culture, but they are not fixed social and political variables. They are flexible, oscillating, and changeable, sometimes dramatically and visibly, other times subtly and gradually. They include a wide range of different identities that individuals and collectivities hold simultaneously.⁸

The acuity of this observation is particularly relevant to India, and the second section of the chapter explores its jurisprudential implications in the context of one of the Court’s basic structure commitments: secularism.

Whether viewed statically or dynamically, in what respect is it correct to pronounce that in the more than sixty years in which the Indian Constitution has been in existence a clear and unambiguous identity has emerged from the often tumultuous course of that post-Independence history? The final section addresses the uncertainty surrounding this question by focusing briefly on two high-profile controversial cases, the outcomes of which revealingly cast doubt on the reliability of any confident response, leaving us to ponder the still very vexed status of Indian constitutional identity.

II. REVOLUTION AND THE CONSTITUTION: STATIC IDENTITY

‘The Constitution is a precious heritage; therefore you cannot destroy its identity.’⁹ Such was the declaration that accompanied the Indian Supreme Court’s reaffirmation of its jurisprudential commitment to the idea that constitutional amendments may be declared unconstitutional. Earlier, in the landmark *Kesavananda* case,¹⁰ the Court had famously asserted its authority to do so when an amendment—even one adopted in full conformity with

constitutionally prescribed procedure—was in defiance of the ‘basic structure’ of the Indian Constitution. Under the theory that *constitutional* change cannot destroy what it modifies, the judgment in effect arrogated to the judiciary a supervisory role over any codified transformation that threatened regime essentials.

Although the assumption of this role can be compellingly told as a story of a beleaguered court’s defence of its institutional prerogatives, its broader meaning and significance for Indian constitutional identity will more clearly come into focus if the novel review power is featured within an even more evocative story that one could tell about revolutionary change. In his First Inaugural Address Abraham Lincoln said, ‘This country ... belongs to the people who inhabit it. Whenever they should grow weary of the existing government, they can exercise their *constitutional* right of amending it, or their *revolutionary* right to dismember or overthrow it.’¹¹ In effect, what the Supreme Court in India did in the series of cases that extended its review powers beyond the confines of ordinary law was to reject the exercise of the amendment power as a means for accomplishing revolutionary change. Thus, in the sentence preceding the injunction against destroying the Constitution’s identity, Chandrachud J wrote: ‘Amend as you may even the solemn document which the founding fathers have committed to your care, for you know best the needs of your generation.’¹² His point was Lincolnian: the people who inhabit India are entitled to shape the Constitution in a manner that mirrors their sense of what the changing times require; but to the degree that their efforts become so radical as to eviscerate the very identity of the Constitution, their actions are illegitimate and hence must be resisted. As Madhav Khosla has observed, ‘More than a struggle for power, the [basic structure] doctrine represents an effort to distinguish between a constitutional amendment and revolutionary action.’¹³

Lincoln and the American experience—in which, it should be said, the idea of an unconstitutional constitutional amendment has never taken hold—was not a direct source of inspiration for Indian jurists. Instead it was Germany—where the Basic Law’s explicitly preservative entrenchment provisions had become the touchstone for the post-War Constitutional Court’s recognition of its authority to invalidate an identity-nullifying amendment—that figured most prominently in the development of Indian jurisprudence.¹⁴ Designed as a hedge against any retreat from the ‘new’ Germany to the ‘old’, the invocation of these ‘eternity’ provisions came to be regarded as a defining assertion of constitutional identity, as an expression of how at its highest legal competence a post-revolutionary German nation conceived of itself and how it expected to be perceived by others.

Indeed, the German interest in the subject of constitutional identity is historically obvious, as would be the interest in the individual identity of anyone who had been close to another whose personality appeared at some point to have drastically changed for the worse. As was said in *Kesavananda*, ‘The personality of the Constitution must remain unchanged.’¹⁵

While the emergence of a nation’s constitutional identity may be imbued with revolutionary significance, once established it quite naturally mutates into the focal point for resistance to radical change. ‘[N]o constitution can contain rules which allow its abolishment altogether; this would permit revolution, whereas it is the very meaning of constitutions to avoid revolutions; and to make them dispensable.’¹⁶ But if constitutions do not explicitly contain rules for their own eradication, most do not provide insurance against the possibility of this happening. Germany is the most notable exception; its eternity clauses are, in Ulrich Preuss’s depiction, intended to render revolutions dispensable. Stated differently, its document is structured to prevent a transformation of such principled magnitude that its constitutional identity would become something very different from what it is. The illegitimacy of this negation of constitutional identity is now well recognised in theorising about the subject; thus the repudiation of the founding assertion of identity-instantiating constituent power—a term imbued with both descriptive and normative significance—cannot later be annulled through means of a subsequent amendment. However elevated its legal status may be relative to ordinary law, such formal constitutional modifications are deficient in those attributes that would enable one to equate them with the legitimating authority of the original affirmation of identity.

The framers of India’s Constitution did not include eternity clauses in their handiwork, yet they clearly saw themselves as exercising the constituent power of the Indian nation. As formulated by Dietrich Conrad, the relevant question became, ‘[H]as the original constituent power been spent in the effort, or have the people retained it, to exercise it, if they wish to replace the existing Constitution by a new one?’¹⁷ Conrad’s answer is apparent in the Indian Court’s amendment jurisprudence. ‘[A]n ordinary legislative assembly can never be said to exercise the original constituent power.’¹⁸ Thus the underlying assumption in these cases is that Parliament’s Article 368 amending power is subordinate to the creative authority that first established the Constitution’s basic structure. Another way of putting this is that the implicit substantive limits to the amending power are inscribed in constitutional provisions in whose contents are to be found an articulation of a fixed constitutional identity. As Bhikhu Parekh has observed, ‘There was an extensive debate ... in the Constituent Assembly,

resulting in the Indian Constitution, which provides the clearest statement of the country's self-given identity.'¹⁹

The substance of this articulation is of course contestable, but in addition to the obvious point that controversy will always attend the question of identity, we should consider that judicial reliance on its defensive properties suggests a further supposition that is surely much in doubt, namely that constitutional identity is to be equated with, or confined to, preservative, status quo goals and aspirations. Properly rendered, however, the concept of identity embodies a dynamic dimension that enables it to facilitate as well as hinder dramatic changes in constitutional development. Understandably in Germany viewing identity as fixed and immutable allows one to embrace the appealing logic that preventing things from getting radically better is a price worth paying to ensure that they do not become radically worse. Yet the static position on identity, important as it is, represents only a partial account of the subject. Particularly with reference to the transformational agenda of Indian constitutionalism, it must be accompanied by a more dynamic understanding of the phenomenon.

III. REFORM AND THE CONSTITUTION: DYNAMIC IDENTITY

To be sure, much of the aspirational content of a nation's specific constitutional identity consists of goals and principles whose permanent and entrenched qualities are shared by other nations, and that are indeed part of a common stock of aspirations we have come to associate more generally with the enterprise of constitutionalism. These aspirations may be described collectively as 'the inner morality of law'²⁰ or the requirements of 'generic constitutionalism'²¹ implicit in a nation's discourse of justice. Such fixed norms need to be reconciled with the particularistic commitments of local traditions and practices; the substance of a nation's constitutional identity will to a large extent reflect how the essentials of constitutionalism combine and interact with the attributes of a constitution that are expressive of unique histories and circumstances.

A constitutional amendment may therefore be considered problematic in one of two ways: (i) the change it portends could subvert the fundamentals of constitutional government, at the core of which is the rule of law and the administration of impartial justice; (ii) the change it portends could substantially transform or negate a defining political commitment of the constitutional order that had been central to the nation's self-understanding. The second possibility implicates the distinctive character of a constitution; the first is more

consequential as it concerns the realisation of constitutionalism in a given polity.

For example, in India the commitment to secularism can be found, among other places, under the constitutional rubric of basic structure, but so far this judicial placement has not led to any Court decision invalidating an amendment. If such were to occur the Court would doubtless contend that its action was a justifiable defence of constitutional identity, perhaps referencing *Khanna J in Kesavananda*: ‘The word “amendment” postulates that the old constitution survives without loss of its identity despite the change and continues even though it has been subjected to alterations.’²² In the case of secularism, however, the identity in question would be very specific to the Indian experience, and for that reason predictably contestable given the competing versions of the concept that have struggled for ascendancy in the course of the nation’s history.

On the other hand, where the Indian Court *has* declared an amendment unconstitutional, it has done so in response to egregious political aggrandisement—notably involving Indira Gandhi’s efforts to hold on to power—and the perceived threat to the fundamentals of constitutionalism related thereto. The ringing affirmations of the basic structure doctrine in *Indira Gandhi* (1975) and *Minerva Mills* (1980) were occasioned by amendment provisions that, in the opinion of a justice in the first of these cases, offended ‘[t]he common man’s sense of justice’.²³ This was the sense of justice that instinctively triggers resistance to an assault on the very possibility of constitutional government, as opposed to any challenge to its specific variants. ‘If by constitutional amendment’, wrote another justice in the latter case, ‘Parliament were granted unlimited power of amendment, it would cease to be an authority under the Constitution, but would become supreme over it, because it would have power to alter the entire Constitution including its basic structure and even to put an end to it by totally changing its identity.’²⁴ Such invocations, as Khosla has noted, stress ‘abstract principles rather than particular provisions’,²⁵ which is to say they speak to general attributes that we associate with the necessary requirements of governing within constitutional parameters. Or as Edmund Burke said of Warren Hastings’ crimes in India, they were ‘not against forms, but against those eternal laws of justice, which are our rule and our birthright’.²⁶

Once we descend from the more abstract conceptual heights of constitutional identity, we find ourselves in the trenches of a dialogical developmental account that incorporates an easily overlooked feature of the universal constitutional condition, which is that in one way or another all constitutions confront or embody the problem of *disharmony*. Sometimes this condition exists in the form of contradictions and imbalances internal to the constitution itself, and

sometimes in the lack of agreement evident in the sharp discontinuities that frame the constitution's relationship to the surrounding society.²⁷ The question of identity is prominently implicated in the various permutations of the disharmonic constitution, embodied principally in the determination to eliminate or maintain the discordant aspects of the constitutional predicament. Disharmony is a precondition for change, and efforts to reduce or defend it reveal that, taken as a whole, constitutional identity is not a static or fixed thing. To apprehend the full complexity of the idea is to see its dynamic quality, which results from the interplay of forces seeking either to introduce greater harmony into the constitutional equation or, contrariwise, to create further disharmony. One could imagine the latter development culminating in a rupture of constitutional continuity, thereby setting in motion a process whose goal might be the reconstituting of the polity.

In relation to India there are two powerful claims on constitutional identity, both firmly rooted in centuries of conflict and contestation. Since Independence one of these claims—for a secular composite culture nation—has been in ascendance, but the other—for a Hindu nation—has influenced the aspirational content of constitutional identity, and at times posed a distinct threat to the hegemony of the predominant view. The identity that has emerged from this extended discordant chronicle reflects the entrenched realities of both visions; the constitutional text embodies them (by no means equally given one side's effective control of the framing process), as does the history of constitutional construction and interpretation. Along the way there have been efforts to reinvent the past, most notably by those determined to create a history expunged of the truths that complicate their ethno/religious story.

Often the debate in India over judicial enforcement of the Basic Structure doctrine concerns its application to the issue of secularism. The Constitution was adopted against a backdrop of sectarian violence that was only the latest chapter in a complex centuries-old story of Hindu-Muslim relations on the Asian subcontinent. Much of that history had been marked by peaceful coexistence; nevertheless, the bloodbath that accompanied Partition reflected ancient contestations and ensured that the goal of communal harmony would be a priority in the constitution-making process. Thus, 'India, with its complex and cross-cutting variations along the lines of religion, language, and caste, is the pre-eminent instance of the use of multicultural policies to maintain democracy and represent culturally inflected interests.'²⁸

But it was not the only priority. If not as urgent, then certainly as important, was the goal of social reconstruction, which could not be addressed without

constitutional recognition of the State's interest in the 'essentials of religion'. So deep was religion's penetration into the fabric of Indian life, and so historically entwined was it in the configuration of a social structure that was by any reasonable standard grossly unjust, that the framers' hopes for a democratic polity meant that State intervention in the spiritual domain could not be constitutionally foreclosed. As a former Indian Chief Justice has observed, 'The multidimensional jurisprudence woven around the Preamble has a revolutionary thrust as it seeks to transform the socioeconomic structure of our society.'²⁹ The design for secularism in India required a creative balance between socioeconomic reform that could limit religious options and political toleration of diverse religious practices and communal development. Taken together, the ameliorative and communal provisions—often in tension with one another—evinced a constitutional purpose to address the social conditions of people long burdened by the inequities of religiously inspired hierarchies.

Herein lies the dilemma of Indian constitutional identity. The original vision of the secular constitution had emphasised the rights and sensibilities of religious minorities (especially Muslims), to the point that the secular ideal of religious freedom came to be inscribed, paradoxically, in both the aspiration for a uniform civil code and in the implicit invitation to frustrate its realisation. The constitutive domain of religion is, by the terms of the Constitution, open to encroachment by forces of political and social transformation; but the legitimacy of this undertaking is at least partially dependent on preserving political space for religious identity. If it is indeed the case that a 'revolutionary' mission lies at the core of Indian constitutionalism, then inevitably there will be a tension between that commitment and the promise of continuity that has dominated all reflection on the problem of identity at least since the seventeenth century. What Thomas Reid wrote then of personal identity, that it manifested 'an uninterrupted continuance of existence',³⁰ is, as we have seen, applicable to constitutional matters as well. So while the depiction in the landmark *Bommai* case of secularism as 'the soul of the Constitution'³¹ was doubtless done without any conscious awareness of the soul's significance for early modern theories of identity, the association calls attention to the fact that the concept of identity is closely allied with the idea of continuity rather than transformation. To the extent, however, that the constitutional 'soul' in India was intended to be ornery—that is to say, confrontational and militant in relation to the social order within which it was embedded—the Indian case presents an interesting challenge to the dominant theory of identity.

Still, it is a less formidable challenge if the fundamentals of constitutional

identity—most importantly its dynamic aspect—are not overlooked. If continuity—or in Burke’s famous account, prescription (‘a presumption in favour of any settled scheme of government against any untried project’³²)—is critical for establishing the core of such identity, critical too is the recognition that what is settled is also mutable. At the constitutional level, identity is often shaped through the creative interaction between divergent strands within an extant tradition; thus continuity need not connote internal agreement so much as ‘continuities of conflict’³³—in other words, the dynamic of disharmony. Conflicting and enduring understandings of the constitutional self play off against one another within the circumscribed parameters of the national historical narrative. And so the ameliorative and communal strands within the Indian constitutional firmament represent aspirations that, while in tension with one another, provide a measure of animation to the nation’s constitutional identity, and as such defy efforts to sanctify any particular rendering of this identity with the mantle of immutability.

What, then, follows from these reflections on identity? First, constitutional identity can accommodate an aspirational aspect that is at odds with the prevailing condition of the society within which it functions. The idea of the prescriptive constitution might suggest that what is must be (identity as pure discovery), but a strictly positivistic inference need not be drawn from the principle of inheritance. In the case of the framers of India’s Constitution, the prevailing social structure, while deeply rooted in centuries of religious and cultural practice, was contestable in accordance with sources from within the Indian tradition that are also a part of its prescriptive Constitution. History revealed disharmony within established traditions and between the dominant strand and society. ‘One of the remarkable developments of the present age’, wrote Nehru shortly before Independence, ‘has been the rediscovery of the past and of the nation.’³⁴ Nehru was one of several delegates at the Constituent Assembly to invoke the name of Ashoka, whose famous edicts have endured as a source of moral and ethical reflection for more than a millennium. Used both as an emulative model for behaviour towards society’s destitute and as a basis for criticising the Hindu nationalist rejection of Indian nationhood as rooted in a composite culture, the Ashokan example shows how continuity in the construction of a constitutional identity can draw upon alternative (and even dissenting) sources within one tradition, and then reconstitute them to serve at times as a reproach to other strands (and their societal manifestations) within the same tradition. In other words, it exemplifies ‘continuities of conflict’.

A defence of secularism as a central feature of the Indian Constitution’s Basic

Structure inevitably finds people differing in the meanings they assign to this fundamental commitment. For example, the Hindu Right has often assured Indians that it accepts the constitutional centrality of secularism, which it embraces as a version of the strict separationist model endorsed by many in the United States, which requires it to oppose Muslim personal law, and which it contrasts with the ‘pseudo-secularism’ championed by its political opponents.³⁵ The latter include the Justices on the Supreme Court, most of whom have incorporated the differing perspectives of Gandhi, Nehru, Ambedkar, and others to articulate a uniquely Indian understanding that has been aptly described by Rajeev Bhargava as ‘contextual secularism’. At the core of this position is the strategy of ‘principled distance’, which, according to Bhargava, means that ‘[T]he State intervenes or refrains from interfering, depending on which of the two better promotes religious liberty and equality of citizenship.’³⁶ Thus the specific forms that secular States take should reflect the particular constitutive features of their respective polities. In India this means (as is so enshrined in the Constitution) that for certain purposes—for example, establishing separate sectarian electorates—the State cannot recognise religion, but for others—for example, establishing a limited regime of personal laws—it may do so. The State need not relate to all religions in the same way; the bottom line, however, is that public policy regarding intervention, non-interference, or equidistance be guided by the same non-sectarian principle of equal dignity for all.

The process by which this concept of secularism emerged as a mark of constitutional identity, then to be extended protected status under the Court’s Basic Structure jurisprudence, is roughly analogous to the dialogical formation of personal identity. Much as a self evolves interactively within the specific contours of its environment, India’s constitutional identity, as refracted largely through the determinative lens of secularism, is the product of historically conditioned circumstances in which choices are limited by the dual realities of complex communalism and religiously inspired societal inequality. As Anthony Smith has noted, ‘The Indian example reveals the importance both of manufactured political identity and of pre-existing ethno-religious ties and symbols from which such an identity can be constructed.’³⁷ The nation as an ‘idea of continuity’, in which, as Burke said, a constitution discloses itself ‘only in a long space of time’,³⁸ can go far to explain how the main outlines of a secular identity are discoverable as a contingent part of the political and moral order.

IV. CONSTITUTIONAL IDENTITY AND THE COURT: THE ELUSIVE PROMISE

Just as it is tempting to locate constitutional identity in the text of a constitution, it is similarly alluring to imagine finding a definitive articulation of its meaning in the decisions and opinions of the judiciary. As has already been suggested, the text can only provide at best limited service in delivering to us what we desire, much the same as when we look to the judiciary for certain discovery of that elusive object of our interest. The reason for this is only partly accounted for by the wrongness of assuming that the ‘constitution is what the Supreme Court says it is’.³⁹ At least as significant as the acknowledgement of the Court’s fallibility is the unyielding fact that its interpretive powers are constrained by the decisions of other institutional actors involved in the writing of a nation’s constitutional narrative. Indeed, the absence of monopolistic authority over the shaping of constitutional identity is amply illustrated in Indian politics and jurisprudence. As is shown in the following brief discussion of two landmark court cases, the ambiguity that surrounds the portrayal of Indian constitutional identity is to a large degree attributable to the nation’s indeterminate path of post-judicial developments.

1. Identity and the Vagaries of Ordinary Politics

As Sanjay G Reddy has noted, ‘India’s public institutions function in the context of a “long democratic revolution”’.⁴⁰ Among other things, this means that the well-known description of the judiciary as an ‘arm of the social revolution’⁴¹ should not convey a sense that the courts in India, even when they have arguably acted in conformity with this expectation, have had a revolutionary impact on the nation’s development. That the attainment of a democratic revolution was a major component in the vision animating many of the framers of the Constitution is undeniable and abundantly manifest in some key provisions in the document they cobbled together. Even as an unfulfilled aspiration it must be considered highly germane to any assessment of Indian constitutional identity;⁴² its fulfilment would remove any tentativeness from an assessment of its relevance.

The case of *SR Bommai v Union of India* is known for many things, not the least of which are its signal contributions to discussions of emergency power,

federalism, and secularism. Of course, all of these subjects pertain to the question of identity, but there is an aspect of that case that is particularly illuminating, specifically of the ways in which a juri-centric understanding of the entrenchment of Indian constitutional identity must be considered problematic. Much like the United States Supreme Court's decision in *Brown v Board of Education*,⁴³ where the congealing of racial equality into the core of American constitutional identity occurred only in the wake of legislative and executive actions flowing from that landmark case, the ultimate significance of *Bommai* rests not so much in the folds of that decision as in political developments that could emanate from its holding. Thus the Court pointed out, 'The Indian Constitution is both a legal and social document. It provides a machinery for the governance of the country. It also contains the ideals expected by the nation. The political machinery created by the Constitution is a means to the achieving of this ideal.'⁴⁴

Inherent in the Indian constitutional condition is a plainly articulated gap between foundational ideals and existing realities; the question is whether the radical disharmony between law and society establishes a constitutional obligation for the State to resolve the most severe of these contradictions. Arguably, this obligation is inscribed in the Constitution in several ways, including the various invitations extended to the State to regulate religious practices in the interest of social welfare and equality. The most visible constitutional expression of the aspirations that stamped the document with a distinctive identity is to be found in [Part IV](#), the Directive Principles of State Policy. The provisions contained in this section are not enforceable by the judiciary, but, as stated in Article 37, 'the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws'. As has been noted with only slight exaggeration, the 'Directive Principles of State Policy constitute the soul, the very spirit of the ethos of the Constitution. These principles are the epitomes of social policy whereupon the State has been enjoined to embark on the goals of distributive justice.'⁴⁵

Earlier, we saw how in *Kesavananda* the Supreme Court invoked basic structure as a defensive move to preserve what it designated as the Constitution's identity. On paper, at least, this breakthrough was enough to vault the Court to the forefront of the world's most activist judiciaries. But precisely because *Kesavananda* was not about ordinary politics, the actual impact of basic structure jurisprudence was likely to be experienced more symbolically than tangibly. *Bommai* adapted the doctrine for application to the politics of day-to-

day governance, establishing it not only as a standard against which the Court could judge the constitutionality of others' actions, but also as a potential touchstone for directing the course of actions not yet taken. The great challenge of Indian constitutionalism is to deliver on the promise of its transformative aspirations. That arguably requires a Court performing more ambitiously than in the familiar naysayer role of the orthodox judicial review model, but also one attuned to the limitations of judicial power and the hollowness that is so often the fate of the more grandiose hopes for judicial interventions in policymaking.

The principal result in *Bommai* was the approval given to the dismissal of three elected State governments deeply implicated in the violence associated with the destruction of a mosque. Yet the broader meaning of the decision may be found in the connection drawn in some of the opinions between the basic structure doctrine—specifically as it relates to secularism—and the responsibility of the Union government to advance the constitutional essentials of the polity. Thus the immediate consequence of the ruling was to affirm the Centre's finding of a 'failure of constitutional machinery' in the States; more interesting were the long-term possibilities: that the Indian political system had a positive responsibility to abide by the spirit of the Constitution, that the Directive Principles of State Policy would henceforth be imbued with more than hortatory significance. As SP Sathe wrote, '[F]or the first time the Supreme Court used secularism as a reference for judging the validity of State action.'⁴⁶

The development of constitutional identity may thus be conceptualised as a maturation process involving ongoing interactions among multiple actors operating within the parameters of text and history. Of the Constitution, Reddy J noted in *Bommai*, '[I]ts material provisions are inspired by the concept of secularism. When it promised all the citizens of India that the aim of the Constitution is to establish socioeconomic justice, it placed before the country as a whole, the ideal of a welfare state.'⁴⁷ India's Constitution is explicitly and implicitly an affirmative action constitution. By invoking the basic structure doctrine in support of the national government's dismissals of State governments for their derelictions of duty, the Court in effect was liberating the Centre to be a proactive player in fulfilling the aspirations that it, the Court, had certified as high-priority goals. Of course, the attainment of these goals will depend on whether the government in New Delhi is sympathetic to this constitutional agenda; moreover, yet to be determined is whether the Court will require it to be sympathetic. If it does, then the familiar doctrine of affirmative constitutional obligations will have been ratcheted up significantly. In this Indian incarnation it will mean that governments, even those that may not have been complicit in

actively working to undermine constitutional provisions, will be required to expend resources to advance ends whose fulfilment the Court designates as necessary to further constitutional identity. The likely resistance to such an order could precipitate a constitutional crisis, which is one reason to think the Court will be reluctant to push the envelope very far.

2. The Meandering Path of Identity

The forging of constitutional identity is not a preordained process in which one comes to recognise in the distinctive features that mark a constitution as one thing rather than another the ineluctable extension of some core essence that at its root is unchangeable. The disharmonies of constitutional law and politics ensure that a nation's constitution—a term that incorporates more than the specific document itself—may come to mean quite different things, even as these alternative possibilities retain identifiable characteristics enabling us to perceive fundamental continuities persisting through any given regime transformation.

In 2009, the High Court of Delhi decided a case that very quickly came to be seen as emblematic of Indian constitutional identity, but whose overturning a few years later by a two-judge bench of the Supreme Court cannot but cast doubt upon the stability of such a reading. In *Naz Foundation v Government of India*,⁴⁸ the lower court declared unconstitutional a longstanding provision of the Indian Penal Code that had criminalised ‘unnatural’ consensual sexual acts between consenting adults in private; that is, homosexual conduct.⁴⁹ The Court fashioned a constitutional right of privacy largely out of materials appropriated from abroad, with copious references to American precedents. The Indian judges saw themselves as defending ‘a constitutional morality derived from constitutional values’, and they embraced the teaching of BR Ambedkar, who had said at the Constituent Assembly: ‘[I]t is perfectly possible to pervert the Constitution, without changing its form by merely changing its form of administration and to make it inconsistent and opposed to the spirit of the Constitution.’⁵⁰ But these judges failed to elucidate the relevance of the many pages of their opinion devoted to *other* peoples’ constitutions for maintaining the spirit of *their* constitution.

Fortunately, others have provided explanations. Sujit Choudhry, for example, persuasively argues that ‘the missing link between the comparative jurisprudence on same-sex rights and the basic premises of the Indian Constitution is the analogy between sexual orientation and untouchability’.⁵¹ He points out that the judgment’s invocation of the ideals animating the adoption of the Indian Constitution, in particular the intention to advance a ‘social revolution’, provided the broader context within which the criminalisation of same-sex relations was assessed. The Court explicitly appealed to Nehru’s passionate devotion to the constitutional goal of inclusiveness; in addition,

Choudhry reveals that what was not explicit in the text of the opinion—a specific reliance on the South African judiciary’s linkage of discrimination based on caste and sexual orientation—played an important role in the outcome of the case in India. ‘The idea of a constitution as a dynamic, evolving instrument of social change is arguably the principal influence of the Indian constitutional experience ...’⁵² In this account, the Delhi High Court ruling is an embodiment of the identity-marking commitment to ‘transformative constitutionalism’. And so, ‘*Naz Foundation* demonstrates that under the dialogical model, comparative materials can be used in a way that not only acknowledges, but also affirms, a distinct constitutional identity.’⁵³

Four years later, however, this affirmation was in effect challenged, if not rejected, when the Supreme Court overturned the decision in *Naz Foundation*. The reversal was obviously a major disappointment to those who had been encouraged by the lower court’s ringing endorsement of a progressively inclusive political community, but also to anyone expecting to find in the opinion of the three-judge panel an engagement with the substantive arguments in the nullified judgment. Still, the Court’s ruling in *Suresh Kumar Koushal v Naz Foundation* rested on two related arguments about judicial power that are important to this chapter’s consideration of Indian constitutional identity: the sanctity of the ‘principle of presumption of constitutionality’⁵⁴ and the impropriety of ‘extensively rel[ying] upon the judgments of other jurisdictions’.⁵⁵

Clearly, these jurisprudential commitments are a direct repudiation of the idea that the Court is ‘an arm of the social revolution’. Also manifest in the deference to Parliament as the source for legitimate expression of the indigenous will of the people is the presumption that determining the nation’s constitutional identity is not to be achieved through the imposition of the judicial will. Thus even if we assume that inclusiveness is one of the essentials of Indian constitutionalism and that an extensive documentary record is supportive of such an assumption, the dynamic quality of identity and the dialogical process by which it emerges mean that the nature and boundaries of the inclusive constitutional ethos is embedded in a deep cultural matrix from which counterpressures to the dominant creed exert a continuing, if irregular, force seeking a more favourable standing for a less inclusive identity reflective of vital strands within the nation’s Hindu and Muslim traditions.

Taken together, then, the two decisions offer a window into the development of constitutional identity in India. The ruling by the Delhi High Court did not culminate in a definitive statement of identity, as was made clear by the Supreme

Court's subsequent decision to transfer the struggle over same-sex rights from the judicial arena to that of the legislature. Thus, the episodic and untidy process of defining constitutional identity, with its thrusting and counter-thrusting in and out of courtrooms, will proceed in tandem with the evident disharmony between aspirations and behaviour, and with the uncertainty that accompanies a progression whose end-point is necessarily elusive. A pivotal idea of this chapter has been that disharmony, whether manifest in the incongruities lodged within a constitution, or in the gap between inscribed commitments and external realities, is the main impulse behind the shaping of constitutional identity. Yet to understand how it works requires serious engagement with sources from within the traditions of a polity that extend much further back in time than the occasions that trigger the impulse. Therefore, while the Indian Constitution, as framed and amended, is permeated by a transformative ethos that establishes a radically egalitarian playing field upon which a constitutional identity is to be constructed, the document also expresses in more muted fashion an exclusivist voice with deep resonance in the history of the subcontinent. The interactive process intrinsic to a constitutional work in progress ensures that the outcome in *Koushal* will not be the final word on its subject, or for that matter on the bigger idea of identity to which it is connected.

V. CONCLUSION

A constitution is a large piece of a nation's constitutional identity, but it is not coterminous with it. In most cases it lays down key markers of that identity, then to be adapted to changing political and social realities in ways that modify, clarify, or reinforce it through the dialogical engagement of various public and private sources of influence and power. As suggested at the outset, until a convergence is apparent between constitutional rules and principles on the one hand and actual constitutional practices on the other, one would be well advised to withhold definitive conclusions about a nation's constitutional identity.

Circumspection in this regard is particularly warranted in India, where the question of identity is so closely linked with transformative aspirations. The very notion of a confrontational constitution hints at the magnitude and daunting nature of the challenge of reconstruction; what an Indian jurist once called a 'militant environment'⁵⁶ is unlikely passively to submit to the transformative designs of a hostile constitution. For that reason, the success of such a constitution in delivering on its promise of radical change is by no means

assured. Indeed, the one explicit mention of revolution in the Indian Constitution is quite revealing in this respect. It appears in the Statement of Objects and Reasons that serves as a preamble to the Forty-Second Amendment adopted in 1976. 'The question of amending the Constitution for removing the difficulties which have arisen in achieving the objective of socioeconomic revolution ... has been engaging the active attention of Government and the public for some years now.' The response: dramatically increase the powers of the government while diminishing the authority of the judiciary.

In invoking the radical design behind the document, the amendment reflects an accurate rendering of original constitutional aspiration—at least the dominant view—but also the enormous challenge of delivering on its promise. What is more, the dubious auspices under which the constitutional course correction was arranged—the emergency government of Indira Gandhi—suggest that there may be a heavy price to pay for seeking fulfilment of the redemptive ambitions of political leaders. More generally, the Indian example suggests a larger point about constitutional identity and change, namely that aspirational considerations necessarily entail a high measure of uncertainty in establishing their ultimate transformative significance.

This uncertainty is also, as we have seen, inextricably tied to a constitutional commitment—to social tradition and communal integrity—that has always coexisted uneasily with constitutive transformative aspirations. As perhaps most poignantly illustrated in the famous *Shah Bano* case⁵⁷—in which the decision by the Supreme Court to override Muslim personal law in favour of a section of the criminal code precipitated a massive political backlash that culminated in the adoption of legislation denying divorced Muslim women maintenance rights under the law—the goal of societal reconstruction along egalitarian lines is easier inscribed than achieved. The story in this instance was one of 'gender justice ... rendered hostage to community identity'.⁵⁸ But the broader implication of the case and its aftermath is this: that so long as communal identities remain a salient and entrenched feature of the Indian social scene, and so long as these identities continue to draw upon the ample resources of the local constitutional tradition, any depiction of Indian constitutional identity will need to accept the inevitability of flux and ambiguity.

Finally, we must appreciate that constitutional democracy incorporates a commitment that necessarily muddies the waters of identity: democracy. Elections matter, particularly those having dialogical implications for the adjustments and modifications that accompany the progression of a nation's constitutional identity. Whether, for example, the outcome in the 2014 elections

in India ‘entails nothing short of an attempt to roll back the long social revolution that has been effected in this country over the last one hundred years’⁵⁹ remains to be seen. Still, such speculation about a social counterrevolution reminds us that commitments widely imagined as firmly entrenched—even those displaying the markings of constitutional inscription—possess a more contingent quality than may commonly be assumed. This, of course, does not mean that the substance of constitutional identities tracks the vagaries of electoral politics; indeed, with regard to those constitutional essentials that represent the necessary, if not sufficient, elements of the totality of constitutional identity they should have little, if any, determinative impact. In relation, however, to the dynamic components of identity, those making up the core of the expressive function of a constitution, a major displacement in political power can affect the relative standing of competing strands within the disharmonic constitutional order, and thus the shape of constitutional identity. Such is certainly the case in the world’s largest constitutional democracy.

¹ Zachary Elkins, Tom Ginsburg, and James Melton, *The Endurance of National Constitutions* (Cambridge University Press 2009) 129. Of India the authors write, ‘According to the predictions of our epidemiological model, India’s framers have built a document to last generations’: *ibid* 151.

² David S Law and Mila Versteeg, ‘The Evolution and Ideology of Global Constitutionalism’ (2011) 99 *California Law Review* 1163, 1243.

³ Law and Versteeg (n 2) 1244.

⁴ Law and Versteeg (n 2) 1244.

⁵ Walter F Murphy, *Constitutional Democracy: Creating and Maintaining a Just Political Order* (Johns Hopkins University Press 2007) 13.

⁶ Murphy (n 5) 14.

⁷ Andras Sajó, ‘Constitution Without the Constitutional Moment: A View from the New Member States’ (2005) 2 *International Journal of Constitutional Law* 243, 243.

⁸ Baruch Kimmerling, *Clash of Identities: Explorations in Israeli and Palestinian Societies* (Cambridge University Press 2008) 271.

⁹ *Minerva Mills v Union of India* (1980) 3 SCC 625 [16] (Chandrachud J).

¹⁰ *Kesavananda Bharati v State of Kerala* (1973) 4 SCC 225.

¹¹ Abraham Lincoln, ‘Inaugural Address’ (Washington, DC, 4 March 1861) <[http://memory.loc.gov/cgi-bin/query/r?ammem/mal:@field\(DOCID+@lit\(d0773800\)\)](http://memory.loc.gov/cgi-bin/query/r?ammem/mal:@field(DOCID+@lit(d0773800)))>, accessed October 2015.

¹² *Minerva Mills* (n 9) [16] (Chandrachud J).

¹³ Madhav Khosla, *The Indian Constitution* (Oxford University Press 2012) 159.

¹⁴ *Southwest State Case*, 1 BverfGE 14 (1951):

That a constitutional provision itself may be null and void, is not conceptually impossible just because it is a part of the constitution. There are constitutional provisions that are so fundamental and to such an extent an expression of a law that precedes even the constitution that they also bind the framer of the constitution, and other constitutional provisions that do

not rank so high may be null and void, because they contravene those principles.

The German constitutional theorist, Dietrich Conrad, was the key figure in transferring the German understanding to the Indian subcontinent. His work was cited by Indian Justices in several of the Indian cases concerning amendment provisions found unconstitutional by the Supreme Court.

¹⁵ *Kesavananda Bharati* (n 10) [651].

¹⁶ Ulrich K Preuss, 'Constitutional Powermaking for the New Polity: Some Deliberations on the Relations Between Constituent Power and the New Constitution' in Michel Rosenfeld (ed) *Constitution, Identity, Difference, and Legitimacy* (Duke University Press 2004) 157.

¹⁷ Dietrich Conrad, 'Constituent Power, Amendment and Basic Structure of the Constitution: A Critical Reconsideration' (1977–78) 6–7 *Delhi Law Review* 1, 13.

¹⁸ Conrad (n 17) 14.

¹⁹ Bhikhu Parekh, 'The Constitution as a Statement of Indian Identity' in Rajeev Bhargava (ed) *Politics and Ethics of the Indian Constitution* (Oxford University Press 2008) 46.

²⁰ Lon Fuller, *The Morality of Law* (Yale University Press 1964).

²¹ David S Law, 'Generic Constitutional Law' (2005) 89 *Minnesota Law Review* (2005) 652, 659.

²² *Kesavananda Bharati* (n 10) [1426].

²³ *Indira Gandhi v Raj Narain* (1975) Supp SCC 1 [680].

²⁴ *Minerva Mills* (n 9) [86].

²⁵ Khosla (n 13) 159.

²⁶ Edmund Burke, 'Speech in Opening the Impeachment of Warren Hastings, Esq.' in David Bromwich (ed) *On Empire, Liberty, and Reform* (Yale University Press, 2000) 388.

²⁷ Consider here what BR Ambedkar had to say in the period leading up to the new Constitution's implementation, *Constituent Assembly Debates*, vol 12 (Lok Sabha Secretariat 1986) 979, 25 November 1949:

On the 26th of January 1950, we are going to enter into a life of contradictions. In politics we will have equality and in social and economic life we will have inequality. In politics we will be recognizing the principle of one man one vote and one vote one value. In our social and economic life, we shall, by reason of our social and economic structure, continue to deny the principle of one man one value. How long shall we continue to live this life of contradictions?

²⁸ Narendra Subramanian, *Nation and Family: Personal Law, Cultural Pluralism, and Gendered Citizenship in India* (Stanford University Press 2014) 7.

²⁹ AM Ahmadi, 'The Constitution—Its Tryst with Destiny: Flawed or Fulfilled?' (Conference on Fifty Years of Indian Republic, Toronto, Canada, 1 April 2000).

³⁰ Thomas Reid, *Works of Thomas Reid*, vol 2 (Samuel Etheridge 1814) 339.

³¹ *SR Bommai v Union of India* (1994) 3 SCC 1 [144].

³² Edmund Burke, 'Speech on a Motion Made in the House of Commons, the 17th of May 1782, for a Committee to Inquire Into the State of the Representation of the Commons in Parliament' in David Bromwich (ed) *On Empire, Liberty, and Reform* (Yale University Press 2000) 274.

³³ Alasdair MacIntyre, *After Virtue: A Study in Moral Theory* (University of Notre Dame Press, 1981) 206.

³⁴ Jawaharlal Nehru, *The Discovery of India* (Oxford University Press 1997) 515.

³⁵ This position has been often espoused by Arun Shourie, perhaps the leading ideologue of the Hindu Right, who insists, in explicit reference to American church/state separatism, that the State must take no formal cognisance of religion. See Arun Shourie, *A Secular Agenda* (HarperCollins 1997).

³⁶ Rajeev Bhargava, 'What is Secularism For?' in Rajeev Bhargava (ed) *Secularism and Its Critics*

(Oxford University Press 1998) 515.

³⁷ Anthony D Smith, *National Identity* (University of Nevada Press 1991) 113.

³⁸ Burke (n 32) 274.

³⁹ Chief Justice Charles Evans Hughes, 'Speech before the Elmira Chamber of Commerce (May 3, 1907)' in *Addresses of Charles Evans Hughes, 1906–1916* (2nd edn, GP Putnam's Sons 1916) 185.

⁴⁰ Sanjay G Reddy, 'A Rising Tide of Demands: India's Public Institutions and the Democratic Revolution' in Devesh Kapur and Pratap Bhanu Mehta (eds), *Public Institutions in India: Performance and Design* (Oxford University Press 2000) 457.

⁴¹ Granville Austin, *The Indian Constitution: Cornerstone of a Nation* (Oxford University Press 1966) 164.

⁴² This is consistent with Pratap Bhanu Mehta's contention that '[T]he constitution was a radical idea, without itself containing guarantees that the social transformation it promised would come about ...' Pratap Bhanu Mehta, *The Burden of Democracy* (Penguin Books 2003) 56.

⁴³ 347 US 483 (1954).

⁴⁴ *SR Bommai* (n 31) [3].

⁴⁵ Sudesh Kumar Sharma, *Directive Principles and Fundamental Rights: Relationship and Policy Perspectives* (Deep & Deep Publications 1990) 5.

⁴⁶ SP Sathe, *Judicial Activism in India* (Oxford University Press 2002) 177. *SR Bommai* (n 31) [434] (Reddy J): 'Any State government which pursues unsecular policies or an unsecular course of action contrary to the constitutional mandate renders itself amenable to action under Article 356.'

⁴⁷ *SR Bommai* (n 31) [305], citing Gajendragadkar J, Seminar on *Secularism: Its Implications for Law and Life in India*.

⁴⁸ (2009) 160 DLT 277.

⁴⁹ Indian Penal Code 1860, s 377.

⁵⁰ *Constituent Assembly Debates*, vol 7 (Lok Sabha Secretariat 1986) 38, 4 November 1948.

⁵¹ Sujit Choudhry, 'How to Do Comparative Constitutional Law in India: *Naz Foundation*, Same Sex Rights, and Dialogical Interpretation' in Sunil Khilnani, Vikram Raghavan, and Arun K Thiruvengadam (eds) *Comparative Constitutionalism in South Asia* (Oxford University Press 2013) 78.

⁵² Choudhry (n 51) 82.

⁵³ Choudhry (n 51) 48.

⁵⁴ *Suresh Kumar Koushal v Naz Foundation* (2014) 1 SCC 1 [32].

⁵⁵ *Suresh Kumar Koushal* (n 54) [77].

⁵⁶ VR Krishna Iyer, 'Towards an Indian Jurisprudence of Social Action and Public Interest Litigation' in Indra Deva (ed) *Sociology of Law* (Oxford University Press 2005) 308.

⁵⁷ *Mohd Ahmed Khan v Shah Bano Begum* (1985) 2 SCC 556.

⁵⁸ Neera Chandhoke, *Beyond Secularism: The Rights of Religious Minorities* (Oxford University Press 1999) 9.

⁵⁹ Prabhat Patnaik, 'Social Counterrevolution' *Frontline* (13 June 2014) <<http://www.frontline.in/cover-story/social-counterrevolution/article6048919.ece?homepage=true?>>, accessed October 2015.

CHAPTER 8

CONSTITUTIONAL CHANGE

a public choice analysis

SHRUTI RAJAGOPALAN

I. INTRODUCTION

PARLIAMENT has amended the Indian Constitution a hundred times since its ratification in 1950. The fundamental rights listed in [Part III](#) of the Constitution were frequently amended and some constitutional protections, such as the right to private property, deleted.¹

A closer look reveals that the fundamental rights were amended to accommodate positive entitlements for specific groups and interests. Balancing negative rights and positive entitlements, or constitutionally reconciling the fundamental rights with the Directive Principles of State Policy [hereinafter DPSP], has been the tough task faced by every government since 1950.² This has led to frequent amendment of the Constitution in Parliament, and frequent interventions by the judiciary.

Amendments to the Constitution, especially to the fundamental rights, have two starkly different patterns in Indian constitutional history. During 1950–80, Parliament was the battleground for seeking formal constitutional amendments; while post-1980, the Supreme Court became the power centre, with interest groups seeking amendments through interpretation.³

This becomes more puzzling when one considers the similarity in these two phases. The nature of the positive entitlement and the beneficiary may differ, but what is remarkably constant is the struggle to accommodate positive entitlements, usually fulfilling the DPSP, within the framework of the negative rights outlined in the Constitution. What has shifted is the *form* and *forum* for amending negative rights to accommodate positive entitlements.

What is the reason for this shift of interest-group activity from the legislature to the judiciary? The existing literature has attributed this shift to the increasing power of the Indian Supreme Court; coalition politics; changes in ideology; greater emphasis on positive rights; *etc.*⁴ In this chapter, I explain the change in constitutional amendments using economic analysis.⁵

An interest group attempting to change the Constitution has the option of approaching Parliament for an amendment, or alternatively, approaching the Supreme Court to favourably change the interpretation of the constitutional rule. To decide between the two forums and the associated forms, the interest group determines the expected costs and benefits of each option, and chooses the forum that maximises net expected benefit. Unlike the typical explanations from the perspective of the legislature or judiciary *supplying* the changes in rules, this chapter offers a *demand-driven* explanation, analysing the incentives of interest groups seeking rule changes.

To explain amendments in India, I argue that the change in substantive and procedural rules changed the costs and benefits of amending the Constitution, and therefore changed the incentives of interest groups pursuing amendments. This led interest groups to shift the *form* and *forum* while seeking rule change.⁶

Existing explanations centre on whether the legislature or the judiciary should be the guardian of the Constitution, thereby controlling the supply of rule changes. This chapter moves away from conventional doctrinal analysis and shifts the debate to constitutional design by looking at the costs and benefits imposed by different constitutional rules.

I present a framework to understand the choice of an interest group choosing between these two forms and forums to amend the fundamental rights. I demonstrate that, with the interaction of constitutional rules, the relative price of seeking formal amendments to the Constitution has increased, incentivising interest groups to seek rule changes through the judiciary.

II. AN ANALYTICAL FRAMEWORK FOR CONSTITUTIONAL AMENDMENTS

The central feature in this analysis is individual behaviour, and that individuals are pursuing their self-interest, though self-interest is not narrowly defined.⁷ These individuals act within a set of constraints determined by the existing constitutional rules.

Political entrepreneurs and interest groups are motivated by expected returns from a particular rule change. They may use political activity for gain in the form of entitlements, benefits, targeted transfers, direct subsidies, tax breaks, control over licensing, price and quantity controls—more generally known as rent seeking.⁸

First, an interest group can lobby the executive—to either favour it in enforcement or change the rule through an executive ordinance.⁹ Secondly, it can lobby the legislature to enact a statute in its favour.¹⁰ Thirdly, it can petition the judiciary for a favourable interpretation of existing statutes.¹¹ In order to determine whether the interest group lobbies the executive, legislature, or judiciary, it determines the expected return to each option.

Where efforts to gain rents at the policy level are declared unconstitutional, entrepreneurial efforts may focus on a higher constitutional level, that is, to change the constitutional rules.

Constitutional rules create constraints within which an individual or an interest group chooses the form and forum of constitutional amendments. However, expectations of changes to these constitutional rules also create incentives for seeking amendments. Therefore, any analysis of interest groups seeking amendments must include: (i) the costs and benefits imposed by the existing set of rules; (ii) the expected costs and benefits from the rule change.

Constitutional rules governing the legislative or judicial process impact the expected costs and benefits for interest groups and political entrepreneurs through two types of constraints: first, the domain of what can or cannot be collectively decided (substantive rules) and secondly, the process by which the collective decision making will be made (procedural rules). An independent judiciary enforces both substantive and procedural constitutional rules.

In the Indian context, we can identify the substantive rules as the fundamental rights in [Part III](#), and the DPSP in [Part IV](#) of the Constitution. The fundamental rights impose constraints on the ability of individuals and interest groups to redistribute and capture transfers and positive entitlements. Amending the fundamental rights, or removing the constraints to enable transfers and positive entitlements represents the potential benefit available to interest groups. The DPSP allow for positive entitlements for groups, though unenforceable in courts. Therefore, constitutional amendments tend to take the form of allowing for the DPSP, which are otherwise constrained by the fundamental rights. Article 368 represents the procedural costs faced by individuals and interest groups lobbying Parliament.

Existing procedural rules determine the costs imposed on the interest group seeking a rule change and the change in substantive rule represents the benefit to the interest group.

1. Procedural Rules

Procedural rules determine how legislative decisions will be made. Procedural rules to enact legislation specify the type of legislature, the veto power of the President or council, the majority requirements of the voting rule, *etc.* In a parliamentary system, not just the number of votes required but also the number of parties forming the majority group, and the dynamics of coalition politics impact on organisational costs.

The Indian central legislature is bicameral, comprising a Lower House and an Upper House. To pass legislation requires a simple majority of members present and voting in each House of Parliament (Article 100(1)) with a minimum quorum of one-tenth of the members of the House (Article 100(3)). Legislation also requires Presidential approval, which the President may withhold. To pass ordinary legislation in a State requires the majority of members present and voting in the State legislature (Article 189(1)), with a minimum quorum of one-tenth of the members of the House (Article 189(3)). It then requires the State Governor's approval, which the Governor may withhold. Procedural costs of passing legislation in States are lower than in Parliament, as State legislatures are smaller in size, and twenty-two of the twenty-nine States' legislatures are unicameral.

The Constitution includes specific provisions on the powers of Parliament to formally amend the Constitution (Article 368). Only Parliament can enact formal amendments to the Constitution. The Constitution can be divided in three categories based on the procedure required to amend these clauses. First, some clauses of the Constitution may be amended with a simple majority.¹² Secondly, amendments to provisions pertaining to separation of powers and federalism, also called 'entrenched clauses' of the Constitution, require ratification by at least half the State legislatures, in addition to a supporting vote by the majority of the total membership of the House, with not less than two-thirds of the members present and voting in each House of Parliament, and Presidential approval.¹³ Thirdly, amendments to most provisions of the Constitution, including the fundamental rights, may be initiated in either House of Parliament and require a majority of the total membership of the House with not less than two-thirds of the members present and voting in each House of Parliament, and Presidential approval.¹⁴

Procedural rules impose organisational costs on interest groups seeking a rule change. Voting rules with simple majority requirements impose lower

organisational costs on a group seeking a favourable rule change, relative to voting rules that require supermajority or unanimity. Clauses specifying quorum requirements, bicameral legislatures, supermajority requirements, ratification by States, Presidential assent, etc, are procedural rules imposing additional costs.

Under Article 368, the fundamental rights can be amended *relatively* easily. The amendment procedure has a supermajority requirement only for the *quorum*, and only a *majority* of votes required to pass in each House. This amounts to a relatively easy procedure to amend the Indian Constitution compared to procedures laid down in other constitutions (which typically require supermajority voting rules to amend rights) and also compared to other provisions within the Indian Constitution (such as amending provisions on federalism, separation of powers, etc), which require ratification by the States.

Similarly, there are organisational and administrative costs for seeking rule changes through the judiciary. These include court fees, litigation costs, and also the procedures and time frames involved in petitioning courts, appeals processes, the size of the bench where the interest group is seeking a rule change, *etc*. There are two different types or stages of organisational costs. Locus standi requirements, court filing fees, etc determine the relative costs of *approaching* the judiciary. On the other hand, once the suit is filed, the size of the bench, constitutional bench, etc, determines the costs of *securing* a favourable verdict.

A trend lowering costs of *approaching* the judiciary is the dilution of the locus standi requirements post-Emergency. Instrumental in lowering costs for interest groups in *securing* favourable verdicts is the size of the bench. In the 1950s, almost half the constitutional benches of the Supreme Court had more than five judges. This decreased to 15 per cent by the late 1970s, and is steadily decreasing thereafter.¹⁵

In addition to imposing costs for a specific type of rule change in a specific forum, *differences* in procedural rules also provide the *relative price* of approaching different forums for rule changes.¹⁶ For instance, voting rules where the quorum requirement is 10 per cent versus 66 per cent change the relative price of approaching the legislature versus the judiciary.

2. Substantive Rules

Substantive rules specify requirements with respect to what may or may not be the content of legislation. Common substantive rules include individual rights within the framework of constitutional rules. Typically, substantive rules restrain the State from action on certain spheres. However, substantive rules may also be written to require a positive action by the State. One can make this distinction of negative and positive rights based on whether they involve a ‘duty of restraint’ or a ‘duty to facilitate entitlements’ from the State.

In 1950, [Part III](#) of the Constitution guaranteed fundamental rights, including the right to equal treatment and protection under the law, right to private property, freedom of speech and religion, and most importantly right to writ remedy through an independent judiciary. These rights were strong, specific, and generally applicable to all, with few exceptions (accommodating enforceable positive entitlements to protect backward classes, women, minorities, etc). The Constitution also included the DPSP, which outlined positive non-enforceable rights for citizens. At the time of ratification, the positive entitlements provided under the DPSP were not enforceable, and did not infringe on or contract the fundamental rights.

However, positive and negative rights have been in constant conflict. Political entrepreneurs can lobby to change substantive rules to accommodate the tensions between positive and negative rights. Since negative rights restrict the State from making wealth transfers and favouring specific individuals or groups, it may be to the benefit of individuals to organise into interest groups and seek exceptions to these rules.

Amendment of substantive rules leads to expansion and contraction of specific rights. In India, during 1950–80 there was an explicit contraction of negative rights and post-1980 there was an explicit expansion in positive rights. However, in both time periods what is implicit is that the expansion of positive rights leads to contraction of negative rights, and vice versa. They are just flip sides to the fundamental conflict between negative and positive rights.¹⁷ What is interesting in the Indian case is that the *form* of these expanding and contracting rights changed. Initially, negative rights were formally contracted in Parliament to expand positive entitlements. And in the second phase, positive entitlements were expanded by interpretation, thereby contracting negative rights.

3. Choosing the Forum for Amendments

If the Constitution contains strong substantive rules and weak procedural rules, interest groups are more likely to lobby the legislature to formally change the rules. Weak procedural rules imply relatively low costs associated with obtaining the requisite change in the rules through the legislature. A judiciary enforcing strong substantive rules prevents positive entitlements to particular groups, incentivising interest groups to seek constitutional amendments, because *changing* the substantive rule may benefit the interest group.

There is another element to this calculation. These benefits from changing the substantive rule must necessarily exceed the costs imposed by procedural rules. The higher the majority requirements (ratification, quorum, etc), the higher will be the costs of gaining the formal amendment. Therefore, where procedural rules are weaker, it is more likely that interest groups lobby for a formal amendment of the Constitution through the legislature. This is even more likely when the procedural rules of approaching the legislature are *relatively lower cost* than the procedural rules for approaching the judiciary.

The period 1950–80 witnessed an independent judiciary enforcing strong fundamental rights, unenforceable DPSP, and a relatively easy procedure to amend the fundamental rights, resulting in constitutional amendments by Parliament to weaken fundamental rights. It was relatively difficult to approach the Supreme Court for constitutional rule changes, as it adopted a strict interpretation of rules, strong locus standi requirements, and large average bench size. In this phase, the formal amendments in Parliament would be the form and forum of constitutional change. This is demonstrated in detail in Section III.1.

If the Constitution contains relatively weak substantive rules, and strong procedural rules to amend the Constitution, interest groups are more likely to seek amendments through interpretation by the judiciary.

With weak substantive rules, providing exceptions to general rules and allowing for positive transfers, legislation giving effect to these entitlements may escape constitutional challenge. Weak substantive rules—in the Indian case conflicting positive and negative rights—have two effects. First, more special-interest legislation is allowed under existing constitutional rules, and therefore interest groups need to seek fewer constitutional amendments. Secondly, if the legislation is not allowed by the Constitution, weak substantive rules allowing for many exceptions provide greater opportunity for the judiciary to give a broad interpretation, thereby informally amending the rule. Therefore seeking a formal

rule change may be relatively less beneficial and more costly than approaching the judiciary.

While choosing between the judiciary and the legislature, interest groups must also consider costs, and ascertain whether the benefits of pursuing the amendment outweigh the costs. Strong procedural rules impose greater organisational costs and therefore interest groups are less likely to seek formal constitutional amendments from the legislature. This is especially true when the procedural rules of approaching the judiciary are *relatively lower cost* than the procedural rules for amending the Constitution in the legislature.

Since 1980, the Court has enforced weaker fundamental rights (weakened by frequent amendment), and placed a stronger constraint on Parliament's ability to amend the Constitution. While there has been no change to the weak procedure to amend the Constitution under Article 368, the emergence of strong judicial precedent in *Kesavananda Bharati v State of Kerala*¹⁸ (hereinafter *Kesavananda Bharati*) that created a requirement of judicial approval of constitutional amendments, has made the procedure to amend the Constitution through Parliament relatively more costly.

Further, post-Emergency, the Supreme Court has reduced locus standi requirements. Other factors have also changed—for instance, a decrease in the average size of constitutional benches. These actions have reduced the costs imposed on interest groups to approach the judiciary, resulting in increased interest-group activity through the courts relative to the legislature. This is demonstrated in detail in Section III.2.

III. INTEREST GROUPS NEGOTIATING THE CONSTITUTION

Since the Constitution was adopted in 1950, its rules have evolved. The fundamental rights were gradually weakened through formal amendment, and in response the judiciary imposed additional constraints on Parliament's ability to amend the Constitution. This changed the incentives faced by groups demanding rule changes. There was a shift in the relative costs and benefits of seeking formal amendments, that is, formal amendments by the legislature became *relatively higher priced* than amendments through interpretation by the judiciary. Constitutional amendments saw a shift from formal amendments through Parliament until 1980 to amendments through interpretation by the judiciary after 1980.

1. Phase I (1950–80): Amendment by Parliament

At the time of ratification, the positive entitlements provided under the DPSP were not enforceable, and the Constitution contained strong enforceable fundamental rights. Article 368 provided a relatively easy amendment procedure for fundamental rights. This framework of rules created problems and opportunities for the government policies at the time.

The most pressing matter for India's first government was large-scale land reform. The focus was on abolition of the zamindari system, imposing agrarian land ceilings, and redistributing surplus landholdings, to further economic egalitarianism. Towards this end, various States formulated legislation to take land from zamindars and redistribute it among peasants.

The biggest challenge was to provide just compensation, required by Article 31, for land to be acquired for redistribution. The State could not provide compensation for the extensive land redistribution and also have the resources left to fulfil other welfare objectives.

This was the first of many policies pursued to fulfil the DPSP that violated the fundamental rights. Nehru described this tension as one between the socialist policies of the State, 'which represent dynamic movement towards a certain objective', and the fundamental rights, which 'represent something static, to preserve certain rights'.¹⁹

State laws implementing land reforms were challenged in courts as unconstitutional. In *Sir Kameshwar Singh v Province of Bihar*,²⁰ the Patna High Court struck down the Bihar Management of Estates and Tenures Act 1949 as unconstitutional for discriminating between rich and poor landowners' compensation, violating the right to equality under Article 14.

While the State's appeal in *Kameshwar Singh* was pending in the Supreme Court, the Constituent Assembly which, at the time, was the Provisional Parliament, passed the Constitution (First Amendment) Act 1951, shrinking the right to private property to enable positive transfers/entitlements to specific groups of farmers, and giving effect to the DPSP under Article 39.

The First Amendment created a list of preferred legislation called the Ninth Schedule. Article 31B stated that laws listed in the Ninth Schedule could not become void on the ground that they violated any Fundamental Right. The government proposed to protect all land redistribution legislation by including it in the Ninth Schedule. In 1951, the First Amendment was challenged in the Supreme Court in *Shankari Prasad Singh Deo v Union of India*.²¹ The Court held that Parliament was empowered to amend the Constitution without any

restrictions, as long as the procedure for amendment under Article 368 was followed.

The First Amendment amended strong substantive rules in two ways: (i) it created the Ninth Schedule and opened the gates to potentially unlimited exceptions to the fundamental rights, creating strong incentives for interest groups to seek favourable transfers; and (ii) it formally amended the language of the fundamental rights, weakening them in order to incorporate the DPSP. However, the problem of reconciling the DPSP with the fundamental rights was not resolved completely.

An important part of the balancing act between negative and positive rights was the compensation provided for infringement of property rights. If those whose property rights were taken were fully compensated, providing positive transfers to further egalitarianism became impossible. In *State of West Bengal v Bela Banerjee*,²² the Supreme Court held the West Bengal Land Development and Planning Act 1948 unconstitutional for violating principles of just compensation. This decision prompted Parliament to pass the Constitution (Fourth Amendment) Act 1955.

In *Karimbil Kunhikoman v State of Kerala*,²³ the Supreme Court held that the type of lands that the Kerala Agrarian Relations Act 1961 sought to acquire were not protected under the exceptions in Article 31A(1)(a). In response, Parliament enacted the Seventeenth Amendment, and expanded the positive entitlements to more groups by granting exceptions to Article 31.

The Supreme Court reviewed the Seventeenth Amendment in the case of *Sajjan Singh v State of Rajasthan*,²⁴ on the question of Parliament's power to amend the Constitution. The Court's ruling confirmed that Parliament's powers to amend the Constitution were absolute as long as the proper amendment procedure was followed.

The Seventeenth Amendment also marked the end of an era with Nehru's death. Indira Gandhi wanted extensive socialism, expanding redistribution in scope and by including more groups. In May 1967, she announced the Ten-Point Programme, outlining redistributive policies like nationalisation of banks, insurance, curbing monopolies, land reforms, urban land ceiling, and rural housing.

Before the government could launch this programme, the power of Parliament to amend the Constitution was reviewed by the Supreme Court in a challenge to constitutionality of the Ninth Schedule. In *Golak Nath v State of Punjab*,²⁵ the majority opinion held that in future Parliament could not amend the Constitution to abridge any fundamental right. This was the beginning of frequent clashes

between the government and the judiciary on the question of contracting the fundamental rights to create exceptions for interest groups.

While the Supreme Court did not change any procedural constraints on the amending power of Parliament, it imposed a content-based constraint by excluding the fundamental rights. As a backlash to *Golak Nath*, the government enacted the Constitution (Twenty-fourth Amendment) Act 1971, which expressly stated that Parliament could amend the fundamental rights in [Part III](#) of the Constitution.

Immediately after, in *Rustom Cavasjee Cooper v Union of India*,^{[26](#)} the Supreme Court held the Banking Companies (Acquisition and Transfer of Undertakings) Act 1970 void for violating Articles 14, 19, and 31(2).

To remove the problems posed by the Supreme Court enforcing the fundamental rights, Parliament set out to amend the Constitution to expand positive entitlements furthering the DPSP. The Constitution (Twenty-fifth Amendment) Act 1971 took away the supremacy of the fundamental rights. It explicitly stated that laws giving effect to the DPSP in Articles 39(b)–(c) shall not be deemed void, even if they were inconsistent with the fundamental rights guaranteed under Articles 14, 19, and 31. This Amendment remains valid and certain welfare policies under the DPSP trump the fundamental rights. The prior position was that the DPSP were unenforceable in a court of law, and in case of any conflict, fundamental rights would be enforced. However, this came in the way of enabling positive transfers, and the Twenty-fifth Amendment made the DPSP enforceable.^{[27](#)}

The Twenty-fifth Amendment was the biggest blow to the fundamental rights guaranteed in the Constitution. All types of special-interest legislation, enabling transfers, redistributions, creating discriminatory and regulatory rents, and positive entitlements, became constitutional as long as they were linked to the DPSP.

Despite the Twenty-fifth Amendment, legislation added to the Ninth Schedule was being battled in court. Two Kerala land reform laws, added to the Ninth Schedule, were challenged in the Supreme Court in *Kesavananda Bharati*. In a fractured 7–6 opinion, the Supreme Court recognised Parliament’s power to amend the Constitution, but also protected individual rights by formulating the basic structure test. As a result, Parliament could amend the fundamental rights, but such amendments had to pass the basic structure test, that is, the amending power of Parliament could not be exercised in a manner such as to destroy the basic structure of the Constitution.

The Supreme Court enumerated a non-exhaustive list of features forming the

basic structure; the preamble, supremacy of the Constitution, republican and democratic form of government, separation of powers, federalism, some fundamental rights, *etc.* The ruling substantively curtailed the power of Parliament to amend the Constitution and clarified that some parts of the Constitution were out of bounds of the amendment power of Parliament. However, not all the fundamental rights were part of the basic structure. Post-Emergency, the real procedural and substantive effect of this judicial ruling was functional; this effect is discussed below in the discussion on Phase II.

As part of the Ten-Point Programme, the Indira Gandhi-led government pledged to conduct more extensive agrarian redistribution. Positive entitlements now extended to urban as well as rural tenants against the interests of landowners. Various States passed laws and amendments to reduce the ceiling on family landholdings. Parliament, with renewed authority to amend the Constitution, enacted the Constitution (Thirty-fourth Amendment) Act 1974 adding twenty State laws to the Ninth Schedule.

In 1972–74, the government nationalised a number of firms, especially coal mines,^{[28](#)} copper,^{[29](#)} general insurance,^{[30](#)} and textiles.^{[31](#)} In 1973, the government restricted new production activity to a very narrow set of industries and large firms.^{[32](#)} It introduced greater regulation for foreign exchange and foreign goods^{[33](#)} and revived legislation regulating prices of essential commodities.^{[34](#)} This prompted the Thirty-ninth Amendment,^{[35](#)} adding thirty-eight laws to the Ninth Schedule, and the Fortieth Amendment^{[36](#)} in 1976, adding sixty-four laws to the Ninth Schedule.

The fundamental rights were further weakened and exceptions for interest groups were created with alarming frequency. In each case the negative rights of property owners, businessmen, and shareholders were contracted to expand the positive entitlements of customers, debtors, labour unions, and employees.

During this economic reorganisation, in 1975, the Allahabad High Court found Indira Gandhi guilty of electoral malpractice and she declared a state of internal emergency on 25 June 1975. Parliament amended the Constitution to withdraw the election of the Prime Minister from the scope of judicial review.^{[37](#)}

During the Emergency, Indira Gandhi attempted to stack the Supreme Court with judges favourable to the government policy. The Constitution (Forty-second Amendment) Act 1976 stripped the Supreme Court of jurisdiction to review State laws and stripped the High Courts of the power to review central laws. The Forty-second Amendment was the most comprehensive constitutional amendment and had important implications for substantive rules, and the procedure to amend the Constitution. To nullify the effect of *Kesavananda*

Bharati, the Amendment held ‘that there shall be no limitation whatever on the constituent power of Parliament to amend’ the Constitution, and that no amendment ‘shall be called in question in any court on any ground’.

Before these changes could take effect, Indira Gandhi lost the election and in 1977–78 the Janata Party government passed the Forty-third³⁸ and Forty-fourth³⁹ Amendments, undoing many of the changes made by Indira Gandhi’s government, thereby restoring democratic institutions. In particular, the restrictions on judicial review were removed. However, in keeping with its socialist leanings, the new government deleted the right to private property under Article 31, but did not delete Article 31C, which gave the DPSP primacy over the fundamental rights.

At the end of Phase I, in 1980, the fundamental rights were severely weakened and were very vulnerable to interest-group capture. Of the forty-five constitutional amendments, eleven directly amended the fundamental rights. Each instance amended more than one fundamental right. One-hundred-and-eighty-five laws were exempt from judicial review due to the protection of Article 31B and the Ninth Schedule.

2. Phase II (Post-1980): Amendment by Interpretation

To understand the framework of rules operational after 1980, one must understand the impact of *Kesavananda Bharati*. The ruling was upheld in *Minerva Mills v Union of India*,⁴⁰ confirming the basic structure test for amendments to the Constitution. This did not protect all fundamental rights, only those that formed the basic structure of the Constitution. It established that Articles 14, 19, and 21 are part of the basic structure, but other fundamental rights, like property rights under Article 31, may not form the basic structure.

The Supreme Court’s rulings in *Minerva Mills* and *Waman Rao v Union of India*⁴¹ reaffirmed that the basic structure of the Constitution could not be amended. The Court did not provide an exhaustive list of articles that formed the basic structure and therefore rendered unamendable. The Court had also ruled that the question of whether an amendment violated the basic structure was to be *judicially determined*. While the judiciary could review parliamentary amendments for violation of the basic structure, there was no similar test for judicial amendments by interpretation.

This ensured that constitutional amendments could be vetoed *ex post* by the

judiciary, if, according to the judiciary, the amendment violated the basic structure test. This posed an additional hurdle for interest groups seeking formal constitutional amendments from Parliament, because such amendments required *ex post judicial approval*, making amendments through Parliament more costly.

Substantive rules were frequently amended and weakened before and during the Emergency, which affected the post-Emergency era. Some fundamental rights continue to remain subject to the DPSP. The deletion of the right to property meant that even though laws included in the Ninth Schedule may be potential violations of the basic structure test, there is no substantive right which the judiciary can enforce in attempting to curtail interest groups seeking positive entitlements. Therefore, demand to add legislation to the Ninth Schedule was reduced, since such legislation would now be considered constitutional.

Attempts to formally change procedural rules by Parliament did not fare much better in this phase. One draft of the Forty-fourth Amendment attempted to add the requirement of a referendum for constitutional amendments—but it did not pass in Parliament. However, the *Kesavananda Bharati* precedent de facto strengthened the procedure to amend the Constitution by requiring *ex post* judicial approval.

The interaction between constitutional rules in this period caused two outcomes: (i) the weakening of substantive rules by frequent amendment; and (ii) increased difficulty in amending the Constitution (due to the basic structure test, which exposed all such additions to *post facto* judicial ratification).

The fundamental rights were still amended by Parliament. However, the manner in which the DPSP were read into the fundamental rights, and the process by which special classes of positive entitlements were created, shifted to the judiciary for the most part. Previously, legislators had invoked the DPSP to amend the Constitution; the Supreme Court now embarked on the same journey. In making this explicit, the Supreme Court held that the ‘harmony and balance between fundamental rights and directive principles is an essential feature of the basic structure of the Constitution’.⁴²

The Court started diluting locus standi requirements. Traditionally, the law required that only individuals whose rights had been violated or who were directly adversely affected by the action could approach the courts. In 1981, the Supreme Court held: ‘Where a legal wrong or a legal injury is caused to a person ... and such person ... [is] unable to approach the court for relief, any member of the public can maintain an application for an appropriate direction, order or writ ...’⁴³

Post-1980, groups previously unable to access judicial remedies were

represented in the courts. Article 23, which gives individuals the right to be free from human trafficking and forced labour, was interpreted for the first time and enforced.⁴⁴ This oppressed class previously had no access to the judiciary. The Court has also expanded the fundamental rights as enforceable against private persons in some cases, where previously they were only enforceable against the State.

Not all litigation led to enforcing *existing* rights for newly enabled groups. In many cases, an *expansive* interpretation and/or additions to the Right to Life under Article 21 was justified using the DPSP.⁴⁵ In a spate of litigation since 1980, the Court has read many of the positive entitlements listed in the unenforceable DPSP into Article 21.

Previously, cases reviewed by the Supreme Court were on violations of Articles 14, 19, and 31, because the State created entitlements for special groups as part of its economic policy. The expansion of right to life concerned specific classes, but based on social and not economic policy: for instance, rights of undertrials, convicts, and prisoners;⁴⁶ the right to a speedy trial;⁴⁷ the right to legal aid;⁴⁸ and the right to privacy.⁴⁹ These cases included both negative and positive action by the State, especially in the case of right to legal aid also provided for under Article 39A of the DPSP.

This was a big change in direction for the Supreme Court, where the Court upheld positive rights in individual cases, but it previously only enforced the negative component of Article 21. In 1960, in *Re Sant Ram*,⁵⁰ the Court held that the right to livelihood is included in the freedoms guaranteed under Article 19 in a limited sense, but not included in Article 21.⁵¹ However, this view shifted dramatically and the Court expressly read into the right to life the DPSP under Article 39(a) to include the ‘right to an adequate means of livelihood’. In 1986, the Court held ‘it would be sheer pedantry to exclude the right to livelihood from the content of the right to life’.⁵²

In *Bandhua Mukti Morcha v Union of India*, the Court held that the ‘right to live with human dignity enshrined in Article 21 derives its life breath from the Directive Principles of State Policy and particularly ... Articles 41 and 42’.⁵³ The right to dignity now includes the right of women against rape.⁵⁴

The Court has defined the right to health to include healthy working conditions for labourers, preventive care for women and children, and State medical care.⁵⁵ In *Paschim Banga Khet Mazdoor Samity v State of West Bengal*,⁵⁶ the Court held that failure by a government hospital to provide timely medical treatment violates Article 21.

In *Francis Coralie v Union Territory of Delhi*, the Supreme Court clarified that Article 21 includes dignity and the 'bare necessities of life such as adequate nutrition, clothing and shelter and facilities for reading, writing, and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings'.⁵⁷

In several cases,⁵⁸ the Court read shelter as a basic right. In *State of Himachal Pradesh v Umed Ram Sharma*, the Court held that the right to life 'embraces not only physical existence of life but the quality of life and for residents of hilly areas, access to road is access to life itself'.⁵⁹ The Supreme Court has taken the right to life to also include the 'finer facets of human civilisation which makes life worth living' including 'tradition and cultural heritage'.⁶⁰ It has expanded the right to include the 'right to live guaranteed in any civilized society implies the right to food, water, decent environment, education, medical care, and shelter'.⁶¹

Under the expanded view of the right to life, the Supreme Court has held that a citizen 'has a fundamental right to free education up to the age of 14 years'.⁶² This has now become a formal right with the addition of Article 21A.⁶³

The biggest expansion of the the right to life was in reading Articles 21, 47, 48A, and 51A(g) together, with the Court opening the gates to environmentalist interest groups. The Court has read that the right to life includes ancillary rights like the right to a clean environment,⁶⁴ clean drinking water,⁶⁵ and clean air.⁶⁶

The 1980s witnessed various groups approaching the judiciary to enforce specific rights and positive entitlements.⁶⁷ 'Pre-Emergency clientele essentially consisted of landlords whose lands were about to be taken away ... industrialists whose businesses were about to be nationalized, higher caste applicants opposing reservations ... The poor and disadvantaged could never reach the Court.'⁶⁸

Sathe's argument highlights first that the Supreme Court reduced the costs for approaching the court, allowing representation for the disadvantaged. Secondly, the pre-Emergency clientele of the Court had their negative rights violated by impugned action or legislation. Groups demanding positive entitlements sought relief from the legislature. Post-Emergency, interest groups were petitioning a different forum as predicted—the judiciary—to expand and enforce positive rights and entitlements.

While this does not imply that there were no formal amendments to the fundamental rights in Parliament, more demands for amendments have shifted to the judiciary. Since 1980, ten⁶⁹ out of fifty-five amendments (18.1 per cent)

enacted by Parliament have amended fundamental rights. Four of these amendments have specifically added laws to the Ninth Schedule.⁷⁰ Eighty-one of the ninety-seven laws added to the Ninth Schedule in this period were land reform laws. While Article 31 was deleted in 1978, seventy-three of the ninety-seven laws (75 per cent) added to the Ninth Schedule in this period were amendment acts where the original legislation was already in the Ninth Schedule; the constitutional amendment sought to expand the existing constitutional protection to include these amendments.

Since Article 31 had been deleted, and fundamental rights weakened, these amendments by Parliament were less frequent, created fewer exceptions to existing fundamental rights, and there was less interest-group activity in Parliament. Important exceptions are Articles 15 and 16, leading to interest-group activity in the judiciary and in Parliament seeking exceptions to constitutional constraints on reservations in jobs and educational institutions.

In 1992, the VP Singh-led government created a 27 per cent quota of all government jobs for 'Other Backward Classes' (OBCs). The 27 per cent quota for OBCs was in addition to the 22.5 per cent of all government jobs reserved for Scheduled Tribes (ST)/Scheduled Castes (SC). This caused public protests and litigation and in *Indra Sawhney v Union of India*,⁷¹ the Supreme Court held that the reservation policy was constitutionally valid, but such reservations must not exceed 50 per cent of all jobs. This was essentially amendment by interpretation of Article 16, as there were no formal guidelines on the proportion of reservations in the Constitution.

Subsequently, Tamil Nadu created a quota of 69 per cent for government jobs and admissions to educational institutions.⁷² Parliament enacted the Constitution (Seventy-sixth Amendment) Act 1994 to exempt the legislation from judicial review by adding it to the Ninth Schedule. This is an exception, as it was included in the Ninth Schedule, while most other States were petitioning the judiciary.

In *Indra Sawhney*, the Court held that reservations made for posts were limited to initial appointment and did not extend to promotions. In response, Parliament passed the Constitution (Seventy-seventh Amendment) Act 1995 to specifically allow for promotions in the reserved category. When the Court held that the backlog of unfilled vacant posts could not form a separate category, the government passed the Constitution (Eighty-second Amendment) Act 2000. In *Union of India v Virpal Singh Chauhan*⁷³ and *Ajit Singh Januja v State of Punjab*,⁷⁴ the Court prevented SC/ST candidates, promoted on the rule of reservation, from enjoying seniority, which prompted the Constitution (Eighty-

fifth Amendment) Act 2002.

These constitutional amendments were challenged before the Supreme Court. Unusually, the Court overruled its prior rulings, in upholding all three constitutional amendments, which enabled exceptions to the 50 per cent rule formulated by the Court.⁷⁵

In reservations in educational institutions, in *TMA Pai v State of Karnataka*,⁷⁶ the Court held that the State cannot impose quotas in private unaided institutions. In response, Parliament enacted the Constitution (Ninety-third Amendment) Act 2005, amending Article 15, to allow for reservations in private unaided colleges, except minority institutions under Article 30(1). This amendment has been challenged in the Supreme Court⁷⁷ and the question of violating the basic structure was left to a larger bench.

What makes these relatively recent constitutional amendments both interesting and insignificant is that post-*Kesavananda Bharati*, interest groups benefit *only if* they secure judicial approval of constitutional amendments. This has led to interest groups seeking favourable interpretations directly through the judiciary, and approaching Parliament *only when they fail to secure such interpretation*. Success with Parliament amending the Constitution is irrelevant until the judiciary ratifies such amendments.

What is unusual about reservations is that both the judiciary and State and Central legislatures have been lobbied to gain exceptions and entitlements for specific groups—with success at the legislature. There may be many reasons—first, uncertainty over a favourable judicial outcome, or certainty over a negative judicial outcome. Secondly, the interest groups in question have lower costs of approaching the legislature, due to social organisation factors. However, one aspect conforming to the trend is that, relative to the demand, there are fewer amendments in Parliament, especially fewer additions to the Ninth Schedule. In fact, there have been no additions to the Ninth Schedule since 1995, despite frequent demands from interest groups.⁷⁸

IV. CONCLUSION

Indian constitutional history has witnessed a slow evolution in constitutional rules. This change in the constraints—imposed by the fundamental rights and costs imposed by procedures to amend the Constitution—changed the incentives for interest groups. While both the Supreme Court and Parliament are very

important in this evolution of rules, the interest-group explanation provides us with the demand-side impetus for rule changes in specific forms and forums.

From 1950 to 1980, almost a quarter of the constitutional amendments amended the fundamental rights, mostly to accommodate DPSP. Post-1980, Parliament enacted formal amendments, but the percentage amending the fundamental rights dropped and some of these amendments had little to do with furthering DPSP. However, the Constitution has not remained static, and has evolved significantly in this period due to amendment by the judiciary. Post-1980 India witnessed an explosion in litigation on welfare issues, reading in various DPSP by amending the interpretation of Article 21.

The consequence is clear: with few exceptions, there has been a shift in interest groups demanding rule changes from Parliament to the judiciary. This trend is likely to continue unless there is a substantial change in the framework of rights and procedures, and the consequent incentives for interest groups demanding rule changes.

¹ Twenty-one Amendments have directly amended fundamental rights.

² HM Seervai, *Constitutional Law of India*, vol 2 (4th edn, Universal Book Traders 2002) 1921–2020; SP Sathe, *Judicial Activism in India* (Oxford University Press 2011) 209–35.

³ The judiciary getting more involved in everyday matters and rights and entitlements of citizens is discussed in Upendra Baxi, ‘Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India’ (1985) 4 *Third World Legal Studies* 107; Burt Neuborne, ‘The Supreme Court of India’ (2003) 1 *International Journal of Constitutional Law* 476; Pratap Bhanu Mehta, ‘The Rise of Judicial Sovereignty’ (2007) 18 *Journal of Democracy* 71.

⁴ Baxi ([n 3](#)); Neuborne ([n 3](#)); Mehta ([n 3](#)).

⁵ Economic analysis can be used to analyse political behaviour. Public Choice theory extends the self-interested individual assumptions from the market to political behaviour. See James M Buchanan and Gordon Tullock, *The Calculus of Consent* (Liberty Fund 1999).

⁶ I present a positive theory of constitutional change and maintenance to explain this trend in Indian constitutional history. I do not discuss the normative implications of frequent amendments, or positive entitlements these amendments enabled. The purpose of this chapter is not to analyse the content of each amendment.

⁷ Self-interest only requires that the interest of his opposite number in the exchange be excluded from consideration. The individual legislator, judge, bureaucrat, or political entrepreneur can be motivated for various reasons. The motivation for the rule change may be that the individual truly believes in a different and more just distribution of resources. But the pursuit of the rule change as an end would be characterised as pursuing his self-interest. See Buchanan and Tullock ([n 5](#)).

⁸ Robert D Tollison, ‘Rent Seeking: A Survey’ (1982) 35 *Kyklos* 575.

⁹ Susan M Olson, ‘Interest-group Litigation in Federal District Court: Beyond the Political Disadvantage Theory’ (1990) 52 *Journal of Politics* 854.

¹⁰ George J Stigler, ‘The Theory of Economic Regulation’ (1971) 2 *The Bell Journal of Economics and Management Science* 3; Sam Peltzman, ‘Toward a More General Theory of Regulation’ (1976) 19 *Journal of Law and Economics* 211.

¹¹ Warren J Samuels, 'Interrelations between Legal and Economic Processes' (1971) 14 Journal of Law and Economics 435.

¹² Constitution of India 1950, arts 2, 11, 59(3), 73(2), 75(6), 97, 105(3), 124(1), 125(2), 133(3), 135, 137, 148(3), 158(3), 171(2), 221(2), 343(3), 348(1), and Schedules 5 and 6.

¹³ Constitution of India 1950, arts 54, 55, 73, 162, 124–47, 214–31, 241, 245–55, 368; and any of the Lists in the Seventh Schedule.

¹⁴ The only exception is the First Amendment, passed by a unicameral Provisional Parliament of India in 1951, before the bicameral legislature was established.

¹⁵ Nick Robinson and others, 'Interpreting the Constitution: Supreme Court Constitutional Benches since Independence' (2011) 46(9) Economic and Political Weekly 27.

¹⁶ Paul H Rubin, Christopher Curran, and John F Curran, 'Litigation versus Legislation: Forum Shopping by Rent Seekers' (2001) 107 Public Choice 295.

¹⁷ Seervai ([n 2](#)) 1921–2020; Sathe ([n 2](#)) 209–35.

¹⁸ (1973) 4 SCC 225.

¹⁹ *Parliamentary Debates*, vol 12 (Lok Sabha Secretariat 1951) Part 2, col 8820–22.

²⁰ AIR 1950 Pat 392.

²¹ AIR 1951 SC 458.

²² AIR 1954 SC 170.

²³ AIR 1962 SC 723.

²⁴ AIR 1965 SC 845.

²⁵ AIR 1967 SC 1643.

²⁶ (1970) 1 SCC 248.

²⁷ In *Kesavananda Bharati*, the Court held that the Twenty-fifth Amendment violates the basic structure insofar as it violates the harmony between DPSP and Fundamental Rights. However, not all Fundamental Rights in [Part III](#) are part of the basic structure of the Constitution. Therefore, if laws giving effect to the DPSP violate a fundamental right that is not part of the basic structure, the essence of the Twenty-fifth Amendment holds.

²⁸ Coking Coal Mines (Nationalisation) Act 1972; Coal Mines (Nationalisation) Act 1973.

²⁹ Indian Copper Corporation (Acquisition of Undertaking) Act 1972.

³⁰ General Insurance Business (Nationalisation) Act 1972.

³¹ Sick Textile Undertakings (Nationalisation) Act 1974.

³² Monopolies and Restrictive Trade Practices Act 1969.

³³ Smugglers and Foreign Exchange Manipulators (Forfeiture of Properties) Act 1976.

³⁴ Essential Commodities Act 1955.

³⁵ Constitution (Thirty-ninth Amendment) Act 1975.

³⁶ Constitution (Fortieth Amendment) Act 1976.

³⁷ Constitution (Thirty-ninth Amendment) Act 1975, s 4.

³⁸ Constitution (Forty-third Amendment) Act 1977.

³⁹ Constitution (Forty-fourth Amendment) Act 1978.

⁴⁰ (1980) 3 SCC 625.

⁴¹ (1981) 2 SCC 362.

⁴² *Minerva Mills* ([n 40](#)) [56].

⁴³ *SP Gupta v Union of India* (1981) Supp SCC 87 [17].

⁴⁴ *People's Union for Democratic Rights v Union of India* (1982) 3 SCC 235.

⁴⁵ Sathe ([n 2](#)) 209–35.

⁴⁶ *Sunil Batra v Delhi Administration* (1978) 4 SCC 494; *Prem Shankar Shukla v Delhi Administration*

(1980) 3 SCC 526; *Munna v State of Uttar Pradesh* (1982) 1 SCC 545; *Sheela Barse v Union of India* (1986) 3 SCC 596.

⁴⁷ *Hussainara Khatoon (I) v Home Secretary, State of Bihar* (1980) 1 SCC 81; *Kadra Pahadiya v State of Bihar* (1983) 2 SCC 104; *Common Cause v Union of India* (1996) 4 SCC 33; *Common Cause v Union of India* (1996) 6 SCC 775; *Raj Deo Sharma v State of Bihar* (1998) 7 SCC 507.

⁴⁸ *MH Hoskot v State of Maharashtra* (1978) 3 SCC 544; *Khatri (2) v State of Bihar* (1981) 1 SCC 627; *Suk Das v Union Territory of Arunachal Pradesh* (1986) 2 SCC 401.

⁴⁹ *Kharak Singh v State of Uttar Pradesh* AIR 1963 SC 1295; *Gobind v State of Madhya Pradesh* (1975) 2 SCC 148; *R Rajagopal v State of Tamil Nadu* (1994) 6 SCC 632; *People's Union for Civil Liberties v Union of India* (1997) 1 SCC 301; *Mr 'X' v Hospital 'Z'* (1998) 8 SCC 296.

⁵⁰ AIR 1960 SC 932.

⁵¹ This view was held until the early 1980s and was affirmed in *AV Nachane v Union of India* (1982) 1 SCC 205; *Begulla Bappi Raju v State of Andhra Pradesh* (1984) 1 SCC 66.

⁵² *Olga Tellis v Bombay Municipal Corp* (1985) 3 SCC 545 [33]; *DTC v Mazdoor Congress* (1991) Supp (1) SCC 600.

⁵³ (1984) 3 SCC 161 [10].

⁵⁴ *Bodhisattwa Gautam v Subhra Chakraborty* (1996) 1 SCC 490.

⁵⁵ *Parmanand Katara v Union of India* (1989) 4 SCC 286.

⁵⁶ (1996) 4 SCC 37.

⁵⁷ (1981) 1 SCC 608 [8].

⁵⁸ *Olga Tellis* (n 52); *Shantistar Builders v Narayan Khimalal Totame* (1990) 1 SCC 520.

⁵⁹ (1986) 2 SCC 68 [11].

⁶⁰ *Consumer Education & Research Centre v Union of India* (1995) 3 SCC 42 [22].

⁶¹ *Chameli Singh v State of Uttar Pradesh* (1996) 2 SCC 549 [8].

⁶² *Unni Krishnan v State of Andhra Pradesh* (1993) 1 SCC 645 [175].

⁶³ Constitution (Eighty-sixth Amendment) Act 2002.

⁶⁴ *Indian Council for Enviro-Legal Action v Union of India* (1996) 3 SCC 212; *MC Mehta v Union of India* (1996) 4 SCC 750; *Vellore Citizens' Welfare Forum v Union of India* (1996) 5 SCC 647; *Narmada Bachao Andolan v Union of India* (2000) 10 SCC 664.

⁶⁵ *AP Pollution Control Board II v Prof MV Nayudu* (2001) 2 SCC 62.

⁶⁶ *MC Mehta v Union of India* (1998) 6 SCC 63.

⁶⁷ Baxi (n 3) 109. While these groups were formed by civil society actions and social movements, instead of the market, they still represented very specific interests, demanding specific entitlements and relief.

⁶⁸ Sathe (n 2) 210.

⁶⁹ Forty-seventh, Fiftieth, Sixty-sixth, Seventy-sixth, Seventy-seventh, Seventy-eighth, Eighty-first, Eighty-fifth, Eighty-sixth, and Ninety-seventh Amendments.

⁷⁰ Forty-seventh, Sixty-sixth, Seventy-sixth, and Seventy-eighth amendments.

⁷¹ (1992) Supp (3) SCC 217.

⁷² The Tamil Nadu Backward Classes, Scheduled Castes and Scheduled Tribes Act 1993.

⁷³ (1995) 6 SCC 684.

⁷⁴ (1996) 2 SCC 715.

⁷⁵ *M Nagaraj v Union of India* (2006) 8 SCC 212.

⁷⁶ (2002) 8 SCC 481.

⁷⁷ *Ashoka Kumar Thakur v Union of India* (2008) 6 SCC 1.

⁷⁸ AH Zaidi, 'Promises, Promises—That's Our Manifesto Destiny' *The Times of India* (New Delhi, 1 February 1998); 'RPI Threatens Nationwide Stir if Temple Work Begins' *The Times of India* (New Delhi, 28 December 1999); S Gupta, 'Quota Reservations: Q&A—Ashok Yadav' *The Times of India* (New Delhi, 27 July 2001); 'Parliamentary Committee Chairman Visits Mumbai' *The Times of India* (New Delhi, 4 January 2002); 'Centre to Move Bill on Quota in Promotions' *The Indian Express* (New Delhi, 9 August 2012).

CHAPTER 9

INTERNATIONAL LAW AND THE CONSTITUTIONAL SCHEMA

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I. INTRODUCTION

It is now becoming increasingly trite but nevertheless true to assert that international law in the age of globalisation is all-pervasive. There are a breathtaking number and variety of treaties—multilateral, plurilateral, and bilateral—spanning a wide area of regulation. This is accompanied by increasing institutional density in the international arena. There is also an increase in the phenomenon of labelling ‘not-so-customary norms’¹ and even soft law as custom, and applying them. At the heart of all this hectic international activity is standard setting, with corresponding increases in the costs of deviation.² Such standard setting has consequences, at times, fundamental, for individuals and entities within national borders.³ It would appear axiomatic then that international standards, and indeed such intense international engagement in areas of consequence to individuals and entities within national states, should be built on the outcomes of participatory processes, and be accountable to impacted actors (or their representatives) at the national level. However, this appears not to be the case in some countries. The Indian constitutional scheme, as currently interpreted and practised, with regard to international law is a case in point.

This chapter first considers the doctrinal debates attached to key constitutional provisions relating to international law. It then considers how Indian courts have internalised norms of international law in the light of the constitutional guidance to ‘foster respect for international law and treaty obligations’.⁴ Indian courts have been extraordinarily receptive to norms of international law and have developed domestic rights jurisprudence in dialogue with international law. Laudable as this is, there is more to the courts’ receptivity to international law. This chapter advances the hypothesis that Indian courts have internalised norms of international law by using and interpreting international law instrumentally to dispense ‘justice’, and expand their own power and discretion. In so doing the courts have often glided over distinctions between different sources of

international law, ignored hierarchies, where they exist, between norms of international law, paid little heed to the legal status or gravitas of legal norms, and created, thereby, a body of jurisprudence in relation to international law that is as assertive and far-reaching as it is puzzling. It is a body of jurisprudence, notwithstanding its seemingly expansive and progressive embrace of international law, which is incapable—given its lack of nuance and precision—of assisting in the creation, crystallisation and further development of norms of international law. This body of jurisprudence, moreover, in wresting power from Parliament, is also vulnerable, however salutary the outcomes of particular cases might be, to the charge that it is democracy denying. This is particularly problematic in the light of constitutional provisions that seemingly invest the executive with untrammelled treaty-making power. The constitutional schema, therefore, in practice has lent itself to a usurpation of power by the executive and the judiciary, leaving Parliament and ‘people power’ with a limited role in relation to international law.

II. FOSTERING RESPECT FOR INTERNATIONAL LAW

1. Article 51(c)

Article 51(c) of the Constitution directs the State to ‘endeavour to’, inter alia, ‘foster respect for international law and treaty obligations in the dealings of organised peoples with one another’.

There are several noteworthy features of Article 51(c). First, this Article falls in [Part IV](#) of the Constitution that identifies the Directive Principles of State Policy (DPSP). Although the DPSP are not intended to be ‘enforceable by any court’, they are nevertheless ‘fundamental in the governance of the country’, and it is ‘the duty of the State to apply these principles in making laws’.⁵ In the words of the Supreme Court, ‘[i]n view of Article 51 of the Constitution, this Court must interpret the language of the Constitution, if not intractable, which is after all a municipal law, in the light of the United Nations Charter and the solemn declaration subscribed to by India’.⁶ In addition, in the Court’s jurisprudence, fundamental rights are read in conjunction with the DPSP, ‘like two wheels of a chariot, one no less important than the other’.⁷ Numerous international legal norms have been read into fundamental rights,⁸ as for instance

the precautionary principle into the environmental right,⁹ thereby expanding the remit and reach of international law, and of the courts themselves.

Secondly, the State is merely obliged to 'endeavour' to foster respect for international law.¹⁰ The obligation identified in Article 51 is one of effort rather than of result, and such obligations resist tests of justiciability. Thirdly, it is unclear from the terms of Article 51(c) whether the State is obliged to foster 'respect' for international law internally, in its own conduct or as between India and other nations, or all of these.¹¹ In the absence of any limiting criteria, presumably it implies all of these. Fourthly, the juxtaposition of 'international law' with 'treaty obligations' is curious. This could be attributed, as some scholars have, to poor drafting, as 'international law' would include 'treaty obligations',¹² or it could suggest that 'international law' refers to customary international law. This in turn would imply that international customary law is not incorporated *prima facie* into Indian municipal law.¹³ Finally, the term 'organised peoples with one another' is another curiosity. Some scholars have argued that this must be read to mean the dealings of States and peoples with one another,¹⁴ while others argue that the term 'organised peoples' includes apart from sovereign states 'self-governing communities which have not secured recognition by the family of nations, yet may have the capacity to conclude certain treaties, mainly of a non-political character'.¹⁵

2. The Case Law

Notwithstanding the lively scholarly debate on the textual building blocks of Article 51(c), the courts have refrained from analysing the text in detail, preferring instead to approach the obligation to ‘foster respect for international law and treaty obligations’ in an expansive and instrumental manner.

In theory, international legal norms are not directly enforceable in India in the absence of appropriate domestic legislation giving effect to these norms.¹⁶ In practice, however, the courts have fostered respect for international law and treaty obligations by incorporating and internalising numerous international legal norms into domestic law. In their approach to international law, the courts appear to favour a certain ‘give and take and mutuality of influence’¹⁷ between different sources of international law; however, given that there are critical distinctions between sources of international law, it is worth exploring how different sources of international law have been raised and treated by the Indian courts.

Article 38 of the Statute of the International Court of Justice identifies the sources of international law as international conventions (or treaties), international custom, and general principles of law of civilised nations.¹⁸ Broadly, international conventions (or treaties) that arise through a process of conscious negotiation by States bind those States that are party to them, and international custom that evolves through consistent state practice and *opinio juris* (a sense of legal obligation) binds all States. The notion of general principles of law recognised by civilised nations is believed by many scholars to refer to legal principles developed *in foro domestico*¹⁹ and shared by legal systems. But others believe that such principles are distinguished not by where they are developed—*in foro domestico* or internationally—but by the fact that they are made objective through recognition by States.²⁰ General principles require attitudinal consistency by States, whereas custom requires behavioural consistency by States.²¹ While both require convincing evidence of general acceptance, general principles are built not on State practice but on legal expressions of moral and humanitarian considerations. These three formal sources of international law are characterised as ‘hard law’ in that they are law properly so called. In addition, there exists a vast array of norms—for instance declarations, resolutions, or decisions taken by conferences—that are characterised as ‘soft law’. The term ‘soft law’ is used to refer to ‘international

prescriptions that are deemed to lack requisite characteristics of international normativity', but which, nevertheless, 'are capable of producing certain legal effects'.²² Soft law can have persuasive value but it is by definition neither 'law' properly so called, nor binding on States. As we shall see, although the Indian courts appear to have a relatively consistent approach to treaties, they tend to blur the boundaries between custom, general principles of law, and soft law, thereby obfuscating the lines between hard and soft law, law and not law.

a. *On Treaties: Judicial Incorporation, Interpretation, and Gap Filling*

The courts have raised, used, and 'incorporated' international conventions or treaties in several ways. First, where an international treaty to which India is a party has been incorporated in domestic law, and the terms of it are unclear or ambiguous, courts have interpreted the domestic legislation in consonance or harmony with the international treaty. They do so on the basis of a prima facie presumption that Parliament did not intend to act in breach of international law and its treaty obligations. Conversely, where the law on the issue as settled in India is clear enough, the courts have held that it is unnecessary to look elsewhere (viz. international law).²³

A recent case that illustrates this general point is *Salil Bali v Union of India*.²⁴ The Court was asked to consider the constitutionality of the Juvenile Justice Act 2000, in relation to the age of a juvenile, in the light of the December 2012 Delhi rape. In upholding the constitutionality of the Act and the impugned provision, the Court relied, inter alia, on international law. It noted that the Act was:

[i]n tune with the provisions of the Constitution and the various Declarations and Conventions adopted by the world community represented by the United Nations. The basis of fixing of the age till when a person could be treated as a child at eighteen years in the Juvenile Justice (Care and Protection of Children) Act, 2000, was Article 1 of the Convention of the Rights of the Child ...²⁵

Secondly, where an international treaty to which India is a party has not been incorporated into domestic law, courts have directed the State to nevertheless give effect to it. An example of an unincorporated treaty being given effect is *People's Union for Civil Liberties v Union of India*²⁶ (the telephone tapping case), where the Court expanded Article 21 to include the right to privacy on the grounds that municipal law must be read in conjunction with international law. The International Covenant on Civil and Political Rights 1966 (Article 17) and

the Universal Declaration of Human Rights 1948 (Article 12), to which India is a party, protect the right to privacy. The Court noted that ‘the provisions of the covenant, which elucidate and go to effectuate the fundamental rights guaranteed by our Constitution, can certainly be relied upon by courts as facets of those fundamental rights and hence, enforceable as such’.²⁷

Thirdly, where an international treaty to which India is a party has not been incorporated into domestic law, in addition to giving effect to the treaty, the Court has, at least in one notable instance, judicially ‘incorporated’ or legislated it. In *Vishaka v State of Rajasthan*,²⁸ the Supreme Court ‘in the absence of enacted domestic law’ laid down ‘guidelines and norms’ on sexual harassment to be observed at all workplaces until a legislation is enacted for the purpose. The Court noted, ‘it is now an accepted rule of judicial construction that regard must be had to international conventions and norms for construing domestic law when there is no inconsistency between them and there is a void in the domestic law’.²⁹ Further, ‘[a]ny international convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into these provisions [Articles 14, 15, 19, and 21 of the Constitution] to enlarge the meaning and content thereof and to promote the object of constitutional guarantee’.³⁰

The Supreme Court herein ‘made law’, and, it did so with reference to international law. The Court referred to the Convention on Elimination of All Forms of Discrimination Against Women 1980, to which India is a party, subject to some reservations, but is as yet an unincorporated treaty, to derive legitimacy for its excursion into lawmaking. In order to derive authority for its lawmaking, the Court claimed to be acting ‘in exercise of the power available under Article 32 of the Constitution for enforcement of the fundamental rights’.³¹ And, it emphasised that this would be treated as the law declared by this Court under Article 141 of the Constitution. It is worth noting that the Court’s power under Article 141 of the Constitution is to ‘declare law’, a power which only binds courts and tribunals throughout India. The Court does not have the power, as it has here been assumed, to ‘make law’ binding upon all citizens of India.³² Giving effect to unincorporated treaties is in itself a usurpation of the legislative function,³³ let alone making law to act as a place holder until Parliament steps in. In taking an expansive view of international law in *Vishaka*, the judiciary ‘made law,’ extended its own reach, and encroached on the domain of Parliament.

Although the extent to which the Supreme Court went in *Vishaka* may be unusual, scholars have documented a trend among the world’s common law

judges towards the phenomenon of ‘creeping monism’—the trend of judges to utilise unincorporated (human rights) treaties in their work.³⁴ Judges have welcomed this trend because ‘it respects the universality of fundamental human rights and freedoms and the vital role of an independent judiciary in reconciling the competing claims of individuals and groups of persons with the general interests of the community’.³⁵ Such a trend, nevertheless, raises questions about where and how national courts will strike the balance between their roles as international actors (sympathetic to universal values) on the one hand and as domestic constitutional actors (subject to constitutional constraints) on the other.

Finally, and in a similar vein, courts do not hesitate to refer favourably even to treaties to which India is not a party. A recent case in point is *G Sundarrajan v Union of India*,³⁶ where the Supreme Court was asked to consider whether setting up the Kudankulam nuclear power plant was contrary to public policy. In holding that it was not, as it served the larger public interest, the Court nevertheless stressed the obligation that the relevant authorities were under to ensure that adequate nuclear safety measures were put in place before the plant commences operation. In this context, the Court drew attention to several international treaties, including one that India had not ratified.³⁷ Quoting extensively from this instrument, the Court noted, ‘India is not a signatory to the same but the said Convention is worth referring to in order to understand and appreciate the worldwide concern for public safety.’³⁸ Although the Court did not seek to give effect to this treaty, it uses this unratified treaty to provide context and establish benchmarks. Another recent case in point is the *National Legal Service Authority v Union of India (Transgenders case)*, where the Court referred to numerous treaties under the heading ‘India to follow International Conventions’, including the Convention against Torture 1980, to which India is not a party.³⁹ The Court recited a string of relevant treaties without indicating whether or not India is a party to these treaties, and distinguishing the legal effects thereon.

In relation to treaties to which India is not a party, the Gujarat High Court decision in *Ktaer Abbas Habib Al Qutaifi v Union of India*⁴⁰ goes perhaps the furthest. The Court in this case read the principle of non-refoulment, drawn from the Refugee Convention to which India is not a party, into Article 21. Citing Article 51(c) and Article 253, the Court held ‘[t]he principle of “non-refoulment” is encompassed in Article 21 of the Constitution of India and the protection is available, so long as the presence of the refugee is not prejudicial to the national security’.⁴¹ In doing so, however, it noted that the principle of non-

refoulment ‘forms part of general international law’,⁴² and that ‘[t]here is substantial, if not conclusive, authority that the principle is binding on all states, independently of specific assent’.⁴³ Although the Court asserted rather than established this principle as one of general international law, this claim does provide cover to the Court in its attempt to incorporate it into domestic law.

b. *On Customary and ‘Not-So-Customary’ Norms*

As with treaties, the Indian courts appear inclined to incorporate international customary and not-so-customary norms into domestic law. The classic case in this regard is the *Vellore Citizens’ Welfare Forum* case, where the Court held that the international environmental law principles of precaution and ‘the polluter pays’ are part of domestic environmental law, as well—arguably—as customary international law.⁴⁴ In the Court’s reasoning Article 21, and other relevant constitutional provisions,⁴⁵ as well as India’s network of statutory environmental laws, were sufficient to render the precautionary and ‘the polluter pays’ principles part of domestic environmental law.⁴⁶ It is worth noting that these constitutional provisions contain a mandate ‘to protect and improve’ the environment, and the network of environmental laws seeks to further this mandate. At the time there was no reference in any environmental legislation to the concept of precaution, and the Court did not identify one either. Further, the Court declared that ‘sustainable development as a balancing concept between ecology and development has been accepted as a part of the customary international law although its salient features are yet to be finalized by international law jurists’.⁴⁷ It reached this conclusion by reference to a series of soft law instruments, including the Rio Declaration, Agenda 21, and the Bruntland Report.⁴⁸ It listed several principles as ‘salient principles’ of ‘Sustainable Development’⁴⁹ and identified the precautionary and ‘polluter pays’ principles as ‘essential features of sustainable development’, noting that ‘[e]ven otherwise once these principles are accepted as part of the Customary International Law there would be no difficulty in accepting them as part of the domestic law’.⁵⁰ The guarded phrasing of this last statement (‘even otherwise’ and ‘once’) appears to leave the question of whether precaution and ‘polluter pays’ are custom open. However, subsequent judgments have understood the *Vellore* case to suggest that these principles are custom.⁵¹ Indeed, even the Canadian courts have cited the Indian courts as recognising precaution as

custom.⁵² The *Vellore* Court's reasoning is riddled with logical leaps,⁵³ but suffice it to say here that both the precautionary and 'polluter pays' principles are contested in international law.

Although there are numerous references to the precautionary principle in international law,⁵⁴ there are divergent views on whether the precautionary principle is properly so called, how it might best be defined, what its precise content is, what obligations it creates and on whom, and whether, in its strong version, it lends itself to actualisation.⁵⁵ As such, to characterise this principle as custom (if indeed this is what the *Vellore* Court did), without the benefit either of serious forensic analysis of state practice and *opinio juris* or at least of compelling argument, is at best intellectual sloppiness. The Court did not address any of these central queries. Yet it directed the government 'to implement the precautionary principle'.

There are several concerns with the approach the Court followed in this case. First, having defined little and promised much, in essence the Court put itself forward as the sole arbiter of what is (or is not) a situation warranting an application of the precautionary principle. Since there are no definitions, benchmarks, or boundaries, determinations can only be made on a case-by-case basis, and can only be made by the Court.

Secondly, there is something inherently 'democracy denying' about courts adopting so-called customary international law with such cheerful abandon. Customary international law of more recent vintage differs from traditional customary international law in several fundamental ways: it can arise quickly; it is based less on actual state practice and more on international pronouncements, such as UN General Assembly resolutions and multilateral treaties—many of which are aspirational; and, it seeks to regulate not the relations of States among themselves, but a State's treatment of its own citizens.⁵⁶ In sum, as some scholars have characterised it, new customary international law is less consensual and less objective than traditional customary international law, and more likely to conflict with domestic law.⁵⁷

Finally, many so-called norms of customary law do not often have sufficient legal content or precision in and of themselves to be 'norm creating',⁵⁸ as for instance the principle of sustainable development. When courts embrace such customary law into domestic systems, without adding the necessary precision and legal content into it, as the Court did in the *Vellore* case, they essentially expand their own discretion at the expense of democratic processes.

c. General Principles of Law

The case law on ‘general principles of law recognized by civilized nations’ is sparse, but one case is distinctive for its treatment, albeit telegraphic, of general principles of law as well as for its inclusion of the inchoate and contested notion of *jus cogens* into the Court’s jurisprudence. In the *State of Punjab v Dalbir Singh*,⁵⁹ the Supreme Court considered the constitutional validity of section 27 (3) of the Arms Act 1959, that imposes a mandatory death sentence for causing death through the use of prohibited arms/ammunition. In holding this section unconstitutional, the courts relied inter alia on the dicta on sentencing discretion in previous death penalty cases which they argued represented *jus cogens*. In their words:

[T]he ratio in both *Bachan Singh* and *Mithu* has been universally acknowledged in several jurisdictions across the world and has been accepted as correct articulation of Article 21 guarantee. Therefore, the ratio in *Mithu* and *Bachan Singh* represents the concept of *jus cogens* meaning thereby the peremptory non-derogable norm in international law for protection of life and liberty.⁶⁰

First, it is unclear what exactly is purported to be a peremptory norm or *jus cogens*. The ratio in *Bachan Singh*⁶¹ and *Mithu Singh*⁶² are neither identical nor capable of being distilled into a single norm of general application, let alone a peremptory norm. Secondly, the Court asserts the existence of a general principle (developed *in foro domestico* and shared across legal systems), and conflates it with the notion of *jus cogens*. Admittedly, *jus cogens* can emerge from general principles of law,⁶³ but peremptory norms represent, by definition, a higher order of norm, a norm that trumps others, and must therefore be convincingly argued and established. The Vienna Convention on Law of Treaties 1969 defines *jus cogens* as a norm ‘accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted, and which can be modified only by a subsequent norm of general international law having the same character’.⁶⁴ There is a lack of clarity in the scholarly literature on the sources of peremptory norms,⁶⁵ the content of such norms,⁶⁶ and the legal consequences thereof.⁶⁷ Scholars have also noted that it is a concept that lacks consistency in state practice.⁶⁸ Although *jus cogens* are not premised on consistency in State practice, it requires a generality of acceptance and recognition at least as high as that necessary for custom.⁶⁹ Notwithstanding its references to a few foreign judgments, the Court does not seek to demonstrate such generality of acceptance. The Court asserts rather than argues and establishes the peremptory nature of the norm, whatever it

may be. Yet these sentences have been referred to approvingly in a subsequent judgment,⁷⁰ and may well acquire a life of their own in Indian jurisprudence.

d. *Soft Law*

The courts, it appears, approach soft law—normative statements and agreements in non-legally binding or political instruments—in the same expansive and catholic fashion that they do hard law. Indeed, they frequently refer to soft law norms in the same breath as hard law. A recent case in point is *National Legal Services Authority v Union of India*,⁷¹ which quoted extensively from the Yogyakarta principles, and relied on these, among other sources, to recognise ‘transgenders’ as a third gender, and to extend to them the constitutional protections enshrined in [Part III](#). The Court, noting the discrimination faced by the transgendered community, highlighted ‘the necessity to follow the International Conventions to which India is a party and to give due respect to other non-binding International Conventions and principles’.⁷² In their view, this requires India to recognise and follow such non-binding norms.⁷³ It is worth noting that the Yogyakarta principles, fashioned not by States but by a group of international human rights experts, can best be characterised as ‘soft law’ possessing persuasive value.⁷⁴ The Court acknowledges that the Yogyakarta principles are non-binding norms, but declares, nevertheless, that they must be ‘recognized and followed’.⁷⁵

To be clear, this discussion is not intended to suggest a disdain for soft law. On the contrary, soft law expresses ‘emerging notions of an international public order’ and is ‘thus a vehicle for extending the realm of legitimate international concern’ beyond national jurisdiction.⁷⁶ Soft law provides a platform for consensus building, catalyses the development of hard law, and guides the structuring of subsequent regimes.⁷⁷ Nevertheless, courts—in reflexively and unreflectively adopting soft law—missed a valuable opportunity to assist in the crystallisation of norms contained in these instruments.

3. Fostering Respect for International Law in the Service of ‘Justice’

This survey of illustrative case law on ‘fostering respect for international law and treaty obligations’ across varied sources of international law offers many insights. The courts appear driven by their perceived constitutional mandate to dispense justice. In furthering this mandate they use international law, among other tools, in an instrumental fashion. In *Nilabati Behera v State of Orissa*, the Court noted that ‘The wide powers given to this Court by Article 32, which itself is a fundamental right, imposes a constitutional obligation on this Court to forge such new tools, which may be necessary for doing complete justice and enforcing the fundamental rights guaranteed in the Constitution ...’⁷⁸ Similarly, in *MV Elizabeth v Harwan Investment and Trading Pvt Ltd* the Court noted that ‘Legislation has always marched behind time, but it is the duty of the Court to expound and fashion the law for the present and the future to meet the ends of justice’.⁷⁹

It is evident from the case law discussed that courts use all available tools, including international law, to further their constitutional mandate to dispense justice. It is also clear that courts have developed constitutional values and rights jurisprudence in dialogue with international law. The most progressive judgments over time have relied on international (and foreign) legal norms. Recent examples include the Supreme Court’s judgment in the *Transgenders* case,⁸⁰ which extended constitutional rights protection to the transgenders community, and the Delhi High Court’s judgments in *Mohd Ahmed v Union of India*,⁸¹ which operationalised the right to health, and the *Naz Foundation* case,⁸² which decriminalised homosexuality. Indian courts have expanded constitutional protections through a blend of receptivity to international law and engagement in transnational judicial dialogue. They have thus established themselves as legitimate and active participants in the global project of arriving at and respecting universal rights and values.

It is worth noting, however, that using international law in this instrumental fashion has significant drawbacks. The Court’s use of international law has expanded its (already considerable) power and discretion. This has occurred in several ways. First, the courts have given effect to unincorporated treaties, gradually usurping parliamentary functions. Secondly, the courts have incorporated custom and not-so-customary norms without examining in any depth (or at all) state practice and *opinio juris*, and soft law norms without an analysis of their legal status and the particular conditions that warrant their application. This has, given the presence of infinite international legal norms of differing legal gravitas, created and nurtured uncertainty in the corpus of law that can be expected to be drawn on to decide cases, especially in the

environmental and human rights field. Thirdly, the courts have engaged in a largely superficial manner with the content and mechanics of international law. They have often raised and asserted rather than argued and established. Fourthly, the lack of rigour, precision, and nuance in the Court's engagement with international legal norms renders it impotent to assist in the dialectic process of international norm creation and crystallisation.⁸³ While many of the cases discussed represent 'State practice' and count in quantitative assessments of the use of or reference to a particular norm, the conceptual vacuity of these judgments in relation to formal international law renders them unreliable in any qualitative content-based assessments of the evolution of norms in international law. This represents a significant missed opportunity for India in shaping the evolution of international law.

Broadly, it could be argued that international law—since it contains seemingly authoritative yet less scrutinised 'hooks' for judges to hang their judgments on, dispense justice with, and reach particular outcomes—offers judges a fertile route to expand their own power. This is problematic at many levels, not least because it creates room for subjectivity and militates against constitutional morality.⁸⁴ The recent Supreme Court judgment in *Suresh Kumar Koushal v Naz Foundation*,⁸⁵ that reversed the Delhi High Court's judgment, and 'recriminalised' homosexuality on patently superficial grounds, testifies both to the extent of subjectivity in Indian judgments, and the transient and contingent nature of progressive politics in this case-by-case method of judicial governance.

Thus, while the courts have fostered respect for and internalised international legal norms, they have also fostered respect for themselves in the process, yet not enough to take their role as norm creators in the international legal process seriously. In a display of institutional chauvinism, the courts have expanded their own power, but in institutional terms, perhaps at considerable cost.

The solitary check the Indian courts have long accepted in their embrace of international law is the existence of contrary municipal law. In *Gramophone Company of India Ltd v Birendra Bahadur Pandey*, the Supreme Court opined that 'Comity of Nations or no, Municipal Law must prevail in case of conflict. National Courts cannot say yes if Parliament has said no to a principle of international law. National Courts will endorse international law but not if it conflicts with national law.'⁸⁶ Similarly, in *Additional District Magistrate, Jabalpur v Shivakant Shukla*, the Supreme Court noted that in case of a 'conflict between the municipal law on the one side and the international law or the provision of any treaty obligations on the other, the courts would give effect to municipal law'.⁸⁷ Even the *Vellore* case contained the caveat 'which are not

contrary to municipal law’ in the role it envisaged in domestic law for rules of customary international law.⁸⁸ This check has been reaffirmed as recently as in the *Transgenders* case.⁸⁹ This is significant in relation to customary international law, as many jurisdictions incorporate it directly as part of the law of the land, even in some cases according it a higher rank than contrary municipal law.⁹⁰

III. TREATY MAKING AND IMPLEMENTATION

I will now turn to the powers of the executive and Parliament in relation to treaty making and implementation.

1. The Executive’s Treaty Making and Implementing Power

In line with Commonwealth practice, the Constitution provides the executive with what some scholars have characterised as ‘virtually unlimited powers’ to enter into treaties.⁹¹ Article 73 states that the executive power ‘shall extend to the matters to which the Parliament has powers to make laws’. The Parliament by virtue of Article 246 read with the relevant entries in the Union List⁹² has the power *inter alia* to legislate with respect to entering into and implementing treaties and agreements. In addition, Article 253 recognises the power of Parliament to make laws for the whole or any part of India for implementing any international agreement. In *PB Samant v Union of India*,⁹³ the Bombay High Court held that the executive power under Article 73 is to be read in conjunction with the power conferred under Article 253. In the Court’s words:

There is no manner of doubt that in case the Government enters into treaty or agreement, then in respect of implementation thereof, it is open for the Parliament to pass a law which deals with the matters which are in the State list. In case the Parliament is entitled to pass laws in respect of the matter, then it is difficult to appreciate how it can be held that the Central Government is not entitled to enter into treaty or agreement which affects the matters included in the State list.⁹⁴

The treaty-making power of the executive extends therefore even to matters within the competence of the State legislature.⁹⁵ Scholars have argued that this militates against the Centre–State balance necessary for effective implementation of international treaties, and highlights the need for a cooperative mechanism that would allow the Centre and the State to be partners

in concluding international treaties.⁹⁶

The position is neatly stated in *Maganbhai Ishwarbhai Patel v Union of India* thus: '[t]he executive is qua the State competent to represent the State in all matters international and may by agreement, convention or treaties incur obligations which in international law are binding upon the State'.⁹⁷ Since the power of the executive, by virtue of Article 73 read with Article 246, the relevant entries in the Union list, and Article 253 is coextensive with that of Parliament, and Parliament has yet to legislate in this area, the executive has the unfettered power, for now, to enter into treaties and agreements, and to determine the manner in which they should be implemented.⁹⁸ The government of India, in an oft-quoted passage, proclaimed, 'Parliament has not made any laws so far on the subject [of treaties] and until it does so, the President's power to enter into treaties remains unfettered by any international constitutional restrictions.'⁹⁹

The executive has sweeping powers in relation to treaty making—due both to constitutional prescription and to legislative apathy. In *Ram Jawaya Kapur v Union of India*,¹⁰⁰ the Court held that '[o]rdinarily the executive power connotes the residue of governmental functions that remain after legislative and judicial functions are taken away'.¹⁰¹ The lesser the terrain occupied by legislation, therefore, the greater the executive power. Such sweeping executive powers in relation to treaty making have proven controversial, in particular in the context of India's engagement with the GATT/WTO regime.¹⁰² In theory, Parliament could enact a law providing guidance on the kind of treaties the executive can enter into. It could also direct the executive to enter into a particular treaty or to refrain from doing so.¹⁰³ Parliament, however, is yet to legislate in this area.

There are, nevertheless, some constraints on the executive's treaty-making power. The first constraint is imposed by international law. Article 46 of the Vienna Convention on Treaties 1969 prevents States from claiming that their consent to be bound by a treaty is invalid on the grounds that their consent violated a provision of their internal law regarding competence to conclude treaties, that is, 'unless that violation was manifest and concerned a rule of its internal law of fundamental importance'. Manifest violations of internal laws of fundamental importance (for instance, constitutions) therefore can invalidate treaties.¹⁰⁴

The second constraint is imposed, in theory, by the fact that India follows the dualist tradition. Treaties do not have the force of law unless enacted into law by Parliament. The Supreme Court in *Jolly Verghese v Bank of Cochin* held that

‘international conventional law must go through a process of transformation into the municipal law before the international treaty can become internal law’, and that from ‘a national point of view the national rules alone count’.¹⁰⁵ As noted before, however, the courts appear to be moving away from this strict transformation doctrine to one that embraces unincorporated treaties.¹⁰⁶ In *Gramophone Company of India Ltd*, the Court held that ‘national courts will endorse international law but not if it conflicts with national law’.¹⁰⁷ In any case, as one scholar notes, ‘the Executive regards the existence of Parliamentary power as more of a performance limitation than a capacity limitation on its treaty making power’.¹⁰⁸

Further constraints on the executive’s treaty-making powers have been recognised in case law.¹⁰⁹ The executive is obliged to comply with the provisions of the Constitution and the principles underlying it, the law of the land, and the fundamental rights guaranteed to citizens.¹¹⁰ An interesting case in point is *DK Basu v State of West Bengal*,¹¹¹ where the Supreme Court expressly nullified a declaration appended by the executive to an international agreement. While ratifying the International Covenant on Civil and Political Rights 1966, the Government of India had appended a declaration to Article 9(5) that provides an enforceable right of compensation for unlawful arrest and detention. The Indian declaration noted that ‘there is no enforceable right to compensation for persons claiming to be victims of unlawful arrest or detention against the State’.¹¹² The Supreme Court opined that the ‘reservation ... has now lost its relevance in view of the law laid down by this Court in a number of cases awarding compensation for the infringement of the fundamental right to life of a citizen’.¹¹³ In a line of cases beginning with *Nilabati Behera v Union of India*,¹¹⁴ the Supreme Court had implicitly ignored the declaration and awarded compensation, but in *DK Basu*, the Court went further.

In sum, executive power in this realm is considerable, and political space for a consultative process with the people’s representatives is limited, a fact recognised by the National Commission to Review the Working of the Constitution, which recommended that Parliament enact a law regulating ‘treaty making’ so as to democratise the process as well as to create accountability, and that a Parliamentary Committee be created to determine which treaties must be subject to fuller debate in Parliament, and which treaties could be entered into by the government acting on its own. Many constitutional theorists have also pressed for review and change. Rajeev Dhavan, for example, characterises executive power in this realm as a ‘formidable power which needs to be

democratized’.¹¹⁵ And, the ever-quotable Justice Krishna Iyer notes that ‘[o]ur constitutional mechanism vis-à-vis treaty power needs creative scrutiny, innovative hermeneutics and progressive perestroika’.¹¹⁶

2. Parliament’s Treaty Implementing Power

The near-unfettered power enjoyed by the executive in relation to treaty making is checked to some extent by the role envisaged for Parliament in treaty implementation. Article 253 provides that ‘[n]otwithstanding anything in the foregoing provisions of this Chapter, Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body’.

Although Parliament has the power to make law to implement treaties, it is neither required to do so in every instance nor does it. Unless treaties operate to restrict the rights of citizens or modify its laws, treaties can be given effect to by the executive in the absence of implementing legislation. The Court in *Maganbhai* held:

There is a distinction between the formation and the performance of the obligations constituted by a treaty. Under the Constitution the obligations arising under the agreement or treaties are not by their own force binding upon Indian nationals or others. The power to legislate in respect of treaties lies with the Parliament, and making of law under that authority is necessary when the treaty or agreement operates to restrict the rights of citizens or others or modifies the laws of the State. If the rights of the citizens and others that are justiciable are not affected, no legislative measure is needed to give effect to the agreement or treaty.¹¹⁷

In practice, although India is a party to many treaties, few of these have been incorporated into domestic law.¹¹⁸

The last clause of Article 253 merits further scrutiny. Parliament is empowered to legislate not just to implement treaties but also ‘any decision made at any international conference, association or other body’. As such decisions are likely to be either soft law or non-law, the Constitution envisages a role not just for hard law sources of international law, but also the possibility that India may wish to implement soft law prescriptions. An interesting example of this is afforded in the ongoing multilateral climate change negotiations. States are negotiating towards a ‘Protocol, another legal instrument or agreed outcome with legal force’.¹¹⁹ The term ‘agreed outcome with legal force’ was introduced by India. It permits a range of legal form options for the outcome of these

negotiations. An ‘agreed outcome with legal force’, as India had sought, could encompass a non-binding international outcome that has domestic legal force. Article 253 would support such an outcome by permitting implementing legislation on non-binding international norms.

IV. CONCLUSION

This study of relevant case law and doctrinal debates in relation to international law and the Indian Constitution reveals that the Indian constitutional schema has permitted a situation in which both the executive and the judiciary enjoy and exercise near-unfettered power in relation to international law and treaty obligations (making, implementation, interpretation). While both the executive and the judiciary have demonstrated a high degree of institutional chauvinism, Parliament has crept quietly in its shadows. This imbalance is inherently democracy denying, blurs accountability, and constricts the space available for people power.

The Indian courts have developed domestic rights and constitutional jurisprudence in lockstep with international law. This is a testament to the openness and receptivity of the Indian polity as well as its constitutional project. The courts, however, need to approach international law with more discipline, rigour, and vigour. They need discipline in identifying relevant international norms. They need to exercise rigour in their appreciation of these norms; the more precision, nuance, and legal content they can import into the norms of international law that they seek to adopt into domestic law, the more coherent the jurisprudence, the greater its precedential value, and the more valuable a role such jurisprudence will play in the development of international legal norms. They need vigour in that in the narrow band of cases that customary international law—properly so called and appreciated with reference to state practice and *opinio juris*—is adopted into domestic law, they should defend it with heart. More broadly, courts need to engage substantively with norms of international law so as to drive normative content in the evolution of international law. Parliament for its part needs to exercise the powers conferred on it by the Constitution. As recommended by the National Commission and several constitutional theorists it needs both to pass legislation to circumscribe the unfettered powers exercised by the executive, and also to incorporate international law into domestic law through legislation. The executive for its part, notwithstanding the extensive powers offered to it by the Constitution,

needs to exercise these powers with due deference to Parliament and the people.

* I am grateful to Shibani Ghosh for her excellent research assistance and insightful feedback.

¹ Daniel Bodansky, 'Customary (and Not So Customary) International Environmental Law' (1995–96) 3(1) *Indiana Journal of Global Legal Studies* 105.

² Tom Ginsburg, 'Locking in Democracy, Constitutions, Commitments and International Law' (2006) 38(4) *New York University Journal of International Law and Politics* 707.

³ Joshua Cohen and Charles Sabel, 'Global Democracy' (2006) 37(4) *New York University Journal of International Law and Politics* 763.

⁴ Constitution of India 1950, art 51(c).

⁵ Constitution of India 1950, art 37.

⁶ *Kesavananda Bharati v State of Kerala* (1973) 4 SCC 225.

⁷ *Minerva Mills v Union of India* (1980) 3 SCC 625 [56]. In any case, one scholar has argued that even though the DPSP are not enforceable, if Parliament enacts a law that contravenes a DPSP, the President could refuse his/her assent to it. CH Alexander, 'International Law in India' (1952) 1(3) *International and Comparative Law Quarterly* 289, 294.

⁸ See generally, VG Hegde, 'Indian Courts and International Law' (2010) 23(1) *Leiden Journal of International Law* 53.

⁹ See *Vellore Citizen's Welfare Forum v Union of India* (1996) 5 SCC 647 [13]–[15] and discussion below.

¹⁰ See VS Mani, 'Effectuation of International Law in the Municipal Legal Order: The Law and Practice of India' (1995) 5 *Asian Yearbook of International Law* 145, 157.

¹¹ Mani ([n 10](#)).

¹² Mani ([n 10](#)).

¹³ Alexander ([n 7](#)) 291.

¹⁴ Mani ([n 10](#)) 158.

¹⁵ Alexander ([n 7](#)) 294–95.

¹⁶ Constitution of India 1950, art 253, provides Parliament with the power to make laws to implement any 'treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body'. See National Commission to Review the Working of the Constitution, A Consultation Paper on Treaty-Making under Our Constitution (2001); See generally, Hegde ([n 8](#)) demonstrating a shift from the doctrine of 'transformation' to that of 'incorporation' in Indian case law.

¹⁷ Mani ([n 10](#)) 172.

¹⁸ Statute of the International Court of Justice 1945, art 38. Art 38 also identifies subsidiary sources of international law.

¹⁹ See Bruno Simma and Philip Alston, 'Sources of Human Rights Law: Custom, Jus Cogens, and General Principles' (1988–89) 12 *Australian Yearbook of International Law* 82, 102.

²⁰ Simma and Alston ([n 19](#)) 102.

²¹ Daniel Bodansky, *The Art and Craft of International Environmental Law* (Harvard University Press 2009) xx.

²² See remarks by G Handl in W Michael Reisman and others, 'A Hard Look at Soft Law' (1988) 82 *American Society of International Law Proceedings* 371.

²⁵ *Salil Bali* ([n 24](#)) [44]; see also the interesting case of *Dadu v State of Maharashtra* (2000) 8 SCC 437 [23].

- ²³ See *Kuldip Nayar v Union of India* (2006) 7 SCC 1 [167].
- ²⁴ (2013) 7 SCC 705. An early case in point is *M/S Mackinnon Mackenzie and Co Ltd v Audrey D'Costa* (1987) 2 SCC 469. See also *Pratap Singh v Union of India* (2005) 3 SCC 551.
- ²⁶ (1997) 3 SCC 433. See also, for an early example, *Sheela Barse v Secretary, Children's Aid Society* (1987) 3 SCC 50.
- ²⁷ *People's Union for Civil Liberties* ([n 26](#)) [13].
- ²⁸ (1997) 6 SCC 241.
- ²⁹ *Vishaka* ([n 28](#)) [14].
- ³⁰ *Vishaka* ([n 28](#)) [7].
- ³¹ *Vishaka* ([n 28](#)) [16].
- ³² Upendra Baxi, 'The Avatars of Indian Judicial Activism: Explorations in the Geography of (In)justice' in SK Verma and Kusum Kumar (eds), *Fifty Years of the Supreme Court of India: Its Grasp and Reach* (Oxford University Press 2000) 156, 157.
- ³³ *Regina v Secretary of State for the Home Department ex parte Brind* [1991] 1 AC 696 (HL).
- ³⁴ See Melissa Waters, 'Creeping Monism: The Judicial Trend Towards Interpretative Incorporation of Human Rights Treaties' (2007) 107 Columbia Law Review 628.
- ³⁵ 'Bangalore Principles' on Domestic Application of International Human Rights Norms and on Government under the Law, Concluding Statement of the Judicial Colloquium held in Bangalore, India, 24–26 February 1988, para 5.
- ³⁶ (2013) 6 SCC 620.
- ³⁷ The Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management 1997, *G Sundarrajan* ([n 36](#)) [223]–[224] (Deepak Misra J).
- ³⁸ *G Sundarrajan* ([n 36](#)) 223.
- ³⁹ (2014) 5 SCC 438 [58]–[60].
- ⁴⁰ 1999 CriLJ 919.
- ⁴¹ *Ktaer Abbas Habib Al Qutaifi* ([n 40](#)) [24].
- ⁴² *Ktaer Abbas Habib Al Qutaifi* ([n 40](#)) [23].
- ⁴³ *Ktaer Abbas Habib Al Qutaifi* ([n 40](#)) [23].
- ⁴⁴ *Vellore Citizen's Welfare Forum* ([n 9](#)) [13]–[15].
- ⁴⁵ Constitution of India 1950, arts 47, 48A, and 51(g).
- ⁴⁶ *Vellore Citizens' Welfare Forum* ([n 9](#)) [13]–[14].
- ⁴⁷ *Vellore Citizens' Welfare Forum* ([n 9](#)) [10].
- ⁴⁸ *Vellore Citizens' Welfare Forum* ([n 9](#)) [10].
- ⁴⁹ *Vellore Citizens' Welfare Forum* ([n 9](#)) [11].
- ⁵⁰ *Vellore Citizens' Welfare Forum* ([n 9](#)) [11], [15].
- ⁵¹ See eg, *Research Foundation for Science Technology National Resource Policy v Union of India* (2005) 10 SCC 510 [33] and quoted with approval in *Research Foundation for Science v Union of India* (2005) 13 SCC 186 [35].
- ⁵² See eg, *Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)* [2001] 2 SCR 241 (Supreme Court of Canada).
- ⁵³ See Lavanya Rajamani, *The Precautionary Principle in the Indian Courts: The Vanishing Line between Rhetoric and Law*, ed Shibani Ghosh (ICSSR-CPR, forthcoming).
- ⁵⁴ See, for an extensive list of references, Nicolas de Sadeleer, *Environmental Principles: From Political Slogans to Legal Rules* (Oxford University Press 2002) 91–223.

⁵⁵ See Cass Sunstein, 'Beyond the Precautionary Principle' (2003) University of Chicago Legal Theory and Public Law Working Paper 38/2003 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=307098>, accessed October 2015.

⁵⁶ Curtis Bradley and Jack Goldsmith, 'Customary International Law as Federal Common Law' (1997) 110(4) Harvard Law Review 815.

⁵⁷ Bradley and Goldsmith ([n 56](#)).

⁵⁸ See generally, Vaughan Lowe, 'Sustainable Development and Unsustainable Arguments' in Alan Boyle and David Freestone (eds) *International Law and Sustainable Development* (Oxford University Press 1999) 19.

⁶⁰ *Dalbir Singh* ([n 59](#)) 101.

⁵⁹ (2012) 3 SCC 346.

⁶¹ *Bachan Singh v State of Punjab* (1980) 2 SCC 684.

⁶² *Mithu v State of Punjab* (1983) 2 SCC 277.

⁶³ Alfred von Verdross, 'Forbidden Treaties in International Law' (1937) 31 American Journal of International Law 571.

⁶⁴ Vienna Convention on the Law of Treaties 1969, art 53.

⁶⁵ Variously attributed to state consent, natural law, necessity, international public order, or constitutional principles. See Dinah Shelton, 'Normative Hierarchy in International Law' (2006) 100(2) American Journal of International Law 291.

⁶⁶ Possibilities that have been mooted include prohibition on genocide, slave trading, use of force, etc; Shelton ([n 65](#)) 299–302.

⁶⁷ Shelton ([n 65](#)) 302–03.

⁶⁸ Shelton ([n 65](#)) 297.

⁶⁹ Simma and Alston ([n 19](#)) 103.

⁷⁰ *Md Jamiluddin Nasir v State of West Bengal* (2014) 7 SCC 443.

⁷¹ *National Legal Service Authority* ([n 39](#)).

⁷² *National Legal Service Authority* ([n 39](#)) [49].

⁷³ *National Legal Service Authority* ([n 39](#)) [53].

⁷⁴ See generally, Michael O'Flaherty and John Fisher, 'Sexual Orientation, Gender Identity and International Human Rights Law: Contextualising the Yogyakarta Principles' (2008) 8(2) Human Rights Law Review 207.

⁷⁵ An earlier case that takes a similar approach to soft law is *People's Union for Civil Liberties v Union of India* (2005) 2 SCC 436.

⁷⁶ Reisman et al ([n 22](#)) 371–72.

⁷⁷ Catherine Redgwell, 'Multilateral Environmental Treaty-Making' in Vera Gowlland-Debbas (ed) *Multilateral Treaty-Making* (Martinus Nijhoff Publishers 2000) 104–05.

⁷⁸ (1993) 2 SCC 746.

⁷⁹ (1993) SCC Supp (2) 433 [18].

⁸⁰ *National Legal Service Authority* ([n 39](#)).

⁸¹ Writ Petition (Civil) No 7279/2013 (Delhi High Court 2014).

⁸² *Naz Foundation v Government of India* (2009) 160 DLT 277.

⁸³ See Melissa Waters, 'Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law' (2004–05) 93 Georgetown Law Journal 487, 502, on the mutually reinforcing relations between international legal norms and domestic cultural and societal norms.

⁸⁴ See for a discussion on this concept, *Naz Foundation v Government of India* ([n 82](#)).

⁸⁵ (2014) 1 SCC 1.

- ⁸⁶ (1984) 2 SCC 534 [5].
- ⁸⁷ (1976) 2 SCC 521 [542].
- ⁸⁸ *Vellore Citizen's Welfare Forum* (n 9) [25].
- ⁸⁹ *National Legal Service Authority* (n 39) [58]–[60].
- ⁹⁰ See generally, Simma and Alston (n 19).
- ⁹⁴ *PB Samant* (n 93) [4].
- ⁹¹ Rajeev Dhavan, 'Treaties and People: Indian Reflections' (1997) 39 *Journal of the Indian Law Institute* 1.
- ⁹² Entries 10, 11, 12, 13, 14, 15, and 16.
- ⁹³ AIR 1994 Bom 323.
- ⁹⁵ See eg, Rekha Saxena, 'Treaty Making Powers: A Case for Federalisation and Parliamentaryisation' (2007) 42(1) *Economic and Political Weekly* 24.
- ⁹⁶ Saxena (n 95) 24.
- ⁹⁷ (1970) 3 SCC 400 [80].
- ⁹⁸ National Commission to Review the Working of the Constitution (n 16). See also Mani (n 10).
- ⁹⁹ *Law and Practice Concerning the Conclusion of Treaties* (United Nations Legal Series 1953) 63; cf Upendra Baxi, 'Law of Treaties in the Contemporary Practice of India' (1965) 14 *Indian Yearbook of International Affairs* 137.
- ¹⁰⁰ AIR 1955 SC 549.
- ¹⁰¹ *Ram Jawaya Kapur* (n 100) 12.
- ¹⁰² See Devesh Kapur and Pratap Bhanu Mehta, 'The Indian Parliament as an Institution of Accountability' (Democracy, Governance and Human Rights Programme Paper No. 23, United Nations Research Institute for Social Development, January 2006) 28.
- ¹⁰³ National Commission to Review the Working of the Constitution (n 16) para 10.
- ¹⁰⁴ See generally, Baxi (n 99).
- ¹⁰⁵ (1980) 2 SCC 360 [6] in part quoting AH Robertson (ed), *Human Rights in National and International Law* (Manchester University Press 1968) 13.
- ¹⁰⁶ See case law discussed above, and Hegde (n 8).
- ¹⁰⁷ *Gramophone Company of India Ltd* (n 86) [5].
- ¹⁰⁸ Baxi (n 99).
- ¹⁰⁹ See generally, Dhavan (n 91); P Chandrasekhara Rao, *The Indian Constitution and International Law* (Taxman 1993).
- ¹¹⁰ Dhavan (n 91).
- ¹¹¹ (1997) 1 SCC 416.
- ¹¹² India's declarations to the ICCPR and ICESCR <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en>, accessed October 2015.
- ¹¹³ *DK Basu* (n 111) 42.
- ¹¹⁴ *Nilabati Behera* (n 78).
- ¹¹⁵ Dhavan (n 91).
- ¹¹⁶ VR Krishna Iyer, *Constitutional Miscellany* (2nd edn, Eastern Book Company 2003) 11.
- ¹¹⁷ *Maganbhai Ishwarbhai Patel* (n 97) [80]. See also Mani (n 10) 165–68.
- ¹¹⁸ Rao (n 109) 149.
- ¹¹⁹ Decision 1/CP.17, 'Establishment of an Ad Hoc Working Group on a Durban Platform for Enhanced Action, 2011' in FCCC/CP/2011/9/Add.1 (15 March 2012) para 2.

PART III

CONSTITUTING DEMOCRACY

CHAPTER 10

CITIZENSHIP

NIRAJA GOPAL JAYAL

I. INTRODUCTION

THE chapter on citizenship in the Indian Constitution has two distinctive qualities. First, more than any other set of provisions in the Constitution, the Articles on citizenship have a pronounced quality of immediacy, of belonging only to the moment of their enactment. This is unusual because constitutions generally reflect a quality of timelessness in their phrasing, a sense of being enacted in perpetuity rather than speaking to a presumptively fleeting moment in time. This avowedly momentary character is accentuated, secondly, by the self-limiting provision that a more permanent and enduring law on citizenship will be enacted by Parliament in due course. As he recommended to the assembly the adoption of these Articles, Dr Ambedkar clearly stated that these provisions were not intended to lay down a permanent or unalterable law of Indian citizenship, but ‘all that we are doing is to decide ad hoc for the time being’ the question as to who would be citizens on the date of the commencement of the Constitution.¹ Every other matter relating to citizenship would be determined by Parliament. The phrasing of Article 11—‘Nothing in the foregoing provisions of this Part shall derogate from the power of Parliament to make any provision with respect to the acquisition and termination of citizenship and all other matters relating to citizenship’—reaffirms the transience and self-limiting character of these constitutional provisions.

The immediacy and impermanence were dictated by the particular circumstances of the Partition of India in 1947 that shaped these provisions substantively and in their self-conscious temporariness. Ironically, however, it is the legacy of this historical context that has proved to be the most enduring feature of citizenship law and jurisprudence in India. The present chapter provides an account of the constitutional provisions on citizenship in the Constituent Assembly of India, and the debates that preceded their adoption. It examines also the subsequent legislation of the Citizenship Act of 1955, the case law on citizenship, as well as the amendments effected in the Act and its Rules from the mid-1980s to the present. All of these, it is argued, strongly reflect the

context of the Partition in which the constitutional provisions were drafted and adopted. The legal and judicial trajectory of citizenship in independent India is thus illustrative of the ways in which the Partition legacy continues to inflect this body of law and jurisprudence. Indeed, the imprint of this event has become more, rather than less, deeply entrenched with the passage of time. The Citizenship Act of 1955 encapsulates that innocent moment after the physical and emotional upheaval of the Partition has settled and a fresh attempt is made to legislate citizenship in a way that does not reflect this legacy. However, the legacy creeps in again after the breakup of Pakistan and the influx of immigrants on the eastern border of India. It also becomes more evident on the western border with the influx of Hindu refugees from Sindh and Punjab in Pakistan in the 1990s and beyond.

As reflected in the amendments to the citizenship laws and rules, this legacy is visible in the way in which *jus soli* citizenship has over time come to be visibly inflected by elements of *jus sanguinis*. The Constituent Assembly witnessed a contest between these two principles, and Section II of this chapter offers an interpretation of the debate and documents the constitutional settlement of citizenship. It also identifies the core issues that are most contested, and remain central to citizenship jurisprudence, much of which speaks to the legacy of the Partition. This is done through a focus on four terms whose interpretation has been central to the case law on citizenship: domicile, intention, migrant, and passport. Section III explicates the main provisions of the Citizenship Act 1955 and contextualises the amendments to the Citizenship Act from the mid-1980s to the present. Section IV documents the gradual shift from a *jus soli* conception of citizenship to one increasingly inflected by elements of *jus sanguinis*, reflecting the peculiar quality of the imbrication of the constitutional and statutory law of citizenship in the Partition of India. The apparent exception of recent amendments intended to accommodate the claims of the diaspora is actually less of an exception than it appears, as it echoes the shift from *jus soli* to *jus sanguinis*, albeit in a context discontinuous from that of the Partition. The concluding section reflects on the patterns of change and continuity in the constitutional and post-constitutional law of citizenship.

II. CITIZENSHIP FOR EXTRAORDINARY TIMES

Constitutions do not ordinarily define citizenship. Despite its invocation of the Declaration of the Rights of Man (1789), its vesting of national sovereignty in

the French people, and its canonically inclusive conception of citizenship, the Constitution of the Fifth Republic in France does not actually define this concept. In the American Constitution, citizenship remained undefined until after the adoption of the Fourteenth Amendment, in the aftermath of the Civil War and as a reaction to the Supreme Court's decision in *Dred Scott v Sanford* (1857).² Even the famously progressive Brazilian Constitution of 1988, which privileges the value of citizenship as a founding principle of the republic, and defines expansively the social and economic rights of the people, does not actually indicate what the source and basis of citizenship will be.

When India's Constituent Assembly began its deliberations in December 1946, there was no thought of a separate chapter on the topic of citizenship. By the time the Constitution was adopted, the Partition had intervened and citizenship had become the subject of [Part II](#) of the Constitution, following the first part on the Union and Its Territories. The seven Articles that comprise this section took two years to be finalised, leading Dr Ambedkar, the Chairman of the Drafting Committee, to say of what eventually became Article 5, the opening Article of the section:

Except one other article in the Draft Constitution, I do not think that any other article has given the Drafting Committee such a headache as this particular article. I do not know how many drafts were prepared and how many were destroyed as being inadequate to cover all the cases which it was thought necessary and desirable to cover.³

Article 5 was originally a part of the fundamental rights chapter. The discussion on citizenship was in fact initiated in the Sub-Committee on Fundamental Rights in March 1947, where there was consensus on a single citizenship for the Indian Union. There was also some preliminary discussion of the alternative bases of citizenship (*jus soli* and *jus sanguinis*), as members of the Constituent Assembly were anxious to avoid giving the impression that they were adopting the same 'racial' principle against which the Indian nationalists had offered solidarity to the struggles of Indians in South Africa. As Vallabhbhai Patel said, 'It is important to remember that the provision about citizenship will be scrutinized all over the world.'⁴

The announcement of the Partition in June 1947 gave a new impetus to the debate on citizenship in the Constituent Assembly. The division of British India along broadly religious lines triggered the massive movement of population from one country to the other and (in some cases) back again to the first. It was accompanied by large-scale violence, displacement, and homelessness, which made it impossible to discuss even fundamental rights without some clarity about who the bearers of rights, or citizens, would be in the new republic.⁵ An ad

hoc committee was set up to re-examine the question of citizenship in the wake of the changed circumstances of the Partition. In the early discussions, a variety of possible challenges were articulated, ranging from provisions for marriages between citizens of India and Pakistan, to provisions for residents of seceding areas who wished to retain their Indian citizenship. There was also some debate on the entitlements of Indian residents of Burma, Ceylon, Malaya, and other countries that had sizeable Indian populations. Determining an appropriate cut-off date to determine citizenship entitlements for persons migrating to India from Pakistan was obviously important. But the most contentious issues were around the concepts of domicile, migration, and the intention to settle, and we will return to these after a brief delineation of the constitutional provisions on citizenship in Articles 5–11 of the Constitution.

Article 5 confers citizenship, at the commencement of the Constitution, on every person who has his domicile in the territory of India and

- (a) who was born in the territory of India; or
- (b) either of whose parents was born in the territory of India; or
- (c) who has been ordinarily resident in the territory of India for not less than five years immediately preceding such commencement.

Article 5 was a preliminary foundational statement of *jus soli* citizenship, albeit one that applied only to persons already living rather than to future persons born after the commencement of the Constitution. It was chosen as a form of ‘enlightened, modern civilized’ and democratic citizenship, over the rival principle of *jus sanguinis* described by the constitution makers as ‘an idea of racial citizenship’.⁶ If Article 5 was an enunciation of citizenship for ordinary times, Articles 6 and 7 were articulations of citizenship for extraordinary times. Article 6 provides for citizenship for persons who migrated to India from the territory now included in Pakistan if either of their parents or grandparents was born in India. If such a person migrated to India before 19 July 1948, he⁷ should have been resident in India since the date of his migration; and if he migrated after that date, he should have been registered as a citizen of India by a designated government official. If Article 6 was intended to accord rights of citizenship to those people who migrated from Pakistan to India around the time of the Partition, Article 7 was correspondingly designed to exclude from citizenship those persons who migrated from India to Pakistan after 1 March 1947. However, it provided for rights of citizenship for those who had so migrated from India to Pakistan but returned to India with a permit of resettlement or permanent return issued by an authorised government official, after the same date and by a process similar to that provided for in Article 6. As

we shall see, Article 7 was a hugely embattled provision in the Constituent Assembly.

Article 9 states that individuals who voluntarily acquire the citizenship of a foreign state cannot be citizens of India. Article 10 provides for the continuance of the rights of citizenship for anyone deemed to be a citizen under the earlier provisions ‘subject to the provisions of any law that may be made by Parliament’, and Article 11 gives Parliament complete power to ‘make any provision with respect to the acquisition and termination of citizenship and all other matters relating to citizenship’.⁸ The last two Articles underscore unambiguously the stopgap and ad hoc nature of the constitutional provisions on citizenship, which are intended to provide for the specific situation of the extraordinary event of the Partition while a conception of citizenship for normal times awaits the attention of an elected Parliament.

Echoes of the communally charged atmosphere of the Partition resounded in the assembly as it debated what eventually got enacted as Article 7. Though the markers of religious difference were not openly displayed, they are easily recognisable in the debates on Articles 6 and 7 of the Constitution. Article 6 was obviously unexceptionable as it guaranteed rights of citizenship for what were largely Hindu migrants from Pakistan, commonly described in the discourse of the time as refugees. Article 7, however, implicitly referred to those Muslims who had fled India for Pakistan in the wake of Partition-related violence, but later returned to reclaim their lives, livelihoods, and property. This Article was necessitated by the fact that the numbers of such people were considerable, the High Commission claiming that it received one thousand applications from Muslim refugees on a daily basis.⁹ These people were euphemistically described as ‘migrants’, and this was the most intensely contested Article on citizenship in the Constituent Assembly. It is important to note that though the Constitution does not use the terms refugee and migrant, these words occurred frequently in the speeches made in the Constituent Assembly, and subtly encoded religious identity in a shared universe of meaning.

There was heated contention in the assembly about the necessity for a provision such as this. Jaspat Roy Kapoor labelled Article 7 the ‘obnoxious clause’, arguing that:

Once a person has migrated to Pakistan and transferred his loyalty from India to Pakistan, his migration is complete. He has definitely made up his mind at that time to kick this country and let it go to its own fate, and he went away to the newly created Pakistan, where he would put in his best efforts to make it a free progressive and prosperous state.¹⁰

Other detractors of this Article declared that Indian citizenship was being ‘sold

too cheaply’ and that the migration of these people from India to Pakistan had been intentional. They could now be saboteurs, spies, and fifth columnists, seeking to re-enter India. At best, they might have changed their minds about where to settle once they found Pakistan to be a less comfortable place than they had anticipated; or they might be returning to restore control over the properties they had abandoned when they fled. Loyalty and intentionality were recurring themes in this view, and intention was to become, as we shall see, a central motif in the adjudication of cases in subsequent years.

In contrast, those who advocated Article 7 favoured a more inclusive conception of legal citizenship. They argued that the Muslim migrants who had left India because of the communal riots and violence should be welcomed back. Their loyalties and intentions could not be treated as suspect because they had, to quote Mahajan CJ in *Central Bank v Ram Narain* just a few years later:

[I]n October or November 1947, men’s minds were in a state of flux. The partition of India and the events that followed in its wake in both Pakistan and India were unprecedented and it is difficult to cite any historical precedent for the situation that arose. Minds of people affected by this partition and who were living in those parts were completely unhinged and unbalanced and there was hardly an occasion to form intentions requisite for acquiring domicile in one place or another. People vacillated and altered their programmes from day to day as events happened. They went backward and forward; families were sent from one place to another for the sake of safety ... No one, as a matter of fact, at the moment thought that when he was leaving Pakistan for India or vice versa that he was forever abandoning the place of his ancestors.¹¹

The intention to acquire domicile was not only difficult to establish but also seen to be unreasonable, as it sought to establish rational and deliberate intent in a situation dominated by the raw emotions of fear and insecurity. All these—domicile, intention to permanently settle, and the meaning of migration—became points of contention in the case law.

Even as the Citizenship Act was passed by Parliament in 1955, the legacy of the Partition continued to be unsettled and ubiquitous in citizenship jurisprudence. In the body of case law following 1950, there are only a few cases—such as the *State Trading Corporation* case about whether or not a corporate entity enjoys the fundamental rights of a citizen—that are altogether unrelated to the event of Partition.¹²

Since the term ‘domicile’ in Article 5 was not defined in the Constitution, it came to be contested in several cases that invariably referred to the basic principles of English law making a distinction between domicile of origin and domicile of choice. While there is a wealth of legal commentary on the term in the context of the Conflict of Laws,¹³ what is relevant for our purposes is the relationship between domicile and citizenship adjudicated in a number of cases,

including as recently as 1991. In *Louis de Raedt v Union of India*, a Belgian missionary who had been living in India since 1937, petitioned the court in 1987 claiming that he had, on 26 November 1949, become a citizen under Article 5(e) of the Constitution.¹⁴ The Supreme Court ruled that mere residence in the country did not constitute domicile; it must be accompanied by the intention to make a permanent home in the country, which de Raedt had not demonstrated. The Court's verdict was that de Raedt had applied for a one-year extension of his permission as recently as 1980, which did not indicate a decision to reside permanently in India. At best it indicated the petitioner's uncertainty about his permanent home:

For the acquisition of a domicile of choice, it must be shown that the person concerned had a certain state of mind, the *animus manendi*. If he claims that he acquired a new domicile at a particular time, he must prove that he had formed the intention of making his permanent home in the country of residence and of continuing to reside there permanently. Residence alone, unaccompanied by this state of mind, is insufficient.¹⁵

While intent or *animus manendi* was an important consideration in several cases, the Supreme Court had held, as early as 1955, that both *factum* and *animus* were essential, and neither by itself was sufficient. In *Central Bank of India v Ram Narain*, Ram Narain was being tried in India for an offence committed in Pakistan in November 1947.¹⁶ On behalf of his firm, Ram Narain had taken an advance from the Central Bank of India in Multan District, against stocks (bales of cotton). In the disturbances that occurred during the Partition, the guard of the bank's warehouse fled and the stocks disappeared. In January 1948, an inquiry found that Ram Narain himself had stolen the goods and booked them to Karachi. Ram Narain had already moved his family to Gurgaon, India, and himself moved to India in November 1947. The Bank demanded that he refund the money, but to no avail. It then got a sanction from the government of East Punjab to prosecute Ram Narain, whose plea was that he was not an Indian citizen, but a Pakistani national, at the time of the offence and therefore Indian courts did not have jurisdiction. The High Court upheld this plea, arguing that the courts had no jurisdiction over an accused who was not a citizen of India at the time of the commission of the offence. The Supreme Court dismissed the Bank's appeal, saying that both *factum* and *animus* were essential, and that in this case even if *animus* could be inferred from Ram Narain relocating his family to India in advance of his own move, the *factum* was found wanting and hence it could not be established that he was indeed domiciled in India at the time the offence was committed.¹⁷

It is worth noting that the domicile of women and minor children was inferred

from the domicile of their husbands and fathers, respectively. A woman migrating from India to Pakistan with her husband in December 1947 would lose her Indian domicile and terminate her citizenship by virtue of such a move. However, Article 7 overrides Article 5, and domicile is not a criterion in Articles 6 and 7. This means that if a woman, born and domiciled in India, migrated to Pakistan after 1 March 1947, she would lose her Indian citizenship and domicile even if her husband remained in India. Minors were also considered to have migrated if they accompanied their fathers, though there was uncertainty about situations in which a minor migrated to Pakistan independently of his father, who remained in India. Could such a minor be deemed to have migrated, or to have formed an intention to make Pakistan his permanent home? In *Rashid Hassan Roomi v Union of India*, the petitioner was the son of Indian parents who had lived in India for five years before the commencement of the Constitution.¹⁸ His father migrated to Pakistan, while the son continued to live in India, and eventually went on to become the Chairman of the Town Area Committee. He retained his domicile and citizenship on the grounds that his father had deserted him.¹⁹

The relationship between domicile and migration was no more obvious than that between domicile and citizenship. In *Shanno Devi v Mangal Sain*, the Court adopted a narrow interpretation, in accordance with Article 6, defining migration as coming to India with the intent of permanent residence.²⁰ In *Kulathil Mammu v State of Kerala*, by contrast, a broader view prevailed as the Court interpreted migration as coming and going from one territory to another, a meaning that could attach to both Articles 6 and 7 without bringing in the concept of domicile.²¹ This was justified by the argument that both these Articles began with a *non obstante* clause, as they were designed to deal with the abnormal situation of movement of populations between India and Pakistan. This particular case pertained to a twelve-year-old boy who had migrated to Pakistan with his father in 1948, had returned to India on a Pakistani passport with an Indian visa, gone back and forth a few times, and finally returned to live in India. In October 1964, Aboobacker (whose father had held Indian nationality but was by now dead) was arrested and detained by the State government. His plea before the court that he was an Indian citizen and ‘had simply gone to Karachi in search of livelihood as he was poor’ was contested by the State, which treated his migration as intentional and therefore not attracting the provisions of Article 7.²² The Kerala High Court had upheld the State’s view, but the Supreme Court settled on a wider interpretation that focused only on movement from one place to another ‘whether or not there is any intention of settlement in the place to

which one moves' and held that such an interpretation was indeed the intent of the Constitution makers.²³ The wide interpretation adopted in this verdict then implied that the idea of *animus manendi* did not apply in the abnormal situation of the Partition.²⁴

A piece of evidence that was frequently cited in judicial decisions at this time as a decisive criterion for determining intention was the passport. In the case of the Belgian missionary Louis de Raedt, it was argued on behalf of the petitioner that his case could not be rejected only because he held a foreign passport. Around the time of the Partition, people often had to acquire a Pakistani passport in order to return to India. In some cases, such as *State of Andhra Pradesh v Abdul*, the court took the view that passports were not conclusive evidence of the person having voluntarily obtained Pakistani citizenship or of having renounced Indian nationality.²⁵ In others, such as *Izhar Ahmad Khan v Union of India*, the possession of a Pakistani passport was interpreted as evidence of such volition and intent.²⁶ In *State of Gujarat v Saiyad Aga Mohmed Saiyed Mohmed*, the Supreme Court prevented the government from deporting the plaintiff, despite his possessing a Pakistani passport because:

If a plea is raised by the citizen that he had not voluntarily obtained the passport, the citizen must be afforded an opportunity to prove that fact. Cases may be visualized in which on account of force a person may be compelled or on account of fraud or misrepresentation he may be induced, without any intention of renunciation of his Indian citizenship to obtain a passport from a foreign country.²⁷

In section III, we shall see how the exercise of judicial reasoning in the early decades is, on some of these terms, inverted when the determination of citizenship for people presumed to be illegal immigrants from Bangladesh comes to be litigated.

III. CITIZENSHIP LAWS FOR ORDINARY TIMES

The Citizenship Act 1955 was enacted in pursuance of Article 11 of the Constitution. It provides for the acquisition of citizenship in five ways: by birth, descent, registration, naturalisation, and the incorporation of territory. The most significant amendments to the Citizenship Act have been to Sections 3 (citizenship by birth) and 6 (citizenship by naturalisation) to address concerns about illegal immigration from Bangladesh. Section 7 (citizenship by incorporation of territory) has also been substantively amended to provide for overseas citizenship of India.

There were originally two exceptions to citizenship by birth: (a) if the father possessed diplomatic immunity and was not an Indian citizen; and (b) if the father was an enemy alien and the birth occurred at a place under enemy occupation. While these (obviously infrequent) exceptions remain, another set of exceptions was later introduced that have immediate relevance to migrants from Bangladesh. This is expressed in two sub-clauses of the amended Section 3, which now accords citizenship to those persons born in India (a) on or after 26 January 1950 and before 1 July 1987; (b) those born on or after 1 July 1987 but before the commencement of the Citizenship (Amendment) Act 2003 and ‘either of whose parents is a citizen of India at the time of his birth’; and, in 3(c):

[O]n or after the commencement of the Citizenship (Amendment) Act, 2003, where

- (i) both of his parents are citizens of India;
- (ii) one of whose parents is a citizen of India and the other is not an illegal migrant at the time of his birth.

While Section 3(b) gives citizenship to those born in India before the amendment of 2003 with either parent being a citizen of India at the time of his birth, 3(c) excludes all those born after the commencement of the amendment of 2003 with one parent who is an illegal migrant at the time of their birth. The explanation to this lies in the amendment to the provision relating to citizenship by naturalisation in Section 6 of the Citizenship Act.

Meanwhile, Section 4 relating to citizenship by descent for persons born outside India to Indian parents has been rendered gender-neutral. Until 1992, this applied to persons whose *father* was a citizen of India at the time of his birth. Since 1992, citizenship by descent is available to those born outside India *either of whose parents* is a citizen of India at the time of his birth. In 2004 and 2005, the provisions of citizenship by registration (Section 5) were amended to, on the one hand, exclude from such citizenship any person who is an illegal migrant and, on the other, to lower the residence requirement for a person registered as an overseas citizen of India (for five years) from two years to one.

The most significant amendments to the Act have, however, been to the provisions of Section 6, which deals with citizenship by naturalisation. Section 6A was introduced in 1985 to make special provisions for the citizenship of those covered by the Assam Accord. Migration from Bangladesh peaked in 1971 (at the time of the breakup of Pakistan) and continued steadily thereafter. The subsequent enfranchisement of large numbers of refugees/migrants took on a communal colour and generated massive protests by the All Assam Students’ Union, between 1979 and 1985, against the swamping of Assam by ‘foreigners’. In February 1983, in the midst of elections based on electoral rolls that allegedly

included a large number of ‘illegal’ voters, a terrible massacre took place in Nellie, killing over 2,000 people.

The Assam Accord, the political settlement arrived at between the Assam movement and the central and State governments, provided that (a) all those who had migrated before 1966 would be treated as citizens; (b) those who had migrated between 1966 and 1971 could stay by putting themselves through the designated process of registration as foreigners; and (c) all those who migrated after 1971 would be deemed to be illegal immigrants. The numbers of such illegal immigrants are commonly estimated to be upward of 10 million. Many of them had acquired forms of what Kamal Sadiq has called ‘documentary citizenship’, including ration cards and election cards, which had enabled them to vote in elections.²⁸ The amendment to the Citizenship Act in 1985 was intended to ensure that the names of those who came in after 1966 would be deleted from the electoral roll. Such persons would then have to wait for a period of ten years from their ‘detection’ as a foreigner before becoming legal citizens and voters once again.

In 2004, the section on Citizenship by the Incorporation of Territory into India was substantially amended to include a section (7A) on the registration of Overseas Citizens of India. This provides for any person who is an adult citizen of another country but either was eligible to be a citizen at the time of the commencement of the Constitution or is a child or grandchild of such a citizen. A year later, the Union government specified the rights of such citizens, which include the grant of a lifelong multiple-entry visa to India, but exclude such citizens from voting or contesting election to public office or recruitment to government jobs. Citizens of Pakistan and Bangladesh, or even those who have ever held citizenship of these two countries, are ineligible for registration as overseas citizens of India.

The restrictions on citizenship for migrants deemed to be illegal, on the one hand, and the expansion of citizenship to include the diaspora, on the other, are suggestive of a dilution of the *jus soli* principle established in the Constitution and an increasing recognition of elements of *jus sanguinis*. Section IV of the chapter discusses three issues that are indicative of such a move from *jus soli* to *jus sanguinis* in the citizenship law of India.

IV. THREE PATHS TO *JUS SANGUINIS*

Two of three paths to *jus sanguinis* have been briefly mentioned in section III.

These are, first, the constraint applied to the *jus soli* principle by the provision excluding from citizenship those Indian-born persons one of whose parents is an illegal migrant at the time of their birth; and, secondly, the provisions relating to overseas citizenship of India, which give recognition to members of the diaspora who have not been born in India but are children or grandchildren of those who have. The third aspect of the citizenship law that indicates such a move is contained in the 2004 amendment to the Citizenship Rules 1956 in respect of their application to the States of Gujarat and Rajasthan. In this section, I first return to the amendments excluding the Indian-born children of illegal migrants, and the events leading up to these; then turn to the amendments to the Citizenship Rules for migrants from Pakistan to Rajasthan and Gujarat; and finally to the amendments relating to Overseas Citizenship.

The amended Citizenship Act is not shy of acknowledging that these amendments or ‘special provisions’ are a product of the Assam Accord. As such, the reference to illegal migrants is a thinly veiled reference to Muslim migrants. In the earlier section we noted that a large number of these migrants had acquired the franchise by means that Sadiq has labelled as ‘networks of profit’ and ‘networks of complicity’.²⁹ In other words, kinship networks and money were reasonable guarantees of registration on the electoral rolls. Assiduously courted by the Congress Party, the vulnerability of these people on account of their religious identity had made them Congress sympathisers and eager voters. In 1983, the Congress government at the Centre responded to the political unrest in Assam by enacting the Illegal Migrants (Determination by Tribunals) Act (IMDT Act), which provided for complaints about illegal migrants to be filed and adjudicated by tribunals especially instituted to detect and expel foreigners. While this conveyed the impression of assuaging nativist Assamese sentiment, networks of ethnic solidarity could be and were relied upon to render such complaints meaningless. The law also entailed making an Assam-specific exception to India’s law on foreigners, which ordinarily places the burden of proving citizenship status on the individual in question. The IMDT Act removed the burden of proving their citizenship from the persons suspected of being illegal immigrants. The presence of illegal immigrants in the area could now be reported by their neighbours, and if the tribunal decided, upon its examination of the complaint, that the person so accused was indeed an illegal migrant, it had the power to order his/her deportation.

The IMDT Act was challenged in the Supreme Court by a writ petition filed by Sarbananda Sonowal, one of the leaders of the students’ agitation against immigration. The plea was that the Act was *ultra vires* the Constitution, because it made it ‘impossible for citizens who are resident in Assam to secure the

detection and deportation of foreigners from Indian soil'.³⁰ Its legality was brought into question because though the professed aim of the IMDT Act was to facilitate the detection and deportation of illegal foreign migrants in Assam, the procedure prescribed here did not conform to the Foreigners Act 1946, which is applicable to all foreigners throughout India. An exception had effectively been made for non-Indians who had entered Assam clandestinely after 1971 and were alleged to have brought about a change in the 'whole character, cultural and ethnic composition of the area'.³¹ Such migration, it was claimed, had the potential to create internal disturbance, and should be treated as aggression under Article 355 of the Constitution, which binds the Union to protect States against such aggression.

The petition was supported by the National Democratic Alliance coalition, headed by the Hindu nationalist Bharatiya Janata Party (BJP) when it came to office at the Centre. The new government communicated to the Supreme Court its intention to repeal the Act both because of the internal security implications of the population influx, and also because the application of the Act to only one State was clearly discriminatory.³² In 2000, the State government headed by the Asom Gana Parishad (AGP) (the All Assam Students' Union grown into a political party) claimed that the provisions of the IMDT Act actually *protected* illegal migrants. To support its case that the small numbers of foreigners detected and deported could be directly attributed to the provisions of the Act, it showed that while it had initiated 310,759 inquiries, the total number of people declared to be illegal immigrants was 10,015, of whom only 1,481 had actually been expelled. The Court was therefore asked to order a repeal of the IMDT Act for being 'an ineffective piece of legislation', which was obstructing rather than facilitating the detection, deportation, and the deletion of the names of illegal migrants from the electoral rolls.³³

Religious bias was writ large in the claim, common enough in contemporary political discourse, that while the Hindu population of the State had risen by 41.89 per cent during 1971–91, the Muslim population of Assam had risen 77.42 per cent during the same period.³⁴ In 2004, the Congress Party returned to power at the Centre, and informed the Supreme Court that the Union government would retain the IMDT Act in its current form. Thus, the AGP and the BJP interpreted the small numbers actually deported as a sign that the Act was performing its intended purpose of protecting illegal immigrants for electoral gain for the Congress Party. For its part, the Congress interpreted the same small numbers of those deported as showing that the Act was effective in ensuring that true Indians were not wrongfully deported on the suspicion of being foreigners.

The case was decided in 2005, with the Supreme Court striking down the Act as *ultra vires* the Constitution and transferring all cases pending before the tribunals to the tribunals constituted under the Foreigners (Tribunals) Order 1964 to be decided in the manner provided in the Foreigners Act. The Court concerned itself chiefly with determining the constitutional validity of the Act and especially the question of its applicability only to the State of Assam, thus creating a State-specific exception to a national law. It ruled that the Act violated Article 14 of the Constitution to the extent that the exception was based solely on geography rather than any substantive connection with the object and policy of the Act.³⁵ It refused to entertain any consideration of the election manifesto of a political party as a relevant factor in judging the constitutional validity of any law.³⁶ The judgment affirmed the procedure laid down in the Foreigners Act, which places the burden of proving citizenship upon the person in question, and noted that not only did the IMDT Act not contain any provision similar to Section 9 of the Foreigners Act regarding burden of proof, but that it was also ‘conspicuously silent about it’.³⁷ This, it argued, placed a very heavy burden on both the applicant and the authorities of the State to prove that a person is an illegal migrant liable for deportation. Indeed, said the Court:

Not every person feels that he owes a duty towards the nation and he should initiate proceedings for deportation of an illegal migrant. The applicant also incurs risk to his own security and safety besides spending time and energy in prosecuting the matter ... This shows how one-sided the provisions of the IMDT Act are. They have been so made that they only result in giving advantage and benefits to an illegal migrant and not for achieving the real objective of the enactment, namely, of detection and deportation of a Bangladeshi national who has illegally crossed the border on or after 25th March, 1971.³⁸

Accordingly, the Court upheld the contention of the petitioners that the Act itself was the biggest obstacle to the identification and deportation of illegal migrants, that citizens were hardly likely to initiate such proceedings for deportation, and that, as it had resulted in expulsions in less than half of one per cent of all cases initiated, the Act seemed to have been deliberately designed to protect and shelter illegal migrants rather than to identify and deport them.³⁹

The verdict quoted extensively from a 1998 report of the Governor of Assam, stating that the illegal migrants coming into Assam from Bangladesh were ‘almost exclusively Muslims’.⁴⁰ The xenophobic sentiments expressed in the report raised fears of swamping, and even terror:

The influx of these illegal migrants is turning these districts into a Muslim majority region. It will then only be a matter of time when a demand for their merger with Bangladesh may be made. The rapid growth of international Islamic fundamentalism may provide for [sic] driving force for this

demand.⁴¹

The view that the illegal migrants had reduced the people of Assam to a minority in their own State was endorsed by the Supreme Court, which echoed the petitioner's concern that their presence represented a threat of 'external aggression and internal disturbance'.⁴² It thus came to the conclusion that the IMDT Act contravened Article 355 of the Constitution, which mandates the Union government to protect States against external aggression and internal disturbance.⁴³ However, the fact that the IMDT Act was struck down by the Court has had no impact whatever on the law on citizenship, in particular the 2004 amendment to the Citizenship Act that modifies the provision of citizenship by birth to exclude from it such persons born in India as have one parent who is an illegal migrant at the time of their birth (Section 3(c)(ii)).

It is instructive to contrast this with the amendments to the Citizenship Rules. These were enacted to address the claims to citizenship of Hindu migrants from Pakistan migrating across the western border into the States of Rajasthan and Gujarat.⁴⁴ This region has experienced several waves of such immigration: from the wars between India and Pakistan in 1965 and 1971, and most recently after the demolition of the Babri Masjid in Ayodhya in December 1992. Following this event, the insecurity of members of the Muslim minority in India found parallels in the insecurity of the Hindu minority in Pakistan, approximately 17,000 of whom migrated to India. Most of these people, being Pakistani passport holders, travelled on Indian visas that they simply overstayed. They then became applicants for citizenship. The Union government had already, in response to the widespread allegations about the manipulation of citizenship certification in Assam, withdrawn to itself the powers of district collectors all across India to confer citizenship in accordance with the law. To enable the grant of citizenship by District Collectors in Rajasthan and Gujarat, the Union government had to make an exception to this withdrawal of powers, and this was accomplished in 2004, through an amendment to the Citizenship Rules 1956, for a specified and limited period and within a limited jurisdiction. This made it possible for District Collectors in these specific States to hold 'Citizenship Camps' to process the applications for citizenship of these migrants from Pakistan. There still remain a few thousand people who are awaiting the legalisation of their citizen status. The most significant feature of this amendment is its open declaration of the religious identity of the migrants. Until this point, and to the present as far as the main Act is concerned, the religious identity of migrants (illegal or otherwise) was covertly indicated, but never explicitly mentioned. The 2004 amendment to the Rules dispenses with such

signalling. It even avoids the description of these people as migrants, much less illegal migrants, the coded ‘dog-whistle’ label used to indicate immigrants from Bangladesh. Rule 8A of the Citizenship Rules 1956 reads:

In respect of *minority Hindus with Pakistan citizenship* who have migrated to India more than five years back with *the intention of permanently settling down in India* and have applied for Indian citizenship, the authority to register a person as a citizen of India ... shall be the concerned Collector of the district where the applicant is normally resident.⁴⁵

Let us return to Article 7 of the Constitution and compare the amended Rules to what was once described as ‘the obnoxious clause’:

Notwithstanding anything in articles 5 and 6, a person who has after the first day of March, 1947, migrated from the territory of India to the territory now included in Pakistan shall not be deemed to be a citizen of India:

Provided that nothing in this article shall apply to a person who, after having so migrated to the territory now included in Pakistan, has returned to the territory of India under a permit for resettlement or permanent return issued by or under the authority of any law and every such person shall for the purposes of clause (b) of article 6 be deemed to have migrated to the territory of India after the nineteenth day of July, 1948.⁴⁶

A quick reading shows that though the history of the Partition and the debates in the Constituent Assembly make it clear that Article 7 of the Constitution was intended to cover returning Muslims who had migrated to Pakistan, it forbore from making any mention of the religious identity of these people. The amendment to the Citizenship Rules, by contrast, does not hesitate to assume and name the religious identity of the recent migrants from Pakistan, who are explicitly referred to as ‘minority Hindus with Pakistan citizenship’. Further, recall the repeated questioning of the *intention* of returning Muslims, both in the Constituent Assembly as well as in a vast range of case law. By contrast, the Hindu migrants are not required to prove their *intention to permanently settle in India* so long as they have been resident for at least five years. The requirement for a permit of resettlement has naturally been done away with.

In both these amendments to the Citizenship Act and the Citizenship Rules, it is clear that elements of *jus sanguinis* have infiltrated the constitutional regime of *jus soli*. On the one hand, persons born in India but with one parent who is an illegal migrant at the time of their birth have become ineligible for citizenship. On the other hand, a special dispensation has been made for ‘minority Hindus with Pakistan citizenship’. Both these, one covert and the other explicit, suggest that religious identity has acquired a greater role in the construction of legal citizenship than might be supposed by simply looking at apparently identity-neutral constitutional provisions.

A third path to *jus sanguinis* has become manifest in the amendment of Section 7 of the Act, allowing for Overseas Citizenship of India. This is by no means dual citizenship. The website of the Ministry of Overseas Indian Affairs is at pains to labour the point that ‘OCI is not to be misconstrued as “dual citizenship”’.⁴⁷ Despite political promises made and reiterated over the years, India still has a regime of single citizenship and does not recognise dual citizenship. This means that unlike, for instance, the possibility of an American citizen being also simultaneously a German or Irish citizen, or the possibility of a Pakistani citizen being simultaneously a British citizen, Indian law requires that an Indian citizen who is acquiring British or American citizenship must renounce her Indian citizenship. Moreover, persons who have at any time held citizenship in Bangladesh or Pakistan are specifically excluded from the purview of this provision.

Around the time India became independent, it had been the consistent position of its political leadership that Indians living in other countries must give their complete allegiance to their adoptive homes. This position was adopted despite the anxiety of Indians in other countries of south and south-east Asia, as well as Africa, of being rendered second-class citizens in the countries where they lived. There was a shift in this approach when India was facing international sanctions for its nuclear tests. In 1998, the then Prime Minister announced the constitution of a high-level committee to examine the question of dual citizenship for Non-Resident Indians (NRIs), Indians who live abroad even as they retain their Indian citizenship. The government floated the Resurgent India Bonds scheme to attract investment but these were offered only to select Indians (NRIs as well as former citizens) in the US, Canada, and Europe. The explicit exclusion of citizens of the less prosperous members of the diaspora in places like the Caribbean, Mauritius, and Fiji, elicited accusations of ‘dollar and pound apartheid’. The high interest rates and tax exemptions offered by the bonds scheme made it hugely popular and the success of the scheme led to a second, the India Millennium Deposit scheme, in 2000. Together, these two bonds schemes raised close to USD 10 billion. The demand for dual citizenship from such Indians has been a longstanding one.

Meanwhile, the High Level Committee on the Indian Diaspora submitted its report (also known as the Singhvi Report) in 2001.⁴⁸ Lyrically eulogising the diaspora as the ‘National Reserve of India’ and ‘the National Resource of India’, the report recommended dual citizenship by an amendment to the Citizenship Act.⁴⁹ The substantive argument made in support of dual citizenship invoked the bonds of emotion that tied the emigrants to their land of origin, and referred to

their desire for dual nationality as ‘a higher form of the acknowledgement of their linkage with Mother India’.⁵⁰ The Singhvi Report rejected outright such arguments against dual citizenship as referred to national security concerns. In fact, it remarked that the IMDT Act (which was still undecided in court at the time) had failed to check illegal migration into the country. By contrast, people entering the country with dual citizenship would, it argued, be easier to monitor and regulate. It also betrayed a class bias in promising that the process of dual citizenship would be extremely selective. For instance, those whose ancestry could be traced back to first-wave émigrés (indentured labourers) would be kept out. As regards the common anxieties about divided allegiance and disloyalty, the Singhvi Report offered the assurance that overseas citizens would not be allowed to join the bureaucracy, the police force, or the defence services. It specifically ruled out the grant of political rights such as the right to vote or hold public office for these groups.⁵¹

In 2002, a scheme was inaugurated allowing for individuals of Indian origin in a select group of sixteen countries, all advanced industrial societies of the global North, to be registered as Persons of Indian Origin (PIOs). The justification for the choice of countries invoked the principle of reciprocity in that it was limited to those that recognised dual citizenship. In 2005, the Citizenship Act was amended to introduce the category of ‘Overseas Citizen of India (OCI)’, and the privileges accompanying the status were expanded. Today, it is only those individuals who are or have been at any previous time citizens of Pakistan or Bangladesh that continue to be excluded from this.

In *Talat Jamal Siddiqui v Union of India* (2011) the Delhi High Court upheld a rejection order of the government that denied a PIO card to a woman holding a British passport, because she had once held a Pakistani passport.⁵² This was despite the fact that both her parents were born in pre-Independence India, that she was the spouse of a PIO, and the parent of two PIOs. Among the grounds on which the petitioner contested the rejection in the High Court was the gendered language used in the official notification, claiming that the use of words such as ‘he’ and ‘himself’ clearly did not apply to her. The Court was unfortunately not persuaded even to the modest extent of ordering a gender-neutral rewriting of the rules.

Over the past decade, overseas Indians have clamoured for dual citizenship, and rhetorical promises to this effect have in fact been made, almost on an annual basis. Some OCIs, professionals such as doctors and dentists, advocates, and chartered accountants, have been given permission to practise their professions in India.⁵³ The rights that OCIs do not enjoy include the right to vote

and the right to contest elections for political office. They are also ‘normally’ ineligible for public employment, though exceptions can and have been made from time to time. OCIs also do not have the duty to pay taxes. Nevertheless, the manifestly greater engagement of the diaspora in a range of political activities in recent times—from mobilising funding to providing technical expertise for election campaigns—suggests that members of the diaspora have, even without dual citizenship, become more politically engaged in India. This may well betoken the impending realisation of dual citizenship.

V. CONCLUSION

The core features of contestation and the central anxieties around the legal status of citizenship in India exhibit some significant continuities and inversions. Some of the core principles on which judicial verdicts were based in the early decades after the adoption of the Constitution retain their centrality even as they come to be inverted after the 1990s. Two examples will suffice to demonstrate this. In the earlier phase, courts viewed an individual’s possession of a Pakistani passport in either of two ways: as something that indicated that individual’s intention to permanently settle in Pakistan or, more uncommonly, as something that had been acquired more or less involuntarily. In 1991, the court saw *de Raedt*’s possession of a Belgian passport as conclusive evidence showing that he never had the intention to permanently reside in India. Now, even the possession of an *Indian* passport has lost its evidentiary value. The courts have expressed cynicism about the Indian passports offered by individuals (alleged to be illegal immigrants from Bangladesh) as proof of their Indian citizenship. In *Motimiya Rahim Miya v State of Maharashtra*,⁵⁴ as also in *Razia Begum v State*,⁵⁵ the courts have ruled that Indian passports may have been acquired by misrepresentation and fraud. ‘Documentary’ citizenship thus comes to be mistrusted, with passports being potentially as compromised as ration cards and election cards.⁵⁶

Similarly, the question of intention to settle has retained its importance, albeit in an inverted manner. In the post-Partition period, as we have seen, the determination of citizenship rested heavily on the intent to permanently settle. Intention was positively valued as a condition of entry into the privileged circle of citizenship. In the present, such intention continues to carry positive connotations with reference to the Hindu migrants from Pakistan who, as the amended Citizenship Rules say, have come with ‘the intention of permanently

settling down in India'. However, in the context of Bangladeshi immigration, the intention to permanently settle by acquiring a ration card, election card, or passport, is a matter for suspicion. Intention is here ascribed and deployed to deny, rather than affirm, claims to citizenship.

This chapter has sought to demonstrate the contention over citizenship from the Constituent Assembly to the present. It has also shown that the divisive legacy of the Partition and the religious identities implicated in it continue to lie at the core of this contention. This is the reason why, despite the victory of the *jus soli* conception of citizenship at the constitution-making stage, there has been a gradual and subtle shift towards a *jus sanguinis* conception. While *jus soli* remains the governing principle of citizenship in India, citizenship law and jurisprudence have come to be manifestly inflected by elements of *jus sanguinis*. Whether it is the issue of 'illegal immigrants' from Bangladesh on the eastern border of India, or that of 'minority Hindus with Pakistan citizenship' on the western border, the law and rules have tended to view these very differently, seeing the latter (but not the former) as people with a rightful claim on Indian citizenship. This accenting of Indian citizenship with *jus sanguinis* is reflected also in the expansive approach latterly adopted towards the Indian diaspora.

¹ *Constituent Assembly Debates*, vol 9 (Lok Sabha Secretariat 1986) 347, 10 August 1949.

² 60 US 393 (1857). S 1 of the Fourteenth Amendment to the United States Constitution read: 'All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside.' Rogers M Smith's magisterial history of American citizenship, however, provides a compelling account of the ambiguities in the Fourteenth Amendment in relation to foreign-born blacks as well as tribes. Rogers M Smith, *Civic Ideals: Conflicting Visions of Citizenship in US History* (Yale University Press 1997) ch 10.

³ *Constituent Assembly Debates*, vol 9 (Lok Sabha Secretariat 1986) 347, 10 August 1949.

⁴ B Shiva Rao, *The Framing of India's Constitution: A Study* (Indian Institute of Public Administration 1968) 152.

⁵ See *Constituent Assembly Debates*, vol 2 (Lok Sabha Secretariat 1986) 338, 30 August 1947. In the discussion on fundamental rights, B Das said:

Many things have happened since we discussed Fundamental Rights in April last. India has been divided up and Indian citizens who are born in both parts of India now can claim citizenship in either Pakistan or Hindustan. There may be families that may have a brother in Pakistan acquiring the citizenship of Pakistan while others may be citizens of India. So it is natural that Government should legislate that everybody must declare whether he is a citizen of Pakistan or Hindustan. One would not like the best brains of India to go to Pakistan and when they come back to India will they be taken as Indians or only recognized as citizens of Pakistan because they have served after the separation in that country?

⁶ *Constituent Assembly Debates*, vol 9 (Lok Sabha Secretariat 1986) 347, 29 April 1947.

⁷ We retain here the constitutional usage of the masculine gender with some unease and only in the context of the constitutional provisions.

⁸ Constitution of India 1950, art 11.

⁹ Vazira Fazila-Yacoobali Zamindar, *The Long Partition and the Making of Modern South Asia: Refugees, Boundaries, Histories* (Viking Books 2007) 86.

¹⁰ *Constituent Assembly Debates*, vol 9 (Lok Sabha Secretariat 1986) 366, 11 August 1949.

¹¹ AIR 1955 SC 36 [11].

¹² *State Trading Corporation of India v The Commercial Tax Officer*, AIR 1963 SC 1811.

¹³ HM Seervai, *Constitutional Law of India*, vol 1 (4th edn, Universal Book Traders 2002) 319–25.

¹⁴ (1991) 3 SCC 554.

¹⁵ *Louis de Raedt* ([n 14](#)) [10].

¹⁶ AIR 1955 SC 36.

¹⁷ *Central Bank of India* ([n 16](#)) [11].

¹⁸ AIR 1967 All 154.

¹⁹ The presumption of equivalence between domicile and citizenship also provoked the question of whether a single all-India citizenship implied that an individual could not be domiciled in a particular State. This came up as a Conflict of Laws question in *DP Joshi v Madhya Bharat* AIR 1955 SC 334, in which a constitutional bench of the Supreme Court upheld State domicile in relation to college admissions, ruling that domicile and citizenship were two distinct concepts and that discrimination based on residence was not violative of art 15(1). In *Pradeep Jain v Union of India* (1984) 3 SCC 654 [8], Bhagwati J stated that it was ‘highly detrimental to the unity and integrity of India to think in terms of state domicile’. Jurists have argued that the reality of legal pluralism—especially with respect to personal laws—makes State domicile compatible with all-India citizenship. See Seervai ([n 13](#)) 317–28.

²⁰ AIR 1961 SC 58.

²¹ AIR 1966 SC 1614.

²² *Kulathil Mammu* ([n 21](#)) [4].

²³ *Kulathil Mammu* ([n 21](#)) [5].

²⁴ Seervai ([n 13](#)) 331. Seervai was sharply critical of this judgment, which he argued wrongly overruled the verdict in *Shanno Devi*.

²⁵ AIR 1961 SC 1467.

²⁶ AIR 1962 SC 1052.

²⁷ (1979) 1 GLR 71 [15].

²⁸ Kamal Sadiq, *Paper Citizens: How Illegal Immigrants Acquire Citizenship in Developing Countries* (Oxford University Press 2009).

³⁸ *Sarbananda Sonowal* ([n 30](#)) [47].

⁴¹ *Sarbananda Sonowal* ([n 30](#)) [17].

⁴⁵ Citizenship Rules 1956, rule 8A (emphasis added).

²⁹ Sadiq ([n 28](#)) 56–69.

³⁰ *Sarbananda Sonowal v Union of India* (2005) 5 SCC 665 [2].

³¹ *Sarbananda Sonowal* ([n 30](#)) [2].

³² *Sarbananda Sonowal* ([n 30](#)) [3].

³³ *Sarbananda Sonowal* ([n 30](#)) [8].

³⁴ *Sarbananda Sonowal* ([n 30](#)) [7].

³⁵ *Sarbananda Sonowal* ([n 30](#)) [70].

³⁶ Sarbananda Sonowal ([n 30](#)) [19].

³⁷ Sarbananda Sonowal ([n 30](#)) [40].

³⁹ Sarbananda Sonowal ([n 30](#)) [47].

⁴⁰ Sarbananda Sonowal ([n 30](#)) [17].

⁴² Sarbananda Sonowal ([n 30](#)) [63].

⁴³ Sarbananda Sonowal ([n 30](#)) [67].

⁴⁴ For a detailed account of this case, see Niraja Gopal Jayal, *Citizenship and its Discontents: An Indian History* (Harvard University Press 2013) ch 3.

⁴⁶ Constitution of India 1950, art 7.

⁴⁷ The Ministry of Overseas Indian Affairs, 'Overseas Citizenship of India Scheme' <<http://moia.gov.in/services.aspx?id1=35&id=m3&idp=35&mainid=23>>, accessed October 2015.

⁴⁸ Government of India, *Report of the High Level Committee on the Indian Diaspora* <<http://indiandiaspora.nic.in/contents.htm>>, accessed October 2015.

⁴⁹ *Report of the High Level Committee on the Indian Diaspora* ([n 48](#)) 526.

⁵⁰ *Report of the High Level Committee on the Indian Diaspora* ([n 48](#)) 526.

⁵¹ *Report of the High Level Committee on the Indian Diaspora* ([n 48](#)) 567.

⁵² *Talat Jamal Siddiqui v Union of India* (Delhi High Court, 21 January 2011).

⁵³ Ministry of Overseas Indian Affairs, notification number SO 36E, *Gazette of India*, 6 January 2009.

⁵⁴ AIR 2004 Bom 260.

⁵⁵ (2008) 152 DLT 630.

⁵⁶ Sadiq ([n 28](#)).

CHAPTER 11

LANGUAGE

SUJIT CHOUDHRY*

I. INTRODUCTION

DISPUTES over official language policy have long been at the centre of Indian political life. In British India, one of the principal axes of nationalist mobilisation was language, with Muslim elites seeking to preserve the status of Urdu as the official language of public administration in the face of demands by educated, urban Hindus that Hindi written in the Devanagari script replace Urdu. The loss of the struggle over the official language status of Urdu led Muslim elites to shift their demands to the creation of a State in which Urdu would be the official language, Pakistan. But the partition of British India did not settle the debate over India's official language; rather, it spawned a new debate in the Constituent Assembly over whether Hindi should be the sole official language of the Union government, or whether Hindi and English should enjoy equal status. These debates over the official language of the Union government were renewed in the 1960s, and were only resolved through a compromise that preserved, likely indefinitely, a central role for English—which ironically is not one of India's official languages. A closely related issue was the question of whether the boundaries of India's States should be redrawn to ensure their linguistic homogeneity, a major political flashpoint in the 1950s and 1960s that led to the largest and most peaceful reconfiguration of political space under the rule of law, without recourse to mass violence in the history of liberal democracy. Linguistic reorganisation in turn created a set of States which used their power to make regional vernaculars the common language of political, economic, and social life, and set up a series of controversies with internal linguistic minorities over the language of education in public and State-assisted schools.

The centrality of controversies over official language status during the Constituent Assembly debates gave rise to a broad array of constitutional provisions, which have become sites of ongoing constitutional contestation in the post-Independence period. The largest set of provisions is contained in [Part XVII](#), which is devoted in its entirety to 'Official Language'. [Part XVII](#) has four chapters and nine Articles which address the 'Language of the Union' (Articles

343 and 344); ‘Regional Languages’ (Articles 345 to 347), which in fact relates to the official languages of the States; and the language of the Supreme Court and the High Courts and legislative enactments (Article 348). Moreover, there are important provisions on official language outside of [Part XVII](#). Articles 120 and 210, respectively, address the language of legislative proceedings in the chapters on Parliament (Part V, Chapter II) and State legislatures (Part V, Chapter III). The fundamental rights guarantees in [Part III](#) include cultural and educational rights in Articles 29 and 30 which extend to linguistic minorities, and which have had their greatest impact with respect to minority language schools. The Eighth Schedule selectively enumerates a growing list of Indian languages, and thereby affords them ‘official’ status. Finally, there are other provisions that do not refer expressly to language, but which have figured centrally in linguistic politics. Central among these is Article 3, which confers on Parliament the power to change State boundaries and create new States. Although it lays down no substantive criteria to direct the exercise of this power, it has been used most often in response to language-based political mobilisation, and was the mechanism for linguistic reorganisation.

Studying the constitutional politics of official language status is necessary to come to grips with the Indian constitutional experience. In addition, the constitutional politics of official language status provides insights into the broader forces shaping Indian political development. For example, the drive to adopt Hindi as the official language of the Union government and to resist linguistic reorganisation were part of an integrated strategy to build a common national citizenship that would sustain the unity of the world’s largest democracy in the face of staggering diversity and in the aftermath of Partition, and were designed to pursue a number of specific goals under this overarching framework: creating a common platform for the establishment of a mass, democratic, national politics; dissolving social and economic hierarchy through promoting literacy in a common tongue that would permit social and economic mobility; and providing a basis for direct communication between Indians and public administration in an indigenous language. Non-Hindi speakers, who feared that privileging Hindi and denying official status to regional languages would distribute economic and political power towards Hindi speakers and away from them, resisted this integrative strategy. They invoked precisely the same objectives to argue for the retention of English at the Centre, and the creation of linguistic States with regional languages having official status. Given the importance of these themes to Indian politics outside the context of language, examining controversies over official language status can sharpen and deepen our understanding of these broader trends in Indian politics. Moreover, debates

over official language status served as the basis for mass political mobilisation. Although political rhetoric often invoked the link between language and cultural identity, what actually fuelled these claims was not radical cultural difference, but economic competition for white-collar public-sector employment. The material underpinnings of debates over official language status accordingly can shed light on their role in the mobilisation of other identity-based cleavages in Indian politics, such as caste, in debates over reservations.

The Indian Constitution's provisions on language also offer important lessons for constitutional design and interpretation. It is often assumed that once a language receives official status, it should be used across all areas of government activity. However, as the Indian Constitution shows, the choice of official language can be disaggregated functionally and spatially into a number of distinct institutional decisions, in which the scope for linguistic choice and the consequences of these choices are rather different. Disaggregation can become a tool of constitutional compromise, by eliminating the zero-sum nature of the choice of official language into a multiplicity of separate choices that can be traded off against each other and other constitutional issues. The specific provisions of [Part XVII](#) deploy a multiplicity of other devices to broker constitutional compromise, including delays (eg, Article 343), deferrals (eg, Article 344), defaults that can be displaced through ordinary legislation (eg, Article 345), and low thresholds to constitutional change (eg, Article 3). Although the principal institutional sites for the constitutional politics of official language were the Constituent Assembly, Parliament, and State legislatures, the courts have increasingly played an important role in cases on minority language education arising under Article 30. In the course of working out the relationship between the power of States to set the language of educational instruction and minority language educational rights, the courts have articulated their understanding of the consequences of linguistic reorganisation on an original, pan-Indian conception of citizenship that treats all of India as home to all of its linguistic communities which emerged from the Independence movement, and a newer conception of citizenship that may have replaced it.

II. OFFICIAL LANGUAGE OF THE UNION GOVERNMENT

The official language of the Union government was the single most divisive issue in the Constituent Assembly.¹ At Independence, the official language of British colonial administration was English, which was spoken by less than 1 per

cent of the population. Most Indians spoke one of approximately a dozen regional languages. Hindi was India's most widely spoken language, commanded by approximately 40 per cent of the population. Very few speakers of the other languages spoke Hindi; indeed, the principal languages of South India are radically different from Hindi and from entirely different linguistic families. In the assembly, the main questions were whether to replace English, in whole or part, with an indigenous language as the Union government's official language, and which indigenous language(s) should receive official status in central institutions. There were two camps, one that advocated for Hindi to be the sole official language of the Union government and legal system, and another that argued for both English and Hindi to be official languages of the Union government and legal system.

At first blush, since Article 343 designates Hindi as 'the official language of the Union', it would seem that the proponents of Hindi won. But upon closer examination the resulting set of constitutional provisions reflects a multidimensional compromise between these two positions. Article 343(2) provides for a delay of fifteen years during which the status quo with respect to the use of English would remain in place. Moreover, under Article 343(3), the delay can be extended indefinitely through ordinary legislation, shifting the burden of legislative inertia onto those who wish to preserve the use of English but at the same time not requiring the two-thirds majority needed to amend Article 343. The combination of these mechanisms kept open the possibility that the transitional arrangements surrounding the shift to Hindi could be continued indefinitely and channelled these questions into the legislative process and ordinary politics.

In addition, the question of official language status was disaggregated into a series of specific institutional decisions. Although Article 343(1) designates Hindi as 'the official language of the Union', which implies its sole official status across all central institutions, this categorical declaration is qualified by a number of other provisions which differentiate across the different branches of government, and within each branch, and establish different rules governing official languages for each context. For example, consider Parliament. Article 348(1)(b)(I) provides that English is the language of primary and secondary legislation, until legislation to the contrary is enacted. This continued the status quo of English indefinitely, and shifted the burden of legislative inertia onto those who would adopt Hindi as the language of legislation—the reverse of Article 343(1). Although the Official Languages Act 1967 mandates that there be an official Hindi translation of a central statute, the Supreme Court has held that Article 348(1)(b) makes the English version authoritative, and that it

prevails over the Hindi version in the event of conflict.² The importance of Article 348(1)(b) is underlined by the fact that its reach extends to notifications issued under central legislation.³

The Indian Constitution also differentiates between the language of parliamentary deliberations and the language of legislation. Article 120 permits the use of Hindi or English in parliamentary debates, and permits the Speaker of either chamber to permit a member to use his or her mother tongue (with the right to use English expiring in fifteen years unless extended through legislation, as in the case of Article 343). The possibility of multilingual parliamentary debates, however, is treated separately from the language of the legal outputs of those proceedings, which presumptively remains English. The courts are also governed by rules that depart from Article 343. Article 348(1)(a) establishes English as the language for Supreme Court and High Court proceedings and judgments. While Article 348(2) authorises State legislatures to legislate the use of Hindi or regional languages in High Court proceedings, that power does not extend to the constitutional requirement that judgments be in English (which would require a constitutional amendment to alter). Moreover, for the Supreme Court, the Constitution does not create a legislative mechanism to alter the language of its proceedings, which could only be achieved through constitutional amendment. Indeed, the Court has declined to permit parties to present arguments before in languages other than English, on the basis of Article 348(1)(a), even though it arguably has the inherent authority to do so.⁴ Against the backdrop of the provisions, the rejection of an Article 14 challenge to holding the Delhi University Law entrance exam in English should be understood as rooted in the special constitutional status of English in the legal system.⁵ Finally, Article 346 impliedly maintains English as an official language for Centre–State communications, by preserving the linguistic status quo in this arena as well.

The provisions on Parliament and the courts illustrate the logic of disaggregation, by drawing a distinction between the language of deliberations and decision, permitting the former to be multilingual whereas presumptively, or permanently, retaining the unilingual character of the latter. These distinctions are driven by a number of considerations. One is the demand for legal certainty, which exerts strong pressure in favour of one or very few languages to serve as the language of legislation and judgments. Moreover, given the official status of English prior to Independence for judgments and legislation, legal certainty argued in favour of continuing the linguistic status quo. But official language status also distributes opportunities to participate in the decisions of legislatures or courts, and hence, distributes political power. The opponents of the adoption

of Hindi as the sole official language of central institutions argued that such a policy would distribute political power away from non-Hindi to Hindi speakers. The fear was that this would produce a new kind of colonialism, a form of ‘Hindi Imperialism’. This explains the rationale behind allowing institutions to deliberate in more than one language. And disaggregation explains how different approaches to official language status can be taken for deliberations and decisions. Finally, concerns about the redistributive power of official language status explain the retention of English as the language of legislation and judgments.

Read alongside the cluster of constitutional provisions on language, it becomes clear that the true ambit of Article 343 is the language of public administration. Even here, it is important to disaggregate the language of public services from the internal working language of government—that is, a distinction between external and internal communication. In principle, it is possible for governments to offer services in multiple languages, as the Indian central bureaucracy does. Indeed, Article 350 grants every person the entitlement ‘to submit a representation for the redress of any grievance to any officer or authority of the Union’ in ‘any of the languages used in the Union or in the State’. Rather, the focus of Article 343 is the internal working language of government. From a practical standpoint, the State is limited in its ability to function internally in more than one language, because of the difficulties of translation. There is a zero-sum aspect to the designation of an official language in this sphere, creating clear winners and losers. Article 343 was a victory for Hindi speakers, although it gave an opening for revisiting this issue through statute as 1965 approached.

Article 344 directed the creation of a commission to develop a plan for the transition from English to Hindi, which was struck in 1955 with BG Kher as chair. The possibility created by Article 343 to extend the transitional status of English created the option of deferring the transition past the fifteen-year mark, if not indefinitely. The majority of the Kher Commission’s members decisively rejected that idea, and reiterated the democratic case for conferring official status solely on Hindi as providing a common language for mass democratic politics.⁶ But there were passionate dissents, which argued that such a policy would consolidate political power in the hands of a Hindi-speaking elite and withdraw it from non-Hindi speakers. The focus of the most intense disagreement within the Commission was not on the language of Parliament, but of the examinations for the All India Administrative Service (IAS). In addition to serving in the central bureaucracy, IAS officers are also assigned to work in State governments, where they hold the most senior posts. At Independence, the

exams were administered in English. The Kher Commission recommended that Hindi eventually become the sole language of the examination. The dissenters argued that the result would be neo-colonial in non-Hindi-speaking States, because of the central role played by IAS officers in State bureaucracies.

As the constitutionally set deadline for implementing Article 343 in 1965 approached, the language of the IAS exam emerged as the major flashpoint of controversy. In Tamil Nadu, university students led violent anti-Hindi protests, which led to riots in which sixty-six were killed. As part of a broader decision to postpone indefinitely the implementation of Article 343, the adoption of Hindi as the language of the IAS exams did not proceed. The status of English was preserved by the Official Languages Act 1967, which grants a statutory veto on the continued use of English to each non-Hindi-speaking State. There has been very little litigation surrounding the internal working language of government, and the courts have been non-interventionist. For example, notwithstanding the retention of English as the language of the IAS exam, civil servants receive Hindi language training. In *Murasoli Maran*, the Supreme Court turned back a challenge to this policy, holding that it did not contradict the Official Languages Act's continuation of the use of English in Union government institutions.⁷ But the Delhi High Court also turned back a challenge under Article 14 to a compulsory English exam for the IAS.⁸ The most persuasive reading of that judgment is that since the retention of English was itself authorised by Article 343, it could not be challenged on the basis of another constitutional provision, the right to equality.

Although the dissenters in the Kher Commission framed their concerns surrounding the adoption of Hindi in terms of democracy, at the root of mass political mobilisation on the basis of language and the resistance to Hindi was economic competition over white-collar public sector employment. The demand for those kinds of employment opportunities increased in the post-Independence period because of increased social mobility, which was a product of increasing participation in education, especially secondary education. Education also fuelled the migration of the newly literate, with youth flocking to urban centres in search of employment opportunities not available in rural areas, such as public-sector employment. The choice of an official working language of public administration created unequal access to public-sector employment opportunities, which translated into political demand to redistribute those opportunities from one group to another through official language policies. Material interest, not cultural difference, was at the root of this politics, which in turn drove constitutional adaptation.

These provisions and subsequent developments also illustrate an ongoing, and in some cases, indefinite role for English, as the preserver of linguistic peace between Hindi and non-Hindi speakers. In this context, the Eighth Schedule is striking. It now lists twenty-two languages, which thereby acquire official status. However, the inclusion of a language in this schedule has no operative effect with respect to any of the key provisions of [Part XVII](#). Indeed, the practical irrelevance of the Eighth Schedule is underlined by the fact that English, which clearly has ongoing official status, is not enumerated therein. Since neither the inclusion nor exclusion of a language in the Eighth Schedule has real institutional implications, the politics surrounding the Eighth Schedule is largely symbolic. The lack of any concrete impact may be the real reason why the Supreme Court in *Kanhaiya Lal Sethia* declined to subject decisions to include languages in the Eighth Schedule to judicial oversight.⁹

III. LINGUISTIC REORGANISATION OF STATES

The disaggregation of official language status into a multiplicity of separate decisions, which vary across and within specific institutions, and which can be traded one off against the other as part of a comprehensive constitutional negotiation, is one of the great contributions of the Indian constitutional experience to other societies wrestling with the constitutional politics of mobilisation around official language status. Disaggregation also sheds light on the relationship between federalism and language. In Indian political discourse, it has often been assumed that the adoption of multiple official languages requires federalism. The unstated premise of this claim is that the public sector is a single, indivisible zone across all areas of government activity. But the above examples show how it is possible for a government to operate with multiple official languages without federalism. The Indian experience also illustrates the limits of disaggregation, with respect to the internal working language of government, because of the pressures towards linguistic homogeneity. Economic competition over public-sector employment opportunities was at the root of the political resistance to the implementation of Article 343; because of the indivisibility of the internal working language of government, it also fuelled the demand for linguistic federalism, to create multiple public sectors to offer white-collar employment opportunities in a range of languages.

Demands for linguistic federalism dated back to the movement for Independence. Since 1920, the Congress Party had been committed to linguistic

provinces, and indeed, organised itself internally along regional-linguistic lines that did not correspond to the internal administrative divisions of British India. It abandoned this stance in the wake of Partition, out of the fear that linguistic federalism would be the stepping stone to secession, by creating States that would serve as sites of political identification and loyalty that would conflict with a pan-Indian conception of citizenship. Indeed, in the debates over linguistic federalism, national elites framed an argument for national citizenship in civic terms, as rooted in a shared commitment to liberal democracy and shared political institutions, that formed a common spine of citizenship that transcended linguistic and regional divides, and which underpinned a project of modernisation built around democracy, economic and social mobility, and administrative efficiency. Subnational citizenship was denigrated by these elites as being rooted in primordial and parochial forms of identity that were hostile to this modernising project, and was the basis for the opposition to linguistic States. The Report of the Linguistic Provinces Commission (the Dar Commission), appointed by the Constituent Assembly to study the issue of linguistic provinces, accordingly rejected the demand for linguistic provinces because it was rooted in ‘a parochial patriotism’¹⁰ of a ‘centuries-old India of narrow loyalties, petty jealousies, and ignorant prejudices engaged in a mortal conflict’,¹¹ which was inferior to an ‘Indian nationalism and Indian patriotism’ that was inconsistent with linguistic provinces, and which went hand in hand with the adoption of Hindi as the language of the Centre.¹²

The Constituent Assembly rejected linguistic provinces. But the Constitution contained two provisions that gave political actors the tools to thrust this issue back onto the constitutional agenda. First, Article 345 authorises State legislatures to ‘adopt one or more of the languages in use in the State or Hindi’ as an official language, which led newly created State legislatures to debate which regional languages would receive official language status. Second, Article 3(a) grants authority to Parliament to ‘form a new State by separation of territory from any State or by uniting two or more States or parts of States or by uniting any territory to a part of any State’ through ordinary legislation. These two provisions interacted in the following way: if the choice of official language could not be resolved within State legislatures, the disagreement could be shifted to Parliament and transformed into a debate over the redrawing of State boundaries, which would be relatively easy to accomplish because of low procedural thresholds.

The rejection of linguistic provinces unravelled before Independence. The report of the Dar Commission was rejected, especially in the South, where the

opposition to Hindi was also strongest. The Congress Party responded by appointing the Congress Linguistic Provinces Committee, which recommended in 1949 the creation of Andhra State from the Telugu-speaking parts of Madras State, which had a Tamil majority. Andhra State (later Andhra Pradesh) was created in 1953, which impelled the creation of the States Organisation Commission. The Commission was charged with proposing principles for the redrawing of State boundaries and making specific recommendations about State boundaries. The Commission concluded that language should be a factor in drawing State boundaries, and issued a series of specific recommendations that were largely based on language. Based on the Commission's recommendations, Parliament created Assam, Bihar, Bombay, Jammu and Kashmir, Kerala, Madhya Pradesh, Madras State (later Tamil Nadu), Mysore State (later Karnataka), Orissa, and Punjab in 1956. Multilingual Bombay State was further divided into Gujarat and Maharashtra in 1960, and Punjab into Haryana and Punjab in 1966.¹³

The creation of linguistic States occurred with almost no judicial intervention, closely paralleling the minimal judicial role with respect to Chapter XVII. The one possible hook was Article 3's requirement that bills to create new States be referred to the legislatures of the States affected 'for expressing its views thereon'. States argued that this requirement of consultation should be interpreted as requiring a State's consent to any change in State boundaries. In *Babulal Parate*,¹⁴ a challenge brought by Bombay State to the first States' reorganisation, the Supreme Court decisively rejected this view, which it later affirmed in *Pradeep Chaudhary*.¹⁵ It is interesting to contrast the Supreme Court's refusal to thicken the requirement of consultation into consent with its approach to Article 124(2), where the Court read a requirement to consult the Chief Justice prior to making appointments to the Supreme Court into a need to obtain the Chief Justice's consent. Notably, *Babulal Parate* also rejected the less demanding claim that the process of consultation be repeated each time there were amendments to a bill proposing a change in State boundaries, even though accepting this claim would not have undermined the plenary authority of Parliament.

The lack of a judicial role in the creation of linguistic States is striking when viewed through the lens of the basic structure doctrine. Given the roots for the initial rejection of linguistic States in an overarching theory of Indian nationhood, it is possible to conceptualise an argument rooted in the basic structure doctrine that would have held linguistic reorganisation to run counter to some basic characteristics of the Indian constitutional order. Indeed, on some

formulations, the basic structure of the Indian Constitution includes its territorial integrity, which the Dar Commission argued would be threatened by linguistic States. The Turkish Constitutional Court has developed an argument along these lines, in cases that have banned political parties that advocated the creation of a federal Turkey with a Kurdish-majority State in which Kurdish would be an official language.¹⁶ In *Dalavai*, the Supreme Court hinted at the outlines of such an argument, when it struck down a Tamil Nadu statute that created a pension scheme for anti-Hindi agitators.¹⁷ The Court struck down the statute because ‘the pension scheme formulated by the Tamil Nadu government contains the vice of disintegration and fomenting fissiparous tendencies’.¹⁸ Its judgment was not based on any provision of the Indian Constitution. By implication, the Court seems to have relied on an implicit theory of the Constitution’s underlying structure. It may be that a basic structure challenge to linguistic reorganisation was never made, because the 1956 reorganisation predated *Kesavananda Bharati* by seventeen years. It is interesting to speculate on the constitutional counterfactual of how the Court would have reacted had the doctrine existed in the 1950s, and been invoked by Bombay State in *Babulal Parate*. As I have argued elsewhere, the best justification for the doctrine has been to protect Indian democracy from attempts by political parties to thwart political competition, a particularly acute risk in the era of Congress Party dominance.¹⁹ Given the link between linguistic reorganisation, and the rise of regional parties around language and caste, and that these parties ended the dominance of the Congress Party in the States and ultimately led to the end of Congress Party rule centrally, a far-sighted Court should have not stood in the way.

The State’s power to determine official languages under Article 345 is the analogue to Article 343, and is also subject to the special provisions of Article 348. Article 348(1)(b)(i) provides that the language of primary and secondary legislation in the States shall be English. However, Article 345 authorises the State legislature to confer official status on a regional language ‘for all or any of the official purposes of the State’, a broad formulation which has been understood to include the language of primary and secondary legislation. Moreover, Article 348(3) impliedly confirms that such non-English versions of legislation would have legal force, through its requirement that an English translation be ‘published’ of State legislation, and ‘be deemed to be the authoritative text thereof in the English language’, as opposed to the authoritative text in *any* language. The lack of a provision parallel to Article 348(3) for central legislation suggests that the rule in *Jaswant Sugar Mills* does not apply in the States; rather, in the event of a conflict between the official

versions of a statute in English and the regional language, the latter should prevail. *Ashgar Ali*, a case involving a conflict between the English and Hindi versions of a notification, the effect of the ruling was to apply the Hindi version.²⁰ Although the basis for the holding was that the English translation had not been published under the authority of the Governor, as Article 348(3) requires, and hence, there was no authoritative English version to reconcile with the Hindi version, a better justification for the holding was that the Hindi version was authoritative—the reverse of the position for central legislation.

State legislatures also have the power, under Article 348(2), to authorise the use of Hindi or any other official language in the State for use in High Court proceedings. In *Vijay Laxmi Sadho*, the Supreme Court confirmed that State legislation with this effect prevails over conflicting provisions of the High Court rules that only permit the use of Hindi.²¹ Moreover, under Article 345, English remains in use in the High Courts ‘until the Legislature of the State otherwise provides by law’. *Dayabhai Poonambhai* and *Sarshwati Bai* establish a clear statement rule under Article 345 that requires legislation to expressly exclude Hindi from High Court proceedings; those judgments would not imply the exclusion of English as a necessary implication of legislation that allowed the use of Hindi in High Court proceedings.²² These judgments likely reflect a judicial reluctance to permit the ouster of English from State High Courts, given their central role in an integrated national judicial system operating under the common law, with its rules of precedent, and sitting under a Supreme Court which functions exclusively in English. The express limitation in Article 348(2) that the provision does not extend to High Court judgments, which must remain in English even if the language of the proceedings is changed to Hindi or a regional language, is consistent with this view on the role of the State High Court in India’s judicial hierarchy.

IV. LINGUISTIC FEDERALISM AND LINGUISTIC MINORITIES

The courts have been largely uninvolved in the constitutional politics of official language policy. The major exception is in the context of minority language education. This body of case law arose in the wake of linguistic reorganisation, where newly created linguistic States enacted laws to mandate instruction in the regional languages in elementary and secondary schools. The goal underlying these laws was to further the making of regional vernaculars the common language of political, economic, and social life, by ensuring that all children

resident in the State attained fluency. These laws can therefore be understood as logical extensions of official language legislation. In *Gujarat University*, the Supreme Court provided a constitutional anchor for this legislation in the power of States over education, which was at that time item 11 in the State List in the Seventh Schedule.²³ Although the Forty-Second Amendment shifted education to item 25 in the Concurrent List, States still have the power to enact such laws. To be sure, reorganisation created States that were much more linguistically homogeneous than before. But many contained significant linguistic minorities that operated schools offering mother tongue instruction. Indeed, mother tongue education for linguistic minorities within States was often deeply rooted in questions of cultural identity and survival. The new laws mandating education in regional languages also applied to schools operated by linguistic minorities that primarily offered mother tongue education, which either did not offer education in the official language or at best made it an elective option. These laws generated a clash between linguistic nation building by State governments and the demands of linguistic minorities to be allowed to choose the language of instruction for their children.

The key constitutional provision in these cases has been Article 30, which grants religious and linguistic minorities ‘the right to establish and administer educational institutions of their choice’ (Article 30(1)) and which, in addition, prohibits the State, when granting aid to educational institutions, from discriminating ‘against any educational institution on the ground that it is under the management of a minority, whether based on religion or language’ (Article 30(2)). The focus of the jurisprudence has been on Article 30(1), with the Supreme Court in *State of Bombay v Bombay Education Society* holding that the power of linguistic minorities to ‘administer’ educational institutions encompasses not just managerial authority over financial and administrative matters, but also control over the curriculum, including the language of instruction.²⁴ This interpretation of Article 30(1) flowed from reading that provision in light of the Article 29(1) right of linguistic minorities to conserve their language, script, and culture. In essence, the Court has read Article 30(1) as conferring the right on linguistic minorities to create institutions to exercise their Article 29(1) right. In addition, Article 30(1) has been interpreted to include the right to opt for mother tongue education—that is, it is an option they may or may not wish to exercise. The presence of the phrase ‘of their choice’ in Article 30(1) has been the textual underpinning of this reading of Article 30(1). The Court quickly clarified that the scope of Article 30(1) extends beyond primary and secondary education (as in *Bombay Education Society*) to post-secondary

institutions, in *DAV College, Bhatinda v State of Punjab*.²⁵

The main legal debate has been over the extent to which Article 30(1) grants linguistic minorities the right to exclude instruction in the regional language. The principal cases have come out of the largest non-Hindi States: Karnataka, Maharashtra, and Tamil Nadu. In principle, there are a range of possible policies which States can pursue on the use of regional languages in education: that instruction in the regional language be offered as an elective; that it be mandatory but not exclusive and/or primary; that it be primary; and that it be exclusive. The courts have groped towards a framework that distinguishes among different stages of education, with the right of linguistic minorities operating their own educational institutions to exclude instruction in the regional language diminishing as the age of the child increases. Initially, the courts took the view that States had no power to require instruction in the regional language in primary education, and only had the power to make the regional language ‘a’ mandatory language of instruction at the secondary level, leaving to each individual student the choice of whether they wish to make the regional language the primary language of their instruction.²⁶ The courts later authorised States to make the regional language ‘a’ language of instruction for primary education beginning in the fifth standard, in *Usha Mehta v State of Maharashtra*,²⁷ and even the first standard, in *KR Ramaswamy v State*.²⁸

Underneath the increasing power of States to mandate instruction in regional languages have been important shifts in the doctrinal framework for Article 30. Initially, the courts described Article 30 as an absolute right that could only be regulated by States through laws that enabled the exercise of the right by promoting educational quality and efficiency. The courts held that the State interest in promoting literacy in regional languages was per se inadmissible or very weak. The obvious rejoinder was the State’s power to determine the official language of the State government under Article 345, and to infer from that power the constitutional legitimacy of adopting ancillary policies to support widespread literacy in the official language, including through the educational system. The courts responded to this argument by firmly distinguishing States’ authority over the former, which was plenary, and the latter, which was subject to Article 30.

General Secretary, Linguistic Minorities Protection Committee v State of Karnataka, a decision of the Karnataka High Court, illustrates these points.²⁹ The case was a challenge by Urdu, Tamil, Marathi, and English speakers to a Karnataka law that made instruction in Kannada compulsory from the first grade for children whose mother tongue was not Kannada, and made Kannada the sole

first language in secondary school. Although the Court stated that Article 30 was an ‘absolute’ right, it nonetheless permitted laws that regulated it.³⁰ There are two inconsistent strands to the Court’s explanation of what kinds of State laws Article 30 permits. On one strand of reasoning, the High Courts held that Article 30 only permits ‘regulative measures’ which are ‘conceived in the interest of the minority educational institutions’—for example, laws which ensure educational quality. On this formulation, laws rooted in broad claims to the ‘public interest’ are impermissible. By implication, promoting the use of the regional language cannot serve as a justification for requiring instruction in Kannada, because the interest served is not that of the pupils themselves. The Court buttressed this view by relying on a consensus among policymakers that it is in the best interests of a child to only be educated in a mother tongue—and hence, the requirement for some instruction in a regional language in elementary school was unconstitutional. But on another strand of its reasoning, the Court accepted that linguistic minorities themselves did benefit from a command of the regional language, which led it to conclude that the State could mandate the regional language as ‘a’ mandatory language, but that the State must still leave it to students to choose which language would be the principal language of instruction, based on their educational and career objectives.

It is possible to offer the following reconstruction of the decision that renders it more doctrinally coherent, by rooting it in the underlying theory of citizenship that the Karnataka High Court set out in its reasons, but did not connect with its legal analysis. Under the High Court’s theory, India is a single country with ‘one’ citizenship, held equally by members of all linguistic communities across the entire country. It follows that each State is ‘a miniature India’,³¹ where linguistic ‘minorities are as much children of the soil as the majority’.³² It follows that ‘it is not permissible for a State to impose a condition that a citizen residing in that State permanently or temporarily, must study the official language of that State in high school’.³³ What this suggests is that the State lacks an interest in establishing fluency in the regional language. If this were the real goal underlying the law, then the law would be *per se* unconstitutional for pursuing an unconstitutional purpose. However, what would be permissible, even on this formulation, is the less ambitious goal of providing minority language speakers with a working understanding of the regional language, and with the option of developing fluency in it they wish. If this is the objective underlying the law, it explains the High Court’s holding on secondary schools. The holding on elementary schools must turn on the empirical premise that requiring even some instruction in the regional language for very young children

just to provide them with a working knowledge of it would unduly interfere with the acquisition of literacy in the mother tongue, and is therefore a disproportionate means for pursuing a legitimate State objective.

Usha Mehta, a Supreme Court decision, illustrates the shift in the courts' approach to Article 30.³⁴ The law under challenge made Marathi a compulsory subject from the fifth standard onward. Gujarati-speaking families, for whom the law meant that Marathi would be 'a' language of instruction for their children, alongside mother tongue instruction, brought the challenge. Under *General Secretary, Linguistic Minorities Protection Committee v State of Karnataka*, the Maharashtra law should have been held to be unconstitutional, because it applied to elementary education. However, the Court rejected the challenge and upheld the law. There are two ways to explain the result. One would be that the Court concluded, as an empirical matter, that instruction in Marathi in elementary school would not interfere with the acquisition of literacy in the mother tongue, Gujarati. *General Secretary, Linguistic Minorities Protection Committee* could arguably be distinguished on the basis of the evidentiary record basis for this holding, either because that earlier decision addressed elementary education from the first standard onward and therefore was inapplicable to *Usha Mehta*, or because in between that earlier decision and *Usha Mehta* there had been an evolution in our understanding of the impact of instruction in a second language on developing literacy in the mother tongue. This reading of *Usha Mehta* presupposes a doctrinal continuity with *General Secretary, Linguistic Minorities Protection Committee*.

But the better explanation is that *Usha Mehta* adopted a new theory of citizenship. This new theory of citizenship accepts the sociological reality of linguistic States, in which 'official and common business' is conducted in the regional language.³⁵ Gone is the metaphor of each State as 'a miniature India' where multilingual life is possible. Rooted in a more realistic understanding of the centrality of regional languages to economic, political, and economic life within States, the Court reasoned that for linguistic minorities, to refuse 'to learn the regional language will lead to alienation from the mainstream of life resulting in linguistic fragmentation within the State, which is an anathema to national integration'.³⁶ Under this new theory of citizenship, the objective that was per se unconstitutional in the Karnataka case—the promotion of fluency in the regional language for minority language speakers—is now in 'the larger interest of the State and the nation'.³⁷ The unstated premise is that linguistic reorganisation is a strategy that maintains the unity of India, and that laws which mandate instruction in regional languages support the success of that strategy, by

ensuring the full participation in economic, political, and social life of all State residents, irrespective of the mother tongue. A later judgment of the High Court of Madras made this point even more powerfully, linking the rise of Tamil as ‘a home language and as well a dominant language of people residing in the State irrespective of their community ...’ to linguistic reorganisation, which had taken place more than fifty years go.³⁸

On this interpretation of *Usha Mehta*, this new theory of citizenship, based on a changed view of the facts on the ground after linguistic reorganisation, is what led the Supreme Court to accept that it was legitimate for the State to promote *fluency*, not just a working knowledge, in a regional language, which in turn justified the introduction of instruction at an earlier stage—that is, in elementary school. The other dimension of the case which may explain the shift in the case law is that the Gujarati parents sought in *Usha Mehta* to protect their ability, under Article 30, to offer their children education in English, which they defended as an exercise of the right to provide their children with a ‘good general education’. Thus, the impact of mandatory instruction on developing fluency in a mother tongue was not really at the heart of the case. Now even if the right of linguistic minorities to provide English-language instruction falls within Article 30, it is arguably peripheral to its core concern of maintaining minority identity for minorities whose mother tongue is not English. Thus, not only was the State’s interest stronger, but the rights-claim of the linguistic minority weaker, which may have led to the change in the Court’s approach to assessing the constitutionality of the State law. Nor is this aspect of *Usha Mehta* idiosyncratic; it reflects the growing demand for English-medium language education, and the strategic use by linguistic minorities to protect their ability to offer such instruction to their children through the exercise of Article 30. Once again, constitutional claims about language, even if justified in the name of preserving cultural identity, are increasingly driven by material considerations—in this case, the economic opportunities afforded by English. The poor fit between the economic motivations that may play a growing role in Article 30 claims, and the theoretical justifications of that provision, may have been what led *Usha Mehta* to defer to the State legislature.

However, even after *Usha Mehta*, Article 30 claims by linguistic minorities to protect the right to choose English-medium instruction can still prevail. In *Associated Management of Primary & Secondary Schools*, a five-judge constitutional bench of the Supreme Court faced a constitutional challenge to a Karnataka law that mandated instruction in the first to fourth standards in the mother tongue, for both Kannada speakers and linguistic minorities.³⁹ As in

Usha Mehta, the parents desired to educate their children in English, and brought a challenge under Article 30(1). But unlike in *Usha Mehta*, the State law not only permitted mother tongue instruction for linguistic minorities, but in fact mandated it. Thus, the only conceivable basis for attacking the legislation was that it interfered with the ability of those parents to educate their children in English, which required the Court to squarely address whether this kind of claim fell within the scope of Article 30(1). The Court had no qualms in holding that it did. But unlike in *Usha Mehta*, the Court did not defer to the legislature and struck down the State law. Although the Court's reasoning was sparse, the best explanation of the holding must be that there was no plausible basis for justifying the requirement for mother tongue instruction as a means to promote knowledge of the regional language. The only possible justification for the State law was the paternalistic one of promoting the interests of the linguistic minorities in understanding their own language. In support for this argument, the State pointed to the findings made by courts in previous cases, like *General Secretary, Linguistic Minorities Protection Committee*, that mother tongue instruction was in the best interest of those children. The fatal flaw in the legislation must have been the failure of the State legislature, acting to promote the cultural identity of linguistic minorities, to defer to the linguistic minorities' own assessment of how best to preserve their cultural identity, and how important mother tongue education was to that goal. Ultimately, *Associated Management of Primary & Secondary Schools* grants this choice to linguistic minorities themselves.

V. CONCLUSION

The Indian constitutional experience has captured the global constitutional imagination in a number of areas that are addressed in this Handbook. The central areas of comparative preoccupation include the basic structure doctrine, judicial independence, social and economic rights, reservations or affirmative action, secularism and religion-State relations, and the rise of public interest litigation. When India has been included in comparative studies, the intellectual agenda has been set by the systems around which comparative constitutional law and politics have been framed—that is, the liberal democracies of the North Atlantic, South Africa, and Israel. To be sure, the Indian case now looms larger in global debates on democratic transition and consolidation, although this is a relatively recent development. The engagement with India has been narrow and

selective, approached through the lens of constitutional law and politics in constitutional systems implicitly understood as paradigm or central cases.

We must study India on its own terms. To come to grips with Indian constitutional law and politics requires that we develop our research agendas around the actual practice of constitutional actors in India. Orienting the study of Indian constitutionalism around the problems that have preoccupied constitutional actors opens the door to an alternative strategy of comparative case studies that shifts the field beyond the narrow set of jurisdictions that command central concern. The constitutional politics of official language policy, for example, has been central to the Indian constitutional experience, but has been largely ignored in the vast literature on comparative constitutional law. The Indian experience, both in the design of the Indian Constitution, and its judicial interpretation, deserves careful comparative attention. Above all, the Indian experience with language accommodation and its constitutional compromises through disaggregation reveal the possibilities for both functional disaggregation and spatial disaggregation. They remind us of the idea that different languages might be used for different things, not just in different spaces.⁴⁰ Language links India both with other countries in South Asia (eg, Sri Lanka), and with Turkey and Spain, where a major axis of cleavage for sub-State nationalist mobilisation has been language. This chapter provides a basis for that conversation to occur.

* I thank Madhav Khosla and Varun Srikanth for excellent research assistance. This chapter draws on and develops themes first explored in Sujit Choudhry, 'Managing Linguistic Nationalism through Constitutional Design: Lessons from South Asia' (2009) 7 *International Journal of Constitutional Law* 577.

¹ For a helpful overview of the founding debates on language, see Granville Austin, *The Indian Constitution: Cornerstone of a Nation* (Oxford University Press 1966) 330–83.

² *Nityanand Sharma v State of Bihar* (1996) 3 SCC 576; *Prabhat Kumar Sharma v Union Public Service Commission* (2006) 10 SCC 587.

³ *Jaswant Sugar Mills Ltd v Presiding Officer, Industrial Tribunal* AIR 1962 All 240.

⁴ *Madhu Limaye v Ved Murti* (1970) 3 SCC 738.

⁵ *Shailendra Mani Tripathi v University of Delhi* 2014 SCC OnLine Del 3328 (Delhi High Court).

⁶ Official Language Commission, *Report of the Official Language Commission* (Government of India Press 1956).

⁷ *Union of India v Mursoli Maran* (1977) 2 SCC 416.

⁸ *Dinanath Batra v Union of India* 2013 SCC OnLine Del 2261.

⁹ *Kanhaiya Lal Sethia v Union of India* (1997) 6 SCC 573.

¹⁰ Linguistic Provinces Commission, *Report of the Linguistic Provinces Commission* (Government of India Press 1948) [13].

¹¹ Linguistic Provinces Commission ([n 10](#)) [143].

¹² Linguistic Provinces Commission ([n 10](#)) [133].

¹³ On linguistic mobilisation and reorganisation, see Paul Brass, *Language, Religion and Politics in North India* (Cambridge University Press 1974); Robert D King, *Nehru and the Language Politics of India* (Oxford University Press 1997); Ramachandra Guha, *India After Gandhi: The History of the World's Largest Democracy* (Picador 2007) 180–200.

¹⁴ *Babulal Parate v State of Bombay* AIR 1960 SC 51.

¹⁵ *Pradeep Chaudhary v Union of India* (2009) 12 SCC 248.

¹⁶ See Ceren Belge, 'Friends of the Court: The Republican Alliance and Selective Activism of the Constitutional Court of Turkey' (2006) 40 *Law and Society Review* 653.

¹⁷ *RR Dalavai v State of Tamil Nadu* (1976) 3 SCC 748.

¹⁸ *RR Dalavai* ([n 17](#)) [6].

¹⁹ See Sujit Choudhry, 'How to Do Constitutional Law and Politics in South Asia' in Mark Tushnet and Madhav Khosla (eds) *Unstable Constitutionalism: Law and Politics in South Asia* (Cambridge University Press 2015) 18.

²⁰ *Ashgar Ali v State of Uttar Pradesh* AIR 1959 All 792.

²¹ *Vijay Laxmi Sadho v Jagdish* (2001) 2 SCC 247.

²² *Dayabhai Poonambhai v Natwarlal Sombhai* AIR 1957 MP 1; *Sarshwati Bai v The Allahabad Bank* AIR 1963 All 546.

²³ *Gujarat University v Shri Ranganath Krishna Mudholkar* AIR 1963 SC 703.

²⁴ *State of Bombay v Bombay Education Society* AIR 1954 SC 561.

²⁵ *DAV College, Bhatinda v State of Punjab* (1971) 2 SCC 261.

²⁶ See *General Secretary, Linguistic Minorities Protection Committee v State of Karnataka* AIR 1989 Kar 226.

²⁷ (2004) 6 SCC 264.

²⁸ AIR 2008 Mad 25.

²⁹ *General Secretary, Linguistic Minorities Protection Committee* ([n 26](#)).

³⁰ *General Secretary, Linguistic Minorities Protection Committee* ([n 26](#)) [47].

³¹ *General Secretary, Linguistic Minorities Protection Committee* ([n 26](#)) [38].

³² *General Secretary, Linguistic Minorities Protection Committee* ([n 26](#)) [48].

³³ *General Secretary, Linguistic Minorities Protection Committee* ([n 26](#)) [38].

³⁴ *Usha Mehta* ([n 27](#)).

³⁵ *Usha Mehta* ([n 27](#)) [10].

³⁶ *Usha Mehta* ([n 27](#)) [11].

³⁷ *Usha Mehta* ([n 27](#)) [10].

³⁸ *KR Ramaswamy* ([n 28](#)) [22].

³⁹ *State of Karnataka v Associated Management of Primary & Secondary Schools* (2014) 9 SCC 485.

⁴⁰ On the long prehistory of this social and political practice in India, and the relationship between language politics and the nation-state, see Sheldon Pollock, *The Language of the Gods in the World of Men: Sanskrit, Culture, and Power in Premodern India* (University of California Press 2006).

CHAPTER 12

ELECTIONS

ADITYA SONDHI*

I. INTRODUCTION

MODERN constitutional democracies, which establish democratic self-government as a core ideal, also establish a range of regulatory mechanisms to preserve this ideal.¹ India is no exception. India's constitutional framework contains an extraordinary regulatory regime that, on the one hand, is democracy enhancing, while on the other hand, impinges upon a whole set of other principles. This chapter provides an overview and account of this regime; and considers their operation and the extent to which they are justifiable. While the inner workings of free and fair elections are often governed by statutes and the field of 'election law', important questions are and have been the subject of constitutional debate and adjudication. Some of the topics explored in this chapter relate to specific mechanisms that constitutionalise democratic self-government. Examples include the recognition and nature of the right to vote and the existence of an independent body like the Election Commission to oversee the election process. Other topics are more carefully focused upon potential challenges to free and fair elections, such as challenges posed by money and the problem of campaign finance or challenges posed by certain forms of electoral speech. Together, these topics help us notice the complex legal web surrounding the abstract ideal of self-government and, to borrow a term from Richard Pildes, the 'constitutionalization of democratic politics' in India.²

II. THE RIGHT TO VOTE

The Constitution of India does not explicitly mention the right to vote as a fundamental right. Article 326 of the Constitution, however, refers to elections to the House of the People and to State legislative assemblies as being based on adult suffrage. According to Article 326:

[E]very person who is a citizen of India and who is not less than eighteen years of age on such date as may be fixed in that behalf by or under any law made by the appropriate Legislature and is not otherwise disqualified under this Constitution or any law made by the appropriate Legislature on the ground of non-residence, unsoundness of mind, crime or corrupt or illegal practice, *shall be entitled to be registered as a voter at any such election.*³

A bare textual reading of this provision suggests that the right to vote is sourced from the Constitution, even if the right is not specifically guaranteed as a fundamental right under [Part III](#) of the Constitution. In fact, we might say that Article 326 presupposes the right to vote. Further, it mentions in broad terms the restrictions that might be placed upon the right, the details of which are explicated in the Representation of the People Act 1951 (hereinafter RP Act). Section 62 of the RP Act, while titled as the ‘Right to Vote’, is in fact couched in the negative and contains restrictions and limitations upon the exercise of franchise. It debars from voting those who are disqualified as per Section 16 of the RP Act or have otherwise voted in another constituency, or have been imprisoned. The section does not, by itself, recognise a right to vote for the citizens of India, lending strength to the suggestion that the right is implicit in Article 326 of the Constitution.

The status of the right to vote has been a matter of considerable constitutional debate. In *NP Ponnuswami*,⁴ which first discussed Article 329 of the Constitution dealing with the bar on the interference of courts in electoral matters, the Supreme Court held that the right to vote or stand as a candidate for election is ‘not a civil right’ but is ‘a creature of statute or special law and must be subject to the limitations imposed by it’.⁵ The Court further stated in *Jumuna Prasad Mukhariya* that [Part III](#) of the Constitution—that is, the fundamental rights chapter—had ‘no bearing on a right like this created by statute ...’.⁶ It seems that the Court was simply stating the obvious fact that [Part III](#) did not explicitly provide for the right to vote, and it was disinclined to say anything further about the implicit constitutional recognition of the right.

It was in *Jyoti Basu* that the Supreme Court noticed the tension in Indian electoral jurisprudence that the right to elect, ‘fundamental though it is to democracy’, is ‘anomalously enough, neither a fundamental right nor a common law right’.⁷ The Court was categorical in stating that ‘outside of statute, there is no right to elect, no right to be elected, and no right to dispute an election’.⁸ And being statutory creations, these rights were subject to statutory limitation. As such, the RP Act was regarded as a complete and self-contained code ‘within which must be found any rights claimed in relation to an election or an election dispute’.⁹ At this stage, this unequivocal statement characterised the position of

law.

A shift regarding the right to vote occurred in *People's Union for Civil Liberties v Union of India (PUCL)*.¹⁰ A writ petition was filed against the provisions of an ordinance (which later became an Act of Parliament) to amend the RP Act in order to dilute the reporting requirements established by the Supreme Court's decision in *Association for Democratic Reforms*.¹¹ A three-judge bench delivered three separate opinions, which all agreed on the fact that the newly inserted Section 33-B of the Act was unconstitutional, chiefly because it violated the voter's right to know the antecedents of his candidate which had been established under Article 19(1)(a). However, the opinions differed on the status of the right to vote, with Reddi J holding that the right to vote 'if not a fundamental right, is certainly a constitutional right'.¹² It was only by virtue of the constitutional mandate that existed, Reddi J noted, that the right had been accordingly shaped by the RP Act. It was thus 'not very accurate to describe it as a statutory right, pure and simple'.¹³ The Supreme Court's previous decision in *Jumuna Prasad Mukhariya*, Reddi J observed, could be distinguished on the ground that it dealt with a contesting candidate's rights and obligations and did not deal with or was not related to 'the freedom of expression of the voter and the public in general in the context of elections'.¹⁴ MB Shah J's opinion was categorical in regarding the right to vote as a statutory right.¹⁵ Reddi J's view could not, however, entirely settle matters, for it did not receive complete support from Dharmadhikari J's short concurring opinion. Dharmadhikari J's opinion was caveated by the observation that the 'freedom of a citizen to participate and choose a candidate at an election is distinct from exercise of his right as a voter which is to be regulated by statutory law on the election like the RP Act'.¹⁶ However, as Dam points out, this was somewhat muddled by the concluding lines of the opinion, which stated that he agreed with certain specific conclusions from both Reddi J's and Shah J's opinions: 'Effectively, Judge Dharmadhikari has expressed the view that the right to vote is both a constitutional and statutory right, while each of the other two judges has held the right as either statutory or constitutional.'¹⁷

Thereafter, in *Kuldip Nayar*, the Supreme Court observed that even if one were to cast aside the view taken in *NP Ponnuswami* and proceed on the assumption that the right to vote is a constitutional right, expanding the view taken in *PUCL*, 'there can be no denial of the fact that the manner of voting in the election to the Council of States can definitely be regulated by the statute'.¹⁸ While here the Court was, of course, dealing with elections to the Rajya Sabha,

it is important to note that it did not fully endorse the view expressed by Reddi J in *PUCCL*. In other words, as recently as 2006, the right to vote was not fully recognised as a constitutional right in India.

There have also been cases dealing with the unenumerated and implied rights that follow from the right to vote. The first is regarding the right to know the criminal antecedents of the candidate. The issue first gained traction with the 170th Report of the Law Commission of India. The Report recommended amending the RP Act in order to make it mandatory for candidates to submit a declaration of their (and their spouse's and dependant relations') assets and a declaration as to whether any criminal charges had been framed against them.¹⁹ A petition to implement these recommendations was filed before the Delhi High Court.²⁰ The High Court duly instructed the Election Commission to collect information about assets, criminal offences, educational qualifications, and any other details which the Commission 'considers necessary for judging the capacity and capability of the political party fielding the candidate ...' ²¹ On appeal, the Supreme Court, taking a cue from the High Court's decision, cited cases such as *Indian Express Newspapers v Union of India*²² and *Ministry of Information and Broadcasting v Cricket Association of Bengal*,²³ which had expanded the scope of freedom of speech and expression under Article 19(1)(a). This led the Court to ask:

If right to telecast and right to view sport games and the right to impart such information is considered to be part and parcel of Article 19(1)(a), we fail to understand why the right of a citizen/voter ... to know about the antecedents of his candidate cannot be held to be a fundamental right under Article 19(1)(a).²⁴

Thus, 'democracy cannot survive without free and fair election, without free and fairly informed voters'.²⁵ Finally, the Court directed the Election Commission to issue an order under Article 324 requiring candidates for election to furnish information about: (1) details about past criminal charges; (2) details about any pending charge punishable with at least two years of imprisonment; (3) assets of themselves, their spouse, and their dependants; (4) details of liabilities, in particular those owed to the government or State-run institutions; (5) educational qualifications.²⁶

The second case flowing from the implications of the right to vote was the decision of the Supreme Court in 2013, directing the Election Commission to provide for a 'none-of-the-above' option in electronic voting machines.²⁷ It interpreted its previous decisions to hold that the Court had consistently desisted from recognising the right to vote as a constitutional right, and that 'there is no

contradiction as to the fact that right to vote is neither a fundamental right nor a constitutional right but a pure and simple statutory right'.²⁸ It justified its decision, that citizens had a right to the 'none-of-the-above' option in elections, on the ground that this right emerged from the right to 'freedom of voting' contained within the right to free speech and expression guaranteed by Article 19(1)(a) of the Constitution. In other words, the Supreme Court drew a distinction between the 'right to vote' and the right to 'freedom of voting', the former being a mere statutory right, the latter being part of the constitutional right to free speech. This distinction has rightly been criticised; it is neither clear what purpose it serves nor how the *expression* of the right to vote is distinct from the right to vote.²⁹ A far more suitable solution might simply have been for the Court to clearly acknowledge the right to vote as a constitutional right guaranteed naturally by Article 326 of the Constitution.

Democracy has been held to be part of the basic structure of the Constitution, and thereby immune from amendment.³⁰ Curiously, however, the right to vote—the core expression of democratic rule—is yet to be recognised as a constitutional right. The status of the right to vote matters, quite simply, because it determines the ease or difficulty with which the boundaries of who can vote can be changed. The Supreme Court has been surprisingly accepting of the incongruity that exists in a constitutional framework where democracy is part of the basic structure, elections are conducted by an independent Election Commission that enjoys constitutional status under Article 324, court intervention is precluded by Article 329 of the Constitution, but the exercise of one's franchise is given secondary legal status.

III. THE ELECTION COMMISSION

Article 324 of the Constitution recognises and establishes the Election Commission. The Commission is vested with the 'superintendence, direction and control of the preparation of the electoral rolls for, and the conduct of, all elections to Parliament and to the Legislature of every State and of elections to the offices of President and Vice President'.³¹ According to Article 324(5), 'the Chief Election Commissioner (CEC) shall not be removed from his office except in like manner and on the like grounds as a Judge of the Supreme Court and the conditions of service of the Chief Election Commissioner shall not be varied to his disadvantage after his appointment'.³² Provisions such as this ensure the

independence and status of the Commission and its members, isolating its operations from political interference and executive control.

In *TN Seshan*, the Supreme Court, while dealing with the removal of members of the Election Commission, held that:

[T]he scheme of Article 324 in this behalf is that after insulating the [Chief Election Commissioner] ... by the first proviso to Clause (5), the Election Commissioners and the Regional Commissioners have been assured independence of functioning by providing that they cannot be removed except on the recommendation of the CEC.³³

It was further clarified that the recommendation for removal must be based on ‘intelligible, and cogent considerations which would have relation to efficient functioning of the Election Commission’.³⁴ That is so because this ‘privilege has been conferred on the CEC ...’ to ensure that the ECs ‘are not at the mercy of political or executive bosses of the day’.³⁵ The Court further forewarned that if the power were to be exercisable by the CEC ‘as per his whim and caprice, the CEC himself would become an instrument of oppression and would destroy the independence of the ECs and the RCs if they are required to function under the threat of the CEC recommending their removal’.³⁶ The CEC was described ultimately as ‘merely a functionary of [the Election Commission]’, an ‘alter ego of the Commission and no more’.³⁷

As regards the powers of the Election Commission, the Supreme Court in *Kanhiya Lal Omar* construed the expression ‘superintendence, direction and control’ in Article 324 to include a specific or a general order, and mandated that such power is to be ‘construed liberally so that the object for which the power is granted is effectively achieved’.³⁸ Thereby, the Commission was not circumscribed in the exercise of its powers and could issue executive orders as may be required in the discharge of its functions. In *Mohinder Singh Gill*,³⁹ a constitutional bench of the Supreme Court took its cue from *Kanhiya Lal* while considering whether the Election Commission had the power to cancel an election and direct repolling. The Court observed that Article 324 operated in an ‘area left unoccupied by legislation ...’ and the words in the provision were ‘the broadest [of] terms ...’⁴⁰ The Court further held that the provision is ‘wide enough to supplement the powers under the Act ...’ but subject to the several conditions on its exercise as set out in the law.⁴¹ As a result, and as explained in *Association for Democratic Reforms*, Article 324 operates in areas ‘left unoccupied by legislation’ and where ‘the words “superintendence, direction and control” as well as “conduct of all elections” are the broadest terms’.⁴² Therefore, ‘the Commission can cope with a situation where the field is

unoccupied by issuing necessary orders’.⁴³

In *Common Cause*—a judgment that dealt with election expenses incurred by political parties and submission of return and the scope of Article 324 of the Constitution—the Court held that the integrity of elections was fundamental to democratic government and the Election Commission can ask candidates about the expenditure incurred by them and by a political party.⁴⁴ The Court noted, with visible anguish, that thousands of crores of expenses towards an election remained unaccounted for, marking a ‘naked display of black money ...’⁴⁵ Accordingly, the Court held that the Election Commission’s powers over the electoral process included ‘the scrutiny of all expenses incurred by a political party, a candidate or any other association of body of persons or by any individual in the course of the election’.⁴⁶

In the exercise of its functions, the Commission also frames a ‘Model Code of Conduct’ to be observed by the candidates and parties during elections. However, the Code does not trace itself to any constitutional provision and is less a legally enforceable charter and more a set of behavioural guidelines for electoral candidates. Its efficacy is nonetheless substantial, considering the demands from various political quarters to ‘review’ the Model Code.⁴⁷ As pointed to by Singh, the Code, which came into existence before the Kerala Assembly Elections in 1960, was initially the product of a mutual political consensus, with the Election Commission limited to ‘eliciting consent from political parties ... encouraging them to comply with norms, which the political parties had themselves evolved and resolved to follow’.⁴⁸ However, beginning with the 1980s and especially after the consolidation of the Election Commission’s powers under Article 324 in the 1990s, there has been a ‘reluctance of the Election Commission to push forcefully for a legislated Model Code’.⁴⁹ Singh suggests that this is due to the possibility that ‘a statutory Model Code would open up the space of executive action on which the Election Commission hitherto had exclusive control, to be occupied by a statute, whose form and content would be controlled by the Parliament ...’⁵⁰ In practice, the Election Commission enforcement of the Model Code has taken two forms. The first is the use of paragraph 16A of the Election Symbols Order 1968, which allows the Commission to suspend or withdraw the recognition of a political party found to be violating the Model Code. The second is directing the relevant district administrations to file cases ‘for the breach of specific provisions of the Model Code, which were *also* punishable offences under the [Indian Penal Code] ...’⁵¹

A recent decision of the Supreme Court, *S Subramaniam Balaji v State of Tamil Nadu*,⁵² suggests future possibilities for the enforcement and evolution of the Code. A petition was filed against the practice followed by several parties in the State of Tamil Nadu of announcing gifts for voters in their respective election manifestos. The Court reluctantly admitted it could not intervene and dismissed the argument of such promises amounting to ‘corrupt practices’ under Section 123 of the Representation of People Act 1951. However, at the end of the judgment, the Court noted that ‘the Election Commission, in order to ensure a level playing field ... in elections and also in order to see that the purity of the election process does not get vitiated, [h]as in the past been issuing instruction under the Model Code of Conduct’.⁵³ Noting that there was ‘no enactment that directly governs the contents of the election manifesto ...’ the Court directed the Commission to frame guidelines for this purpose, suggesting that ‘a separate head for guidelines for the election manifesto released by a political party can also be included in the Model Code of Conduct ...’⁵⁴ Interestingly, the Court acknowledged that ‘strictly speaking, the Election Commission will not have the authority to regulate any act which is done before the announcement of the [election] date. Nevertheless, an exception can be made in this regard as the purpose of the election manifesto is directly associated with the election process.’⁵⁵ General guidelines based on these directions have been duly added by the Election Commission.⁵⁶

The lacuna in the framework governing the exercise of powers by the Commission extends to political parties. The Constitution did not actually mention political parties until the Fifty-second Amendment in 1985 (which inserted the Tenth Schedule) and it was only the Election Symbols (Reservation and Allotment) Order 1968 that defined the term. In 1989, the RP Act 1951 was amended by the insertion of [Part IV-A](#), entitled ‘Registration of Political Parties’. The absence of any constitutional provision providing for their establishment, role, and regulation, makes one of the key constituents of the Indian electoral process an ad hoc player.

In *Indian National Congress (I) v Institute of Social Welfare*,⁵⁷ the Court considered whether the Election Commission had the power to deregister a political party under Section 29A of the RP Act. The Court found no express power conferred on the Commission under Section 29A to deregister a political party. Moreover, it clarified that the nature of the power of registration exercised under Section 29A was ‘quasi-judicial’, and since no power of review had been conferred on the Commission, it had no power to review its orders of registration.⁵⁸

The Symbols Order itself has been quite controversial, and has been litigated before the Supreme Court several times. The first, and most important, challenge was in *Sadiq Ali v Election Commission of India*.⁵⁹ The Commission had to decide between rival claims made by two factions of the Congress Party, and passed an order under paragraph 15 of the Symbols Order. The power of the Commission under paragraph 15 was challenged as being *ultra vires* the powers conferred on it by the Constitution. Repelling the challenge, the Court traced the power under paragraph 15 to Article 324 of the Constitution, and argued that ‘The fact that the power of resolving a dispute between two rival groups ... has been vested in such a high authority would raise a presumption ... that the power would not be misused but would be exercised in a fair and reasonable manner.’⁶⁰

In *Kanhiya Lal Omar v RK Trivedi*,⁶¹ the petitioners challenged the overall validity of the Symbols Order, arguing that it was legislative in character and beyond the power of the Election Commission under Article 324. Citing its earlier decision, including *Sadiq Ali*, the Court asserted that even if any of the provisions of the Symbols Order could not be traced to the RP Act 1951, ‘the power of the Commission under Article 324(1) of the Constitution which is plenary in character can encompass all such provisions’.⁶²

In *Desiya Murpokku Dravida Kazhagam v Election Commission of India*,⁶³ the petitioners challenged the constitutional validity of an amendment to the Symbols Order in 2000. The amendment mandated that in order to be recognised as a State party in a State, a party would have to secure at least 6 per cent of the total valid votes polled in the State and would also have to return at least two members to the Legislative Assembly. The petitioners contended that the Symbols Order was ‘only a compilation of general directions, and not ... law’, and thereby violated Articles 19(1)(a) and 19(2) of the Constitution.⁶⁴ The Court dismissed the petitions, simply stating that the ‘Election Commission has set down a benchmark which is not unreasonable ... a party has to prove itself and to establish its credibility as a serious player in the political arena of the State’.⁶⁵

The ‘private’ status of the political parties enabled them to come together after the judgment of the Central Information Commission in *SC Agarwar v INC*, which made political parties amenable to the Right to Information Act 2005.⁶⁶ The swiftly moved Right to Information (Amendment) Bill 2013,⁶⁷ which aimed at insulating political parties from the Right to Information Act, betrayed the pernicious consequences of having these parties exist outside a legal (constitutional) frame. The peculiar position that emerges is that while the prime ombudsman and organiser of elections occupies an elevated, constitutional

status, neither those voting nor political parties find much space within the constitutional framework.

IV. ELECTIONS: REGULATING INPUTS

The regulation of elections can take place at multiple levels. The most preliminary stage of regulation is one relating to the preparation of the electoral roll. In *Lakshmi Charan Sen v AKN Hassan Uzzaman*,⁶⁸ a constitutional bench of the Supreme Court considered alleged irregularities in the preparation of electoral rolls in the State of West Bengal. The petitioners argued that until their objections were disposed of, the elections to the Legislative Assembly could not be carried out on the basis of the new, revised rolls. Chandrachud CJ, writing for the majority (Islam J dissented), declined to hold up elections in all 294 constituencies of West Bengal, though electoral rolls were not prepared in accordance with law for two constituencies, as no case had been made out that no election could be held in any of the 294 constituencies. One of the questions that the Court had to address was whether it was barred by Article 329(b) from hearing such a challenge. The majority, without categorically addressing the issue, suggested that it would 'be difficult ...' to hold that the preparation and revision of electoral rolls was a part of 'election' under Article 329(b).⁶⁹ Subsequently, in *Indrajit Barua v Election Commission of India*,⁷⁰ the Supreme Court took the view that:

[O]nce the final electoral rolls are published and elections are held on the basis of such electoral rolls, it is not open to anyone to challenge the election from any constituency or constituencies on the ground that the electoral rolls were defective. That is not a ground available for challenging an election under Section 100 of the Representation of the People Act, 1951.⁷¹

The proviso added to Section 22(2) of the Representation of the People Act 1950 requires the Electoral Registration Officer to give the person concerned a reasonable opportunity of being heard before amending any entry in the electoral roll on the ground that the entry is defective, he has ceased to be ordinarily resident, or is otherwise not entitled to be registered in that roll. The Court went on the hold in *Indrajit Barua* that the proviso is intended to extend cover to the electoral rolls in eventualities which otherwise might have interfered with the smooth working of the programme.

On matters of such inquiry, in *Lal Babu Hussein v Electoral Registration Officer*, the Court issued exhaustive guidelines to be followed by the Electoral

Registration Officer, one of which merits full reference:

If any person whose citizenship is suspected is shown to have been included in the immediately preceding electoral roll, the Electoral Registration Officer or any other officer inquiring into the matter shall bear in mind that the entire gamut for inclusion of the name in the electoral roll must have been undertaken and hence adequate probative value be attached to that factum before issuance of notice and in subsequent proceedings ... ⁷²

This process attaches greater importance when the citizenship of the voter in question can have a bearing on her ultimate right to contest an election as an Indian citizen and possibly become its Prime Minister (as was the potential case with Sonia Gandhi). The Supreme Court is to be commended for straitjacketing the method of inquiry to be followed by electoral officers—not merely in terms of adherence to the principles of natural justice but also as to the significance of the exercise, by ‘[bearing] in mind the provisions of the Constitution and the Citizenship Act ... and all related provisions bearing on the question of citizenship and then pass an appropriate speaking order ...’⁷³ This is all the more relevant as no statutory appeal is provided and the normal recourse would be the filing of a writ petition, where evidence is not ordinarily led or re-evaluated.

Another important issue is the timing of elections. Sections 14 and 15 of the RP Act provide that the President or Governor shall fix the date for holding elections on the recommendation of the Election Commission. Therefore, the fixing of the schedule for elections for the House of People, a Legislative Assembly, belongs to the Election Commission. Of course, the election process for electing a new legislature should commence immediately upon the dissolution of the assembly, after updating the rolls. In *Digvijay Mote v Union of India*,⁷⁴ the Supreme Court rejected prayers seeking a declaration that elections held during violent periods in disturbed areas were void, and for a stay on future action pursuant thereto. Though not dealing with the timing of elections *per se*, the judgment restated the law on the powers of the Election Commission under Article 324 by holding ‘... that the Constitution has made comprehensive provision in Article 324 to take care of surprise situations’.⁷⁵

In *Re Special Reference No 1 of 2002*,⁷⁶ it was reiterated that as far as the framing of the schedule or calendar for election of the Legislative Assembly was concerned, the same was within the ‘exclusive domain of the Election Commission, which is not subject to any law framed by the Parliament’ and that ‘the plenary powers of the Election Commission cannot be taken away by law framed by Parliament’. Any such law, if made, ‘would be repugnant to Article 324’.⁷⁷ The Court noted that while there could be situations in which the

Commission might not be able to hold elections because of natural calamities, the institution had 'ample powers' to 'coordinate all actions with the help of various departments of the government including military and paramilitary forces'.⁷⁸ Here, it is to be noted that the members of the military and paramilitary on duty during the elections themselves are constrained not to vote as they are away from their constituencies. This merits correction. In the case of soldiers stationed in peace stations, the Supreme Court has recently recognised their right to be registered as voters.⁷⁹ This is a noteworthy step in the right direction.

The final topic, one already briefly touched upon, regarding the various *ex ante* electoral regulations are political parties. Vide the Fifty-second Amendment to the Constitution in 1985, 'Political Parties' were referred to in the Constitution for the first time. This reference was in Schedule X, which focused specifically on the problem of defection. Until then, political parties had been defined in Election Symbols (Reservation and Allotment) Order 1968, as 'an association or body of individual citizens of India registered with the Commission as a political party under Section 29A of the Representation of the People Act, 1951'.⁸⁰ In *Kanhiya Lal Omar*,⁸¹ wherein the validity of the Order was challenged, the Supreme Court did not accede to the argument that the Union government which had been delegated the power to make rules under Section 169 of the RP Act could not further delegate the power to make any subordinate legislation in the form of the Symbols Order to the Commission. The Court held that any part of the Symbols Order which cannot be traced to Rules 5 and 10 of the Rules could 'easily be traced to the reservoir of power under Article 324(1), which empowers the Commission to issue all directions necessary for the purpose of conducting free and fair elections'.⁸² Before ending the judgment, the Court made the following observation:

We are not satisfied with the submission that the several evils, malpractices *etc.* which are alleged to be existing amongst the political parties today are due to the Symbols Order which recognises political parties and provides for their registration *etc.* The reasons for the existence of such evils, malpractices *etc.* are to be found elsewhere. The surer remedy for getting rid of those evils, malpractices *etc.* is to appeal to the conscience of the nation.⁸³

Although the Court was right in noting that electoral corruption and malpractices were not a function of the Symbols Order, the sheer lack of constitutional or legal regulation of political parties has meant that they function entirely on their own terms.

V. ELECTIONS: PROCESS

A second stage at which elections might be regulated is during their process. The two most important regulatory mechanisms at this stage are the regulation of electoral speech and the regulation of money (ie, campaign finance).

As Samuel Issacharoff's work has shown, democratic countries employ a range of techniques to deal with anti-democratic and intolerant political parties.⁸⁴ In India the principal means of democratic self-preservation is neither the banning of parties nor the imposition of criminal sanctions, but instead restrictions on electoral speech.⁸⁵ The most significant Indian case in this regard is *Dr Ramesh Yeshwant Prabhoo v Prabhakar Kashinath Kunte*.⁸⁶ Here, the Supreme Court considered an appeal from a judgment of the Bombay High Court which had set aside the election of a candidate on the ground that he had violated Sections 123(3) and 123(3-A) of the RP Act. These provisions prohibit, inter alia, appeals to religion and the incitement of religious hatred for electoral gain, respectively.

The appellant's contentions included the claim that any restricted speech must have an adverse impact upon public order. It was argued that only this could reconcile the restriction with the free speech guarantee and the explicit exceptions to that guarantee outlined in Article 19 of the Constitution. Rejecting this contention, the Supreme Court found nothing in subsection (3) to warrant that the appeal would affect public order. While Section 123(3-A) incorporated a public order condition, in the case of Section 123(3) the act would be complete the moment a religious appeal was made, for the 'purpose of enacting the provision is to ensure that no candidate at an election gets votes only because of his religion and no candidate is denied any votes on the ground of his religion'.⁸⁷ This purpose, the Court noted, was 'in keeping with the secular character of the Indian polity and rejection of the scheme of separate electorates based on religion in our constitutional scheme'.⁸⁸ The impugned provision was constitutional because it could be saved by a different exception in Article 19(2): decency. Rejecting the argument that this head was limited to sexual morality, a restriction in furtherance of the constitutional commitment to secularism was permissible for it aimed at 'maintaining the standard of behaviour required in conformity with the decency and propriety of the societal norms'.⁸⁹

Given that the Indian Constitution also guaranteed the freedom of religion, the Court clarified that the mentioning of religion per se was not prohibited. What was impermissible was 'an appeal to vote for any candidate because of his religion or to refrain from voting for any candidate because of his religion'.⁹⁰ It

was in this context that the Court noted that a reference to Hindutva or Hinduism will not, in and of itself, be a corrupt practice under Section 123 of the RP Act.⁹¹ In this particular instance, the speeches focused on the supremacy of Hindus, and made clear attacks upon the Muslim community. Surveying various speeches and statements, the Court found them to be corrupt practices under Section 123 of the RP Act. One speech in particular was characterised by the Court as making ‘derogatory reference to Muslims’ and ‘amounted to’, the Court felt, ‘an attempt to promote feelings of enmity or hatred between the Hindus and the Muslims on the ground of religion’.⁹²

Indian electoral speech regulation has taken a less harsh approach than the banning of parties and the like, which has been adopted in some other nations. There have, however, been calls for a more stringent approach. In a recent case, *Pravasi Bhalai Sangathan v Union of India*,⁹³ the Supreme Court considered a petition against hate speeches, especially by political parties and leaders. Rejecting the petition, the Court noted that India’s statutory framework was sufficient to deal with the problem of hate speech and no further judicial intervention was required. It did, however, suggest that the Law Commission consider whether the Election Commission should be empowered to deal with the problem of hate speech even outside of the election period.⁹⁴ Currently, as the Court noted, the Election Commission has only acted during the subsistence of the Model Code of Conduct. In considering whether the Indian approach is the best one to address the problem of undemocratic behaviour, one might also examine what view the approach takes of the voter. As Issacharoff points out, ‘the Indian approach, while committed to maintaining public order during a heated election, exposes uncertainty about voters’ motivations in exercising the franchise’.⁹⁵ There is a fear that voters need to be taken care of, a fear that the exposure to certain forms of speech will disable them.

The second major type of regulation during elections is restrictions upon the use and management of funds. Campaign finance has proven to be a problem that defies solution in a range of jurisdictions, and India is no exception.⁹⁶ There are a number of statutory provisions that relate to campaign finance. These include Sections 29B, 29C, and 77 of the RP Act; Section 293A of the Companies Act 1956; and Section 13A of the Income Tax Act 1961. Section 77 of the RP Act mandates the maintenance of election expenses by the candidate, and was amended following the ruling in *Kanwar Lal Gupta v Amar Nath Chawla*.⁹⁷ Sections 29B, 29C, and 29D, allowing the receipt and declaration of donations by political parties, were inserted by the Election and Other Related Laws (Amendment) Act in 2003. This Amendment also made contributions to

political parties fully tax-deductible under Sections 80 GGB and 80 GGC of the Income Tax Act. Section 13A of the Income Tax Act also mandates that political parties only need to maintain a record of donations in excess of Rs 20,000. Finally, Section 293A of the Companies Act 1956 (and Section 182 of the Companies Act 2013) allows companies to donate to political parties, subject to the limits described in the section.

In *Common Cause v Union of India*,⁹⁸ the Court heard a public-interest litigation petition under Article 32, alleging that there was widespread flouting of the reporting requirements mandated by Section 77 of the Representation of People Act, Section 293A of the Companies Act, and Section 13A of the Income Tax Act. Coming down hard on the lack of compliance, the Court directed an investigation against the responsible parties, and importantly, interpreted Explanation 1 to Section 77 by shifting the burden of proof to the candidate to ‘prove that the said expenditure was in fact incurred by the political party and not by him’.⁹⁹ This decision, according to Gowda and Sridharan, helped ‘[bring] about a degree of transparency in party finance’ by forcing parties to declare incomes and submit audited accounts.¹⁰⁰

VI. ELECTIONS: OUTCOMES

The third level of regulation is at the outcome and verdict stage. As per Article 329 of the Constitution:

- (a) the validity of any law relating to the delimitation of constituencies or the allotment of seats to such constituencies, made or purporting to be made under Article 327 or Article 328, shall not be called in question in any court;
- (b) No election to either House of Parliament or to the House or either House of the Legislature of a State shall be called in question except by an election petition presented to such authority and in such manner as may be provided for by or under any law made by the appropriate Legislature.¹⁰¹

The task of delimitation is to be performed after each new census, according to Article 82 of the Constitution. The statute that currently governs this task is the Delimitation Act 2002. In *Meghraj Kothari v Delimitation Commission*,¹⁰² the Supreme Court was asked to clarify the exact nature of the bar in Article 329(a). The Court was asked to quash a notification issued under the then applicable statute, the Delimitation Commission Act 1962. The bar under Article 329(a) was argued to be inapplicable on the ground that the notification was not ‘law’ and was not enacted under Article 327. Regarding the first contention, the Court

examined the provisions of the Delimitation Commission Act. In particular, it noted Section 10(2), which provided that orders made by the Delimitation Commission under Sections 8 and 9 were ‘to have the force of law and shall not be called in question in any court’.¹⁰³ This showed that the intention of Parliament was that the orders passed by the Commission ‘were to be treated as having the binding force of law and not mere administrative directions’.¹⁰⁴ In response, the appellant referred to *Sangram Singh v Election Tribunal, Kotah*,¹⁰⁵ where the Court had rejected the contention that Section 105 of the RP Act placed the order of an election tribunal beyond the jurisdiction of the High Courts or Supreme Court. However, the Court in *Meghraj Kothari* noted that delimitation was a special case since there was a constitutional bar under Article 329(a). Therefore, it was not the statutory expression ‘shall not be called in question in any court’ that barred the Court’s jurisdiction, but the fact that it was treated as a law under Article 327, thereby gaining the protection of Article 329(a).¹⁰⁶

Regarding the second contention, the Court pointed out that Article 82 ‘merely envisaged that readjustment might be necessary after each census and that the same should be effected by Parliament as it may deem fit ...’,¹⁰⁷ but it was Article 327 that ‘[gave] power to Parliament to make elaborate provisions for such readjustment including delimitation of constituencies ...’¹⁰⁸ On this basis, the Court dismissed the appeal.

In *Election Commission of India v Mohd Abdul Ghani*,¹⁰⁹ the Supreme Court was required to consider an anomalous situation where certain villages on the west bank of the Ganga came to be located on the east bank due to a change in the course of the river. The State government had changed the district to which the villages belonged, but they were still treated as belonging to their old constituency for electoral purposes. The respondents, who were residents of the villages, claimed that this cast a duty on the Election Commission to change their parliamentary constituency by virtue of its power under Section 9(1)(b) of the Representation of the People Act 1950. The High Court had issued a writ of mandamus directing the Election Commission to make the relevant changes to effect the shift of the villages to the parliamentary constituency on the east bank. The specific statutory provisions in dispute in this case were Section 9(1)(b) of the Representation of the People Act 1950 and Section 11(1)(b) of the Delimitation Act 1972. Both sections dealt with the power of the Election Commission to update Delimitation Orders that had been passed by the Delimitation Commission. Importantly, however, as the Supreme Court (through Verma J) pointed out, both sections were identical, except for one addition in

Section 11(1)(b): ‘so, however, that the boundaries or areas or extent of any constituency shall not be changed by any such notification’. This, the Court pointed out, meant that there was ‘a specific restriction against any alteration or change in the boundaries or area or extent of any constituency as shown in the Delimitation Order ...’¹¹⁰ Setting aside the decision of the High Court, Verma J noted that the task to be performed by the Election Commission was:

[T]o merely update the Delimitation Order by making the necessary changes on account of subsequent events to correct the description in the Delimitation Order which has become inappropriate ... [this] cannot extend to alteration of the boundaries or area or extent of any constituency as shown in the Delimitation Order.¹¹¹

On the relationship between the conduct of elections and delimitation, the Andhra Pradesh High Court has held that the ‘constitutional requirement ...’ to ‘conduct of elections to the House of the People and the State Legislative Assemblies as and when they are due ...’ cannot be withheld or postponed on the ground that the Delimitation Commission has not undertaken the task of delimitation and readjustment of territorial constituencies.¹¹² This is expressly clear from the Forty-second Constitutional Amendment, which inserted provisos into Articles 82 and 170(3) providing that election to the Lok Sabha and State Legislative Assemblies need not await delimitation of constituencies after each census.

The second part of Article 329 deals with election disputes. It is also important to take note of Chapter VI of the RP Act, which provides, in some detail, the method of dealing with election disputes, and the filing and trial of election petitions. In *Tukaram S Dighole v Manikrao Shivaji Kokate*,¹¹³ the Supreme Court outlined the principles to be kept in view while dealing with election petitions and appeals arising therefrom. The appellant in this case had filed an election petition against the respondent, alleging that the latter had violated Section 123(3) of the RP Act by appealing to voters to vote on communal grounds. The Court noted that charges of corrupt practices under the Act were ‘equated with a criminal charge ...’ and had a higher standard of proof, that of being beyond reasonable doubt.¹¹⁴ The justification for this higher standard was the ‘serious prejudice ... likely to be caused to the successful candidate ...’ who would have his election set aside and could potentially also incur a disqualification from future elections.¹¹⁵

The Court also referred to *Jeet Mohinder Singh v Harinder Singh Jassi*,¹¹⁶ where the Court had summarised several principles applicable to such cases. The first was that an election was not to be ‘lightly interfered with’,¹¹⁷ since it

entailed consequences both for the affected candidate and for the public at large due to the use of public funds and administrative machinery. The second was the ‘quasi-criminal’ nature of the charge of corrupt practice, as elaborated in *Tukaram S Dighole*.

VII. CONCLUSION

India’s constitutional framework has an elaborate set of mechanisms that govern and control the electoral process. This chapter has sought to provide an account of some of these mechanisms, especially those that travel beyond the domain of election law and raise constitutional questions and concerns. Some aspects of India’s electoral framework, most notably the independent Election Commission, have by and large served the nation well. The practice of free and fair elections is widely regarded as one of the major achievements of the modern Indian State. Some other regulatory aspects, such as campaign finance, present a far less promising picture, and one that does not show any signs of immediate improvement.

This field of law is likely to remain one of intense contestation, with future debates arising on questions that might well differ from those covered in this chapter. A recent controversial ordinance, amending the Rajasthan Panchayati Raj Act 1994, passed by the State of Rajasthan provides an example. The ordinance imposes educational qualifications on those standing for local government elections.¹¹⁸ The constitutionality of the ordinance is currently being considered by the judiciary, and while the measure might appear to be undemocratic, precedent on this question is not conclusive. In *Javed v State of Haryana*, the Supreme Court upheld provisions of the Haryana Panchayati Raj Act 1994, which barred anyone having more than two living children from holding particular offices at the local government level.¹¹⁹ With regard to the primary question of who has a right to stand for office, the Court observed as follows:

Right to contest an election is neither a fundamental right nor a common law right. It is a right conferred by a statute. At the most, in view of [Part IX](#) having been added in the Constitution, a right to contest election for an office in Panchayat may be said to be a constitutional right—a right originating in the Constitution and given shape by a statute. But even so, it cannot be equated with a fundamental right. There is nothing wrong in the same statute which confers the right to contest an election also to provide for the necessary qualifications without which a person cannot offer candidature for an elective office and also to provide for disqualifications which would disable a person from contesting for, or holding, an elective statutory office.¹²⁰

The Court surveyed past cases permitting restrictions upon the holding of office, without saying very much about what distinguished a permissible restriction from an impermissible one. It simply noted that the ‘disqualification on the right to contest an election by having more than two living children does not contravene any fundamental right nor does it cross the limits of reasonability’.¹²¹ Such reasoning fits into the larger dichotomous pattern which this chapter has explored—where, on the one hand, institutions like the Election Commission are given importance and the electoral process is granted paramount status; and, on the other hand, cases involving the right to vote or, as we see with *Javed*, the right to contest elections, invite lesser judicial scrutiny. The way legal developments on questions of elections, like the ordinance notified by the State of Rajasthan, unfold will—more than many other areas of constitutional law—shape the unfolding of Indian democracy.

* I am grateful to Arjun Rao for valuable research assistance.

¹ See Richard H Pildes, ‘Elections’ in Michel Rosenfeld and András Sajó (eds) *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012) 529; Samuel Issacharoff, *Fragile Democracies: Contested Power in the Era of Constitutional Courts* (Cambridge University Press 2015).

² Richard Pildes, ‘Foreword: The Constitutionalization of Democratic Politics’ (2004) 118 *Harvard Law Review* 29.

³ Constitution of India 1950, art 326 (emphasis added).

⁴ *NP Ponnuswami v Returning Officer* AIR 1952 SC 64.

⁵ *NP Ponnuswami* (n 4) [19].

⁶ *Jumuna Prasad Mukhariya* AIR 1954 SC 686 [5].

⁷ *Jyoti Basu v Debi Ghosal* (1982) 1 SCC 691 [8].

⁸ *Jyoti Basu* (n 7) [8].

⁹ *Jyoti Basu* (n 7) [8].

¹⁰ (2003) 4 SCC 399. See also Shubhankar Dam, ‘People’s Union for Civil Liberties v Union of India: Is Indian Democracy Dependent on a Statute?’ (2004) *Public Law* 704.

¹¹ *Union of India v Association for Democratic Reforms* (2002) 5 SCC 294.

¹² *People’s Union for Civil Liberties* (n 10) [97].

¹³ *People’s Union for Civil Liberties* (n 10) [97].

¹⁴ *People’s Union for Civil Liberties* (n 10) [98].

¹⁵ *People’s Union for Civil Liberties* (n 10) [57].

¹⁶ *People’s Union for Civil Liberties* (n 10) [127].

¹⁷ Dam (n 10) [710].

¹⁸ *Kuldip Nayar v Union of India* (2006) 7 SCC 1 [460].

¹⁹ Law Commission of India, *Reform of the Electoral Laws* (Law Com No 170, 1999) <<http://www.lawcommissionofindia.nic.in/lc170.htm>>, accessed October 2015.

- ²⁰ *Association for Democratic Reforms v Union of India* (2001) 57 DRJ 82 (DB).
- ²¹ *Association for Democratic Reforms* ([n 20](#)) 97.
- ²² (1985) 1 SCC 641.
- ²³ (1995) 2 SCC 161.
- ²⁴ *Association for Democratic Reforms* ([n 11](#)) [38].
- ²⁵ *Association for Democratic Reforms* ([n 11](#)) [38].
- ²⁶ *Association for Democratic Reforms* ([n 11](#)) [48].
- ²⁷ *People's Union for Civil Liberties v Union of India* (2013) 10 SCC 1.
- ²⁸ *People's Union for Civil Liberties* ([n 27](#)) [25].
- ²⁹ Madhav Khosla, 'Hot Button' (*The Caravan*, 1 November 2013) <<http://www.caravanmagazine.in/perspectives/hot-button>>, accessed October 2015.
- ³⁰ *SR Bommai v Union of India* (1994) 3 SCC 1.
- ³³ *TN Seshan, Chief Election Commissioner v Union of India* (1995) 4 SCC 611 [11].
- ³¹ Constitution of India 1950, art 324.
- ³² Constitution of India 1950, art 324(5).
- ³⁴ *TN Seshan* ([n 33](#)) [11].
- ³⁵ *TN Seshan* ([n 33](#)) [11].
- ³⁶ *TN Seshan* ([n 33](#)) [11].
- ³⁷ *TN Seshan* ([n 33](#)) [19].
- ³⁸ *Kanhiya Lal Omar v RK Trivedi* (1985) 4 SCC 628 [17].
- ³⁹ *Mohinder Singh Gill v Chief Election Commissioner* (1978) 1 SCC 405.
- ⁴⁰ *Mohinder Singh Gill* ([n 39](#)) [39].
- ⁴¹ *Mohinder Singh Gill* ([n 39](#)) [41].
- ⁴² *Association for Democratic Reforms* ([n 11](#)) [26].
- ⁴³ *Association for Democratic Reforms* ([n 11](#)) [26].
- ⁴⁴ *Common Cause v Union of India* (1996) 2 SCC 752.
- ⁴⁵ *Common Cause* ([n 44](#)) [18].
- ⁴⁶ *Common Cause* ([n 44](#)) [26].
- ⁴⁷ Ujjwal Kumar Singh, 'Between Moral Force and Supplementary Legality: A Model Code of Conduct and the Election Commission of India' (2012) 11(2) Election Law Journal 149.
- ⁴⁸ Singh ([n 47](#)) 152.
- ⁴⁹ Singh ([n 47](#)) 159.
- ⁵⁰ Singh ([n 47](#)) 159.
- ⁵¹ Singh ([n 47](#)) 161.
- ⁵² (2013) 9 SCC 659.
- ⁵³ *S Subramaniam Balaji* ([n 52](#)) [86].
- ⁵⁴ *S Subramaniam Balaji* ([n 52](#)) [87].
- ⁵⁵ *S Subramaniam Balaji* ([n 52](#)) [87].
- ⁵⁶ See Election Commission of India, 'Model Code of Conduct for the Guidance of Political Parties and Candidates' <http://eci.nic.in/eci_main/MCC-ENGLISH_28022014.pdf>, accessed October 2015.
- ⁵⁷ (2002) 5 SCC 685.
- ⁵⁸ *Indian National Congress* ([n 57](#)) [41]. However, the Court admitted that there were three possible

exceptions to this rule: (1) where a party obtained its registration through fraud; (2) where a party itself intimated to the Commission that it had ceased to comply with the requirements of s 29A(5); (3) any similar ground which does not call for an inquiry by the Commission.

⁵⁹ (1972) 4 SCC 664. See also *All Party Hill-Leaders' Conference v Captain WA Sangma* (1977) 4 SCC 161; *Roop Lal Sathi v Nachhattar Singh Gill* (1982) 3 SCC 487; *Subramanian Swamy v Election Commission of India* (2008) 14 SCC 318.

⁶⁰ *Sadiq Ali* ([n 59](#)) [40].

⁶¹ *Kanhiya Lal Omar* ([n 38](#)).

⁶² *Kanhiya Lal Omar* ([n 38](#)) [16].

⁶³ (2012) 7 SCC 340.

⁶⁴ *Desiya Murpokku Dravida Kazhagam* ([n 63](#)) [31].

⁶⁵ *Desiya Murpokku Dravida Kazhagam* ([n 63](#)) [53].

⁶⁶ *Subhash Chandra Agrawal v Indian National Congress* CIC/SM/C/2011/001386: CIC/SM/C/2011/000838.

⁶⁷ The Statement of Objects and Reasons of the Bill justifies its introduction on the basis that there are already provisions in the Representation of People Act 1951 as well as in the Income Tax Act 1961 which deal with transparency in the financial matters of political parties and their candidates and that declaring a political party as public authority under the RTI Act would hamper its internal functioning and could be misused by political rivals. The Bill is yet to be passed.

⁷¹ *Indrajit Barua* ([n 70](#)) [3].

⁷² (1995) 3 SCC 100 [13].

⁸³ *Kanhiya Lal Omar* ([n 38](#)) [18].

⁶⁸ (1985) 4 SCC 689.

⁶⁹ *Lakshmi Charan Sen* ([n 68](#)) [28].

⁷⁰ (1985) 4 SCC 722.

⁷³ *Lal Babu Hussein* ([n 72](#)) [13].

⁷⁴ (1993) 4 SCC 175.

⁷⁵ *Digvijay Mote* ([n 74](#)) [12].

⁷⁶ (2002) 8 SCC 237.

⁷⁷ *Re Special Reference No 1 of 2002* ([n 76](#)) [80].

⁷⁸ *Re Special Reference No 1 of 2002* ([n 76](#)) [105].

⁷⁹ *Neela Gokhale v Union of India* Writ Petition (Civil) No 1005/2013, order dated 24 March 2014.

⁸⁰ Election Symbols (Reservation and Allotment) Order 1968 para 2(h).

⁸¹ *Kanhiya Lal Omar* ([n 38](#)).

⁸² *Kanhiya Lal Omar* ([n 38](#)) [17].

⁸⁴ Samuel Issacharoff, 'Fragile Democracies' (2007) 120 Harvard Law Review 1405.

⁸⁵ Issacharoff ([n 84](#)).

⁸⁶ (1996) 1 SCC 130.

⁸⁷ *Dr Ramesh Yeshwant Prabhoo* ([n 86](#)) [13].

⁸⁸ *Dr Ramesh Yeshwant Prabhoo* ([n 86](#)) [13]. One of the decisions relied upon by the Court, to emphasise the importance of Section 123 and of secular values, was *Ziyouddin Burhanuddin Bukhari v Brijmohan Ramdass Mehra* (1976) 2 SCC 17.

⁸⁹ *Dr Ramesh Yeshwant Prabhoo* ([n 86](#)) [30].

- ⁹⁰ *Dr Ramesh Yeshwant Prabhuo* ([n 86](#)) [18].
- ⁹¹ *Dr Ramesh Yeshwant Prabhuo* ([n 86](#)) [44].
- ⁹² *Dr Ramesh Yeshwant Prabhuo* ([n 86](#)) [59].
- ⁹³ (2014) 11 SCC 477.
- ⁹⁴ *Pravasi Bhalai Sangathan* ([n 93](#)) [29].
- ⁹⁵ Issacharoff ([n 84](#)) 1428.
- ⁹⁶ MV Rajeev Gowda and E Sridharan, 'Reforming India's Party Financing and Election Expenditure Laws' (2012) 11(2) Election Law Journal 226.
- ⁹⁷ (1975) 3 SCC 646.
- ⁹⁸ *Common Cause* ([n 44](#)).
- ⁹⁹ *Common Cause* ([n 44](#)) [23].
- ¹⁰⁰ Gowda and Sridharan ([n 96](#)) 228.
- ¹⁰¹ *Mohd Abdul Ghani* ([n 109](#)) [10].
- ¹⁰¹ Constitution of India 1950, art 329.
- ¹⁰² AIR 1967 SC 669.
- ¹⁰³ The Delimitation Commission Act 1962, s 10(2).
- ¹⁰⁴ *Meghraj Kothari* ([n 102](#)) [11].
- ¹⁰⁵ AIR 1955 SC 425.
- ¹⁰⁶ *Meghraj Kothari* ([n 102](#)) [16].
- ¹⁰⁷ *Meghraj Kothari* ([n 102](#)) [12].
- ¹⁰⁸ *Meghraj Kothari* ([n 102](#)) [9].
- ¹⁰⁹ (1995) 6 SCC 721.
- ¹¹⁰ *Mohd Abdul Ghani* ([n 109](#)) [8].
- ¹¹² *AP Scheduled Castes Welfare Association, Hyderabad v Union of India* AIR 2004 AP 381 [26].
- ¹¹³ (2010) 4 SCC 329.
- ¹¹⁴ *Tukaram S Dighole* ([n 113](#)) [12].
- ¹¹⁵ *Tukaram S Dighole* ([n 113](#)) [12].
- ¹¹⁶ (1999) 9 SCC 386. See also *Jagan Nath v Jaswant Singh* AIR 1954 SC 210; *Razik Ram v Jaswant Singh Chouhan* (1975) 4 SCC 769; *Gajanan Krishnaji Bapat v Dattaji Raghobaji Meghe* (1995) 5 SCC 347.
- ¹¹⁷ *Jeet Mohinder Singh* ([n 116](#)) [40].
- ¹²⁰ *Javed* ([n 119](#)) [22].
- ¹¹⁸ See 'Sweta Dutta, Rajasthan Governor fixes minimum education qualifications for Panchayat polls' (*The Indian Express*, 22 December 2014) <<http://indianexpress.com/article/india/india-others/rajasthan-governor-fixes-minimum-education-qualifications-for-panchayat-polls/>>, accessed October 2015.
- ¹¹⁹ (2003) 8 SCC 369.
- ¹²¹ *Javed* ([n 119](#)) [25].

CHAPTER 13

EMERGENCY POWERS

RAHUL SAGAR^{*}

I. INTRODUCTION

PART XVIII of the Constitution of India provides for three types of extraordinary situations: national security emergencies owing to military conflict or armed rebellion; failures of constitutional machinery in the States; and financial emergencies. An observer surveying the contemporary record might conclude that Parliament's veto power, the Supreme Court's activism, and the growing pluralism of the body politic have 'tamed' these provisions. Consider the facts: no financial emergency has ever been declared; no security emergency has been declared since 1975; and proclamations of failure of constitutional machinery have declined steeply since 1994 (after serial abuse prompted the Court to enhance procedural safeguards). Yet it would be a mistake to conclude from these facts that all is well. This chapter contends that the Constitution's emergency provisions have escaped controversy only because contingent factors—relative calm on the international front and the feebleness of the Centre in an era of coalition politics—have made it harder to exploit these provisions' ambiguities.

This chapter proceeds as follows. Section I briefly outlines the emergency provisions enumerated in [Part XVIII](#) of the Constitution. Section II investigates why Articles 356 and 360, which address failures of constitutional machinery in the States and threats to financial stability and credit, respectively, were included in [Part XVIII](#) of the Constitution. Sections III and IV survey how Articles 352 and 356 have been interpreted over time. The chapter concludes in Section VI with the warning that the safeguards found in [Part XVIII](#) of the Constitution may not be as resilient as they seem.

II. THE PROVISIONS

As mentioned above, [Part XVIII](#) of the Constitution contains provisions directed

at three types of extraordinary situations. The first is Article 352, which allows the President to proclaim an emergency when ‘satisfied that a grave emergency exists whereby the security of India or of any part of the territory thereof is threatened, whether by war or external aggression or armed rebellion’.¹ Following such a proclamation, the Union is allowed to direct, and Parliament is allowed to legislate for, any State.² This includes the authority to control the distribution of revenues.³ In the event of military conflict, the President is also authorised to suspend Article 19 (which protects freedom of speech, assembly, association, and movement). More generally, the President is permitted to restrict the ability of citizens to move courts for the enforcement of the fundamental rights listed in [Part III](#) of the Constitution (except for Articles 20 and 21).⁴

The invocation and exercise of powers during an emergency is hedged about by various safeguards. First, the President may not issue or alter a proclamation unless directed to do so, in writing, by the Union cabinet.⁵ Secondly, no proclamation shall extend beyond a month, unless confirmed by both Houses of Parliament (and then too by majorities of the total membership of each House and two-thirds of those present and voting).⁶ Thirdly, proclamations approved by both Houses must be reconfirmed on a six-monthly basis (by similar majorities, as described above).⁷ Fourthly, if one-tenth of the members of the Lok Sabha submit in writing to the President or the Speaker their intention to move a resolution disapproving the proclamation, a special session of the Lok Sabha must be called within fourteen days for the purposes of considering such a resolution, whereupon a simple majority vote in favour of revoking the proclamation would be conclusive.⁸ Finally, once a proclamation has been issued, laws or actions that curtail rights or remedies under [Part III](#) of the Constitution must contain a ‘recital’ making explicit that they are ‘in relation to the Proclamation of Emergency’ (with the additional proviso that laws or actions suspending remedies must also be laid before Parliament).⁹

A second extraordinary situation foreseen by [Part XVIII](#) relates to the failure of constitutional machinery in States. Article 356 permits the President to proclaim such a breakdown should he be satisfied ‘that a situation has arisen in which the Government of the State cannot be carried on in accordance with the provisions of this Constitution’.¹⁰ A number of consequences follow from such a proclamation, the most important being that the President can ‘assume to himself all or any of the functions of the Government of the State’, and that ‘the powers of the Legislature of the State shall be exercisable by or under the authority of

Parliament’.¹¹ Concomitantly, Article 357 allows Parliament to delegate the legislative power of the State to the President (or to another specified authority).¹² This includes the power to impose duties and powers on officers of the Union, and to sanction expenditure from the Consolidated Fund of the affected State.¹³ The completeness of these powers explains why commentators typically describe Articles 356 and 357 as leading to ‘President’s Rule’.

There are a number of safeguards with respect to Article 356. Most immediately, a proclamation expires after two months unless its continuance is approved by Parliament, whereupon its life is extended to six months.¹⁴ Extensions are not permitted beyond one year unless there is a national security emergency, and the Election Commission certifies ‘difficulties’ in holding elections to the Legislative Assembly of the State in question.¹⁵ And even when these conditions are met, proclamations under Article 356 still cannot be extended beyond three years. Furthermore, Article 356 does not allow the President (or the Union) to assume ‘any of the powers vested in or exercisable by a High Court’.¹⁶

The third extraordinary situation anticipated in [Part XVIII](#) is financial emergency. Article 360 allows the President to proclaim such an emergency when he is ‘satisfied that a situation has arisen whereby the financial stability or credit of India or of any part of the territory thereof is threatened’.¹⁷ Thereupon the Union receives the right to give ‘directions to any State to observe such canons of financial propriety’, and Money Bills passed by States are ‘reserved for the consideration of the President’.¹⁸ The President may also reduce the salaries of public officials, including judges.¹⁹ The safeguards associated with Article 360 are comparatively minimal: a proclamation of financial emergency must be laid before Parliament, and stands to expire after two months, unless extended by resolutions approved by both Houses.²⁰

III. A CURIOUS FEATURE

A curious feature of [Part XVIII](#) is the inclusion of Articles 356 and 360. An emergency is typically described as ‘an unexpected and usually dangerous situation that calls for immediate action’.²¹ Since the extraordinary situations envisaged by Articles 356 and 360 are not likely to be characterised by the sense of immediate danger associated with the usual meaning of the term ‘emergency’, the framers’ thinking with respect to the inclusion of these provisions in [Part](#)

[XVIII](#) is not self-evident.

The present categorisation of emergencies was not inherited from the colonial period. As Gopal Subramaniam has observed, Article 356 derives from Section 93 of the Government of India Act 1935, which was not categorised as an emergency provision.²² So why did the framers include Article 356 in [Part XVIII](#)? The Constituent Assembly debates reveal that when Article 356 was criticised as contrary to federalism, the delegates who stood up to defend it pointed to dark clouds on the near horizon. Algu Rai Sastri, for instance, observed that:

Freedom brings in its wake various problems, and difficulties which have to be faced by a nation. Anti-social elements are very active in Bengal today. They are trying to uproot the Government of the Province. The same thing is happening in Madras. Hyderabad too has been the scene of these activities. All these disturbances that we are witnessing today are no doubt local in character but they may create a grave situation necessitating immediate intervention.²³

Such statements indicate that the delegates that spoke up on behalf of Article 356 misunderstood its purpose. The threats they cited—the States being afflicted by insurrection and disorder—did not actually fall under the purview of Article 356. Such threats came under the purview of Article 352, which, at the time at least, authorised the President to proclaim an emergency on account of ‘internal disturbance’ (subsequently amended to ‘armed rebellion’ by the Forty-fourth Amendment in 1978).

The Drafting Committee saw Article 356 quite differently. They seem to have been thinking along the lines of what Karl Loewenstein has termed ‘militant democracy’.²⁴ That is, their objective was to establish a provision that could be used to tackle political forces, principally communism, that might come to power in the States through the ballot box and then proceed to subvert constitutional democracy. The Committee hoped that Article 356 would be a ‘dead letter’—that is, they hoped that Indian democracy would not need to resort to militant methods to preserve itself against extremism.²⁵ But unwilling to take chances, they wanted the Union to have in reserve legal authority suitable for dealing with the menace of communism.

The delegates who spoke up on behalf of Article 356 also had the threat of communism on their minds, but they appear to have thought that communism would advance through violence and destabilisation rather than through the ballot box. This appears to be the reason why *they* did not find it problematic to place Article 356 under the heading ‘Emergency Provisions’. This explanation still leaves unanswered why the Drafting Committee included Article 356 in [Part XVIII](#). This was a puzzling choice on their part, since militant democracy is a

considered response to an incipient threat to the constitutional order rather than an immediate response to a clear threat to public safety.

The inclusion of Article 360 under the heading ‘Emergency Provisions’ is equally perplexing since financial crises typically follow in the wake of prolonged financial mismanagement, and do not simply spring out of nowhere. What kind of situation did the framers envisage when they endorsed this provision? The debates show members worrying about a particular source of trouble well before Article 360 was drafted. K Santhanam summarised the fear vividly:

Suppose for instance in a State the Ministry is all right, but it wants to make itself popular by reducing or cancelling all taxes and running its administration on a bankrupt basis. Suppose the Government servants are not paid and the obligations are not met and the State goes on accumulating its deficits. Of course this also is a difficult case. The Centre will have to be very careful and indulgent; it will have to give the longest possible rope but at some time or other in the case of economic breakdown also the Centre will have to step in because ultimately it is responsible for the financial solvency of the whole country and if a big province like the United Provinces goes into bankruptcy it will mean the bankruptcy of the whole country.²⁶

This presentation did not go unchallenged. Hriday Nath Kunzru observed that the scenario Santhanam had sketched out need not amount to an emergency, as the term was commonly understood. ‘If misgovernment in a province creates so much dissatisfaction as to endanger the public peace’, Kunzru argued, then the Union could rely on Article 352 to intervene.²⁷ But in the absence of violence and disorder, electors ought to be allowed to apply the ‘proper remedy’ themselves.²⁸ Kunzru subsequently cornered BR Ambedkar on this point before Article 356 went to vote. Pushed by Kunzru to clarify whether Article 356 allowed the Union to intervene in the States for the sake of ‘good government’, Ambedkar responded firmly that ‘whether there is good government or not in the province is [not] for the Centre to determine’.²⁹

It would seem that after the exchange between Kunzru and Ambedkar clarified that Article 356 would not allow the Union to pre-empt the mismanagement of State-level finances, the Drafting Committee felt compelled to insert Article 360. This is not, however, the explanation that Ambedkar offered when introducing the provision. He informed the assembly that the Article ‘more or less’ followed ‘the pattern’ of the United States’ National Industrial Recovery Act 1930, which sought to restructure the American economy in the face of the Great Depression.³⁰

Kunzru promptly pushed back. Ambedkar’s claim was unpersuasive, he asserted, because unlike the National Industrial Recovery Act, which had sought

to stimulate economic growth, Article 360 was aimed at enforcing fiscal prudence.³¹ As such the real purpose of Article 360, Kunzru contended, was to address the kind of scenario previously envisioned by Santhanam. The drafters were concerned about the fiscal impact of populism at the State level, as a number of States had recently enacted laws prohibiting the sale of liquor and narcotics, thereby denying themselves an important source of revenue. The introduction of such laws was indeed unwise, Kunzru conceded—the States in question ought to have shown ‘self-restraint’ in view of prevailing ‘financial difficulties’.³² Nonetheless the Union ought not to be allowed to intervene, he insisted, for a ‘Province can by itself hardly do anything that would jeopardise the financial stability or credit of India’.³³ Moreover, ‘even if a province by its foolishness places itself in a difficult financial position, why should it not be allowed to learn by its mistakes?’³⁴

Kunzru’s critique was immediately rebutted by KM Munshi, a key member of the Drafting Committee, who deemed such a laissez-faire approach impractical. The financial health of the States and the Centre was too interlinked to permit such laxity, he argued. As he put it:

This article in the Constitution is the realization of one supreme fact that the economic structure of the country is one and indivisible. If a province breaks financially, it will affect the finances of the Centre: if the Centre suffers, all the provinces will break. Therefore the interdependence of the provinces and the Centre is so great that the whole financial integrity of the country is one and a time might arise when unitary control may be absolutely necessary.³⁵

If we take Munshi’s response as indicative of the Drafting Committee’s position, then it seems reasonable to interpret Article 360 as the financial equivalent of the concept of militant democracy. That is, the provision was intended to provide the Union with the authority to arrest the sort of profligacy that could undermine the Union’s own financial standing. Even so we are still left wondering why the Drafting Committee included this provision in [Part XVIII](#), since what Article 360 addresses is not an immediate threat to the survival of the Union but rather a slow-growing poison.

IV. ARTICLE 352: CENTRAL ISSUES

Let us now examine how Article 352 has been interpreted. As a comprehensive review cannot be undertaken here, the following discussion focuses on two questions: first, how extensive is the President’s power once an emergency has

been proclaimed, and secondly, is the President's proclamation subject to judicial review? It is contended below that the Court's answers to both these questions have been overly deferential, rendering Article 352 a graver threat to liberty than it need be.

Article 352 has been invoked three times since the Constitution was adopted: in 1962, following war with China; in 1971, following war with Pakistan; and in 1975, following 'internal disturbances'. In each of these periods the Court has interpreted Article 352 in new ways. An early landmark case was *Sree Mohan Chowdhury v Chief Commissioner*, where the Court heard a *habeas corpus* petition filed by an individual detained under the 1962 Defence of India Act.³⁶ Pointing to the Presidential Order issued under Article 359 that prohibited individuals from approaching any court for the enforcement of rights conferred by Articles 21 and 22, the Court declined the appeal, declaring that 'as a result of the President's Order aforesaid, the petitioner's right to move this Court ... has been suspended during the operation of the Emergency, with the result that the petitioner has no *locus standi* to enforce his right, if any, during the Emergency'.³⁷ The Court also refused to inquire into the validity of the Act on the grounds that the appellant was 'arguing in a circle' since:

In order that the Court may investigate the validity of a particular ordinance or act of a legislature, the person moving the Court should have a *locus standi* ... In view of the President's Order passed under the provisions of Art. 359 (1) of the Constitution, the petitioner has lost his *locus standi* to move this Court during the period of Emergency.³⁸

Shortly after came *Makhan Singh Tarsikka v State of Punjab*, where the appellants questioned whether the High Courts of Bombay and Punjab were justified in refusing to entertain their petitions questioning the constitutionality of the Defence of India Act.³⁹ The appellants argued that strictly construed Article 359 did not forbid their seeking the High Court's intervention under Section 491 of the 1898 Code of Criminal Procedure provided that 'any High Court may, whenever it thinks fit, direct that a person illegally or improperly detained in public custody be set at liberty'.⁴⁰ The Court disagreed, declaring that seeking any writ in 'the nature of *habeas corpus*' fell foul of the 'substance', if not the 'form', of Article 359.⁴¹

Though the *Makhan Singh* Court concurred with *Mohan Chowdhury* that detainees had no *locus standi* to question the validity of the Act, it voluntarily addressed the question of what avenues remained open to detainees wishing to challenge 'the legality or the propriety of their detentions'.⁴² It indicated at least

three possible grounds. First, a detainee could approach the courts to enforce fundamental rights not specified in the Presidential Order.⁴³ Secondly, a detainee could move the courts on the ground that his detention ‘has been ordered *mala fide*’.⁴⁴ Thirdly, a detainee could challenge the Act on the grounds that they suffer ‘from the vice of excessive delegation’, that is, they transferred to the executive ‘essentially legislative powers’.⁴⁵

The Court was willing to venture only so far though. When pressed on the point that a prolonged emergency could leave citizens bereft of their rights for an extended duration, PB Gajendragadkar J responded that this spectre:

[H]as no material bearing on the points with which we are concerned. How long the Proclamation of Emergency should continue and what restrictions should be imposed on the fundamental rights of citizens during the pendency of the emergency, are matters which must inevitably be left to the executive because the executive knows the requirements of the situation and the effect of compulsive factors which operate during periods of grave crisis, such as our country is facing today.⁴⁶

The appellants decried the Court’s reticence, arguing it would leave citizens exposed to the ‘abuse of power’. Unmoved, Gajendragadkar J replied:

This argument is essentially political and its impact on the constitutional question with which we are concerned is at best indirect. Even so, it may be permissible to observe that in a democratic State, the effective safeguard against abuse of executive powers whether in peace or in emergency, is ultimately to be found in the existence of enlightened, vigilant and vocal public opinion.⁴⁷

Unfortunately, the Court chose not to reflect on the soundness of these recommendations. It did not discuss whether public opinion could be reliably informed and aware when Article 358 allowed the President to suspend Article 19. It also failed to address whether the preventive detention could be used to intimidate or silence critics.

The cases that followed immediately thereafter, principally *Ananda Nambiar v Chief Secretary*⁴⁸ and *Ram Manohar Lohia v State of Bihar*,⁴⁹ solidified the precedents set by *Makhan Singh*. In *Ananda Nambiar*, the Court outlined two further scenarios under which detention might be challenged in spite of the Presidential Order—namely by contending that the detention order was employed by a person or under circumstances not authorised by the Defence of India Act.⁵⁰ The latter criterion was employed in *Ram Manohar Lohia*, where the appellant’s detention was overturned on the ground that the detention had been justified on the grounds of maintaining ‘law and order’ when the Act only permitted detention for reasons of ‘public order’.⁵¹

A final case from this period that deserves mention is *Ghulam Sarwar v Union of India*.⁵² Note that in *Lohia* the Court had declined to allow the appellant to

argue, contra *Makhan Singh*, that ‘the satisfaction of the President under Art 359 is open to scrutiny of the court’.⁵³ In another case, *PL Lakhanpal v Union of India*, the Court dismissed the appellant’s claim that the continuance of Emergency was a ‘fraud on the Constitution’ because ‘for some time past there was no armed aggression against the territory of India’.⁵⁴ A proclamation of Emergency, AK Sarkar CJ opined, could only be revoked by Parliament.⁵⁵ But in *Ghulam Sarwar* the Court’s opinion, penned by K Subba Rao CJ, now prevaricated on this crucial point. At first glance the Court implicitly concurred with *Makhan Singh*, observing that:

[T]he question whether there is grave emergency ... is left to the satisfaction of the Executive, for it is obviously in the best position to judge the situation. But there is the correlative danger of the abuse of such extra ordinary power leading to totalitarianism ... What is the safeguard against such an abuse? The obvious safeguard is the good sense of the Executive, but the more effective one is public opinion.⁵⁶

But pushed by the appellant to note the continuation of the emergency—‘four long years after the cessation of the hostilities’—the Chief Justice remarked:

A question is raised whether this Court can ascertain whether the action of the Executive in declaring the emergency or continuing it is actuated by *mala fides* and is an abuse of its power. We do not propose to express our opinion on this question as no material has been placed before us in that regard. It requires a careful research into the circumstances obtaining in our country and the motives operating on the minds of the persons in power in continuing the emergency. As the material facts are not placed before us, we shall not in this case express our opinion one way or other on this all important question which is at present agitating the public mind.⁵⁷

The full force of the concern highlighted above was made clear by *Additional District Magistrate Jabalpur v Shivakant Shukla*.⁵⁸ This case arose after individuals detained under the 1971 Maintenance of Internal Security Act filed writs of *habeas corpus* in various High Courts. The High Courts declared that they were entitled to examine the propriety of the detention orders notwithstanding the 1975 Proclamation of Emergency on grounds of ‘internal disturbance’, and a subsequent Presidential Order suspending the enforcement of Articles 14, 21, and 22. Upon appeal the Court disagreed, arguing that unlike the 1962 Presidential Order, which suspended appeal only with respect to detentions under the Defence of India Act, the 1975 Presidential Order was ‘unconditional’, that is, it suspended appeal without reference to any particular statute, leaving the High Courts no standard against which to evaluate detentions.⁵⁹ Hence, the Court concluded, ‘no person has any locus standi to move any writ petition under Article 226 before a High Court for *habeas corpus* or any other writ or order or direction to challenge the legality of an order of detention on the ground

that the order is not under or in compliance with the Act or is illegal or is vitiated by *mala fides* factual or legal or is based on extraneous consideration’.⁶⁰

The ‘startling consequence’ of this decision, HR Khanna J’s famous dissent summarised, was that:

[I]f any official, even a head constable of police, capriciously or maliciously, arrests a person and detains him indefinitely without any authority of law, the aggrieved person would not be able to seek any relief from the courts against such detention during the period of emergency ... In other words, the position would be that so far as executive officers are concerned, in matters relating to life and personal liberty of citizens, they would not be governed by any law, they would not be answerable to any court and they would be wielding more or less despotic powers.⁶¹

Khanna J declared this outcome unacceptable because ‘the essential postulate and basic assumption of the rule of law’ is that ‘the State has got no power to deprive a person of his life or liberty without the authority of law’.⁶² This observation provoked strong reactions from the Court’s majority, who argued that the rule of law actually lay on the side of the Presidential Order, which was issued under Article 352. As Mirza Beg J sharply replied:

If on a correct interpretation of the legal provisions, we find that the jurisdiction of Court was itself meant to be ousted, for the duration of the emergency ... because the judicial process suffers from inherent limitations in dealing with cases of this type, we are bound ... to declare that this is what the laws mean ... it does not follow from a removal of the normal judicial superintendence ... that there is no Rule of Law during the emergency.⁶³

Khanna J’s retort was that a ‘state of negation of rule of law would not cease to be such a state because of the fact that such a state of negation of rule of law has been brought about by a statute’.⁶⁴ To this an exasperated Beg J replied, not entirely unreasonably, that Khanna J’s reasoning passed over the positive law in favour of a ‘brooding omnipotence’. He observed:

It seems to me to be legally quite impossible to successfully appeal to some spirit of the Constitution or to any law anterior to or supposed to lie behind the Constitution to frustrate the objects of the express provisions of the Constitution ... What we are asked to do seems nothing short of building some imaginary parts of a Constitution, supposed to lie behind our existing Constitution, which could take the place of those parts of our Constitution whose enforcement is suspended and then to enforce the substitutes.⁶⁵

Unfortunately, this sharp exchange did not address the central point of contention. Khanna J’s fundamental objection was that the rule of law did not, in a deep sense, tolerate absolute power. The rule of law requires that powers must ‘be granted by Parliament within *definable limits*’.⁶⁶ For the most part, the

Shivakant Shukla majority ignored this point, preferring to defend their decision to focus on the letter of the law. PN Bhagwati J, for example, stated:

I do not think it would be right for me to allow my love of personal liberty to cloud my vision or to persuade me to place on the relevant provision of the constitution a construction which its language cannot reasonably bear ... the Constitution is the law of all laws and there alone judicial conscience must find its ultimate support, and its final resting place.⁶⁷

The only substantive response came from AN Ray CJ, who claimed there *were* limits: the Maintenance of Internal Security Act provided for periodic internal review of detentions; and the infringement of fundamental rights could be challenged in a court of law following the termination of the emergency.⁶⁸ But as in *Makhan Singh*, the Court did not address the satisfactoriness of these limits. As Khanna J noted, the safeguards cited by the Chief Justice left the executive with sole discretion to decide when, if ever, to release detainees.⁶⁹

The *Shivakant Shukla* Court also missed the opportunity to address whether it was entitled to review the underlying Proclamation of Emergency. A passing mention from Bhagwati J focused, once again, on formal rather than substantive legitimacy:

We must also disabuse our mind of any notion that the emergency declared by the Proclamation dated 25th June, 1975 is not genuine, or to borrow an adjective used by one of the lawyers appearing on behalf of the interveners, is 'phoney'. This emergency has been declared by the President in exercise of the powers conferred on him under Article 352, clause (1) and the validity of the Proclamation dated 25th June, 1975 declaring this emergency has not been assailed before us.⁷⁰

The only clear observation on this front came from YV Chandrachud J, who contradicted Subba Rao CJ's statement in *Ghulam Sarwar* by declaring in line with *Makhan Singh* that 'it is difficult to see how a Court of law can look at the declaration of emergency with any mental reservations', seeing as 'imminent danger of these occurrences depends at any given moment on the perception and evaluation of the national or international situation, regarding which the court of law can neither have full and truthful information nor the means to such information'.⁷¹

This question of justiciability received only slightly more consideration in a subsequent case, *Minerva Mills v Union of India*, where the petitioner challenged the constitutionality of legislation passed by the 1976 Parliament on the grounds that its life had been extended by Proclamations that were unreasonably prolonged (the 1971 Proclamation) or *mala fide* (the 1975 Proclamation).⁷² Confronted with the Attorney General's claim that a Proclamation was not justiciable because ascertaining whether the country faced

a grave emergency was a ‘political question’, PN Bhagwati J responded that it would be improper for the Court to decline to investigate whether the President had failed to abide by the provisions of Article 352.⁷³ Bhagwati J then speculated on what would follow should such a determination be made. Initially, per *Makhan Singh*, he argued that security was to be found in the political process:

It is true that the power to revoke a Proclamation of Emergency is vested only in the Central Government and it is possible that the Central Government may abuse this power by refusing to revoke a Proclamation of Emergency even though the circumstances justifying the issue of Proclamation have ceased to exist and thus prolong baselessly the state of emergency obliterating the Fundamental Rights and this may encourage a totalitarian trend. But the Primary and real safeguard of the citizen against such abuse of power lies in ‘the good sense of the people and in the system of representative and responsible Government’ which is provided in the Constitution.⁷⁴

However, he then abruptly wheeled around and made explicit what had been implicit in Subba Rao CJ’s comments in *Ghulam Sarwar*:

Additionally, it may be possible for the citizen in a given case to move the court for issuing a writ of mandamus for revoking the Proclamation of Emergency if he is able to show by placing clear and cogent material before the court that there is no justification at all for the continuance of the Proclamation of Emergency.⁷⁵

Adding the usual caveat that:

This is not a matter which is a fit subject matter for judicial determination and the Court would not interfere with the satisfaction of the executive Government in this regard unless it is clear on the material on record that there is absolutely no justification for the continuance of the Proclamation of Emergency and the Proclamation is being continued *mala fide* or for a collateral purpose.⁷⁶

The foregoing review prompts three observations. First, the Court’s substantive engagement with Article 352 has been patchy. It remains unclear, for instance, whether a Proclamation is justiciable, much less what would follow from an adverse determination. In *Waman Rao v Union of India*, which followed on the heels of *Minerva Mills*, YV Chandrachud J’s opinion for the majority cast doubt on Bhagwati J’s earlier forthright dicta, further muddying the waters.⁷⁷

It is now clear that detention orders passed during an emergency can always be reviewed. But this outcome is not a product of the Court having absorbed Khanna J’s dissent in *Shukla*. It owes instead to the Forty-fourth Amendment to the Constitution in 1978, which disallows the suspension of the enforcement of Articles 20 and 21 during an emergency. This means that the Court does not have precedents favouring liberty to fall back upon should *habeas corpus* come to be suspended at a future date. And such a day may come. The framers who

welded together a nation understood a fundamental truth—that Indian society is ‘fissiparous’—and provided a remedy that may have to be reclaimed.

A second observation follows from the above. India has not experienced national security emergencies since 1977. There is, however, no guarantee that these fortuitous circumstances will persist. There continue to be audacious attacks such as the attack on Parliament in 2001, which sought to wipe out the national leadership. Assuming, then, that emergencies will come, bringing with them demands for decisive action, how confident should we feel about the non-judicial safeguards established by the Forty-fourth Amendment? These safeguards, which are essentially parliamentary in nature, may prove fragile when tested, for Parliaments are not immune from panic; they may be misled; they may lack access to classified information; and they may simply lack courage, as they did between 1975 and 1977.

Here it is worth reflecting on the fundamental dichotomy exposed by ‘The Emergency’. Its origin encapsulates the many perversities of Indian political culture—the personalisation of offices, the fragility of institutions, and the unmanly proclivity for sycophancy. Its end underscores the irrepressibility of political opposition—that often vexing but sometimes invaluable tendency of pluralistic societies to stymie the little and grand plans of those in positions of authority. The brevity of this chapter forbids venturing which of these tendencies can be counted upon more, but the question needs posing, because it focuses attention not on the ‘parchment barriers’ that lawyers and textbooks cite with great certainty, but on estimating whether the relevant safeguards will hold firm on the day of reckoning.

A third observation follows from the above. If we have reason to believe that India will sooner or later confront national security emergencies, and that Parliament cannot be relied upon to stand up to the executive, then the Court must be prepared to intervene. Thus far the Court has proven, to use Lord Atkin’s famous phrase, ‘more executive-minded than the executive’.⁷⁸ Consider, for instance, the views expressed in *Shivakant Shukla*: Ray CJ chided counsel for the detainees that it could ‘never be reasonably assumed’ that they would be mistreated, adding that ‘people who have faith in themselves and in their country will not paint pictures of diabolic distortion and mendacious malignment of the governance of the country’.⁷⁹ Beg J declared ‘the care and concern bestowed by the State authorities upon the welfare of detenus... is almost maternal’.⁸⁰ Chandrachud J criticised the High Courts for having at the back of their minds a ‘facile distrust of executive declarations which recite threat to the security of the country, particularly by internal disturbance’.⁸¹ Bhagwati J stated that though

‘unlawful detentions’ were a possible outcome of unchecked executive power, ‘the fact remains that when there is crisis-situation arising out of an emergency, it is necessary to [trust] the Government with extraordinary powers in order to enable it to overcome such crisis’.⁸²

That the above are the views of four successive Chief Justices says much about the Court’s steadfastness in the past. The point here is not that the separation of powers cannot be relied upon in the Indian context. Rather it is that if Article 352 is to be interpreted in consonance with the preamble, then much depends on the Court exhibiting a willingness to defer in the face of crisis and an unwillingness to bow in the face of indecency. This willingness remains to be estimated.

V. ARTICLE 356: CENTRAL ISSUES

In [Part II](#) of this chapter we questioned the inclusion of Article 356 in [Part XVIII](#) of the Constitution on the grounds that this Article is not intended to address emergencies (as they are conventionally understood). Let us now briefly survey how Article 356 has since been interpreted. Since a comprehensive review is not possible here, the following discussion focuses on two key questions: first, under what circumstances may President’s Rule be imposed; and secondly, who decides whether these circumstances exist? It is contended that the prevailing answers to these questions, as settled by the Supreme Court, exhibit some weaknesses.

Article 356 has been employed more than a hundred times since the adoption of the Constitution. This remarkable statistic can be attributed to the impudence of India’s political leadership, as well as to a permissive interpretation of the purpose of the Article. At least the former of these points is widely acknowledged. From 1959 onward Union governments used Article 356 to dismiss (or to prevent the formation of) State governments controlled by rival political parties, ostensibly on the grounds that the latter had lost the trust of the people. This practice reached its apogee in the 1970s when, in the wake of the Congress Party’s rout in the post-Emergency elections, the Janata Party sought to displace nine Congress-led State governments. The States responded by approaching the Supreme Court. The resulting case—*State of Rajasthan v Union of India*—led to the first important judgment on the purpose of Article 356.⁸³

In *Rajasthan*, the Court flatly rejected the contention that ascertaining whether Article 356 ought to be invoked was a non-justiciable ‘political question’. The

Court was entitled to investigate, Bhagwati J declared, ‘whether the limits on the power conferred by the Constitution have been observed or there is transgression of such limits’.⁸⁴ With respect to Article 356 the relevant limit was that the President had to be *satisfied* that a situation had arisen where the government of the State *cannot* be carried on in accordance with the provisions of the Constitution.

On the whole, the Justices declined to establish a standard for satisfaction. As Bhagwati J explained:

The satisfaction of the President is a subjective one and cannot be tested by reference to any objective tests. It is deliberately and advisedly subjective because the matter in respect to which he is to be satisfied is of such a nature that its decision must necessarily be left to the executive branch of Government. There may be a wide range of situations which may arise and their political implications and consequences may have to be evaluated in order to decide whether the situation is such that the Government of the State cannot be carried on in accordance with the provisions of the Constitution.⁸⁵

A number of explanations were offered in defence of this stance. The above passage from Bhagwati J’s opinion references the *mutability* of circumstances. Fazal Ali J, by contrast, pointed to the Court’s *incapacity*—it did not ‘possess the resources which are in the hands of the government to find out the political needs that they seek to subserve and the feelings or the aspirations of the nation that require a particular action to be taken at a particular time’.⁸⁶ A third explanation came from Beg CJ, who emphasised the problem of *subjectivity*:

What is the Constitutional machinery whose failure or imminent failure the President can deal with under Article 356? Is it enough if a situation has arisen in which one or more provisions of the Constitution cannot be observed? Now what provisions of the Constitution, which are not being observed in a State, or to what extent they cannot be observed, are matters on which great differences of opinion are possible.⁸⁷

These differences, Beg CJ went on to argue, were a consequence of the adoption of the ‘rather loose’ concept of the ‘basic structure of the Constitution’ established by *Kesavananda Bharati*,⁸⁸ which made it impossible for the Court to say ‘that the Union Government, even if it resorts to Article 356 of the Constitution to enforce a political doctrine or theory, acts unconstitutionally, so long as that doctrine or theory is covered by the underlying purposes of the Constitution found in the preamble which has been held to be a part of the Constitution’.⁸⁹

Though the *Rajasthan* Court declined to second-guess the President’s decision to invoke Article 356, the Justices agreed that scrutiny may follow should the circumstances indicate bad faith. They established, in other words, a threshold

rather than a substantive test. Bhagwati J put the point most strongly:

Take, for example, a case where the President gives the reason for taking action under Art. 356, cl. (1) and says that he is doing so, because the Chief Minister of the State is below five feet in height and, therefore, in his opinion a situation has arisen where the Government of the State cannot be carried on in accordance with the provisions of the Constitution. Can the so-called satisfaction of the President in such a case not be challenged on the ground that it is absurd or perverse or *mala fide* or based on a wholly extraneous and irrelevant ground and is, therefore, no satisfaction at all?⁹⁰

This declaration forced the *Rajasthan* Court to address an obvious question. In the cases before them the States had argued that ‘the sole purpose of the intended Proclamations’ was to dissolve the State legislatures ‘with the object of gaining political victories’.⁹¹ Had not the Union acted *mala fides* then? The Court’s response revealed that the threshold for satisfaction was so low that only an imprudent Union leadership would fail to meet it. Broadly, the Justices held that the charged political environment following the end of the Emergency meant that one could not conclusively impute *mala fides* to the Janata Party’s proposal. As Beg CJ put it:

[A] dissolution against the wishes of the majority in a State Assembly is a grave and serious matter ... The position may, however, be very different when a State Government has a majority in the State Assembly behind it but the question is whether the State Assembly and the State Government for the time being have been so totally and emphatically rejected by the people that a ‘critical situation’ has arisen or is bound to arise unless the political sovereign is given an opportunity of giving a fresh verdict. A decision on such a question undoubtedly lies in the Executive realm.⁹²

Moreover, the Union government had merely proposed to ‘give electors in the various States a fresh chance of showing whether they continue to have confidence in the State Governments’. Since ‘one purpose of our Constitution and laws is certainly to give electors a periodic opportunity of choosing their State’s legislature’, the Chief Justice opined, ‘a policy devised to serve that end could not be contrary to the basic structure or scheme of the Constitution’.⁹³

Following *Rajasthan*, the Janata Party proceeded to dismiss the nine Congress-led State governments. Upon its return to power in 1980, the Congress settled scores by dismissing nine Janata-led State governments. These depressing events contributed to the establishment in 1983 of the Sarkaria Commission, which was tasked with reviewing Union–State relations.⁹⁴ The Commission acknowledged the difficulty in supervising the employment of Article 356:

A failure of constitutional machinery may occur in a number of ways. Factors which contribute to such a situation are diverse and imponderable. It is, therefore, difficult to give an exhaustive catalogue of all situations which would fall within the sweep of the phrase, ‘the government of the State cannot be carried on in accordance with the provisions of this Constitution’.⁹⁵

Nonetheless, the Commission went beyond the *Rajasthan* Court by identifying four conditions under which the exercise of Article 356 might be justified: a *political crisis* arising from the inability of any party to cobble together a workable majority in the State legislature; *internal subversion* resulting from an effort of a State government to undermine responsible government; *physical breakdown* following an inability to respond to internal disturbance or natural calamity; and *non-compliance* with the Union, for instance by failing to maintain national infrastructure or refusing to follow directions during war.⁹⁶ The last of these conditions, the Commission noted, is made explicit by Article 365 of the Constitution, which states that:

Where any State has failed to comply with or to give effect to any directions given in the exercise of the executive power of the Union ... it shall be lawful for the President to hold that a situation has arisen in which the government of the State cannot be carried on in accordance with the provisions of this Constitution.⁹⁷

Based on the above criteria, the Commission had no trouble reaching the conclusion that Article 356 ought not to be employed, as it had in recent times, ‘for superseding the duly constituted Ministry and dissolving the State Legislative Assembly on the sole ground that, in the General Elections to the Lok Sabha, the ruling party in the State has suffered a massive defeat’.⁹⁸

The Commission also recommended bolstering the ‘tenuous’ standard of judicial review established by *Rajasthan*. The ‘[j]udicial remedy of seeking relief, even against a *mala fide* exercise of the power, will remain more or less illusory’, it warned, ‘if the basic facts on which the President, in effect, the Union Council of Ministers, reaches the satisfaction requisite for taking action under Article 356(1), are not made known’.⁹⁹ Hence it recommended:

[T]o make the remedy of judicial review on the ground of *mala fides* a little more meaningful, it should be provided, through an appropriate amendment, that notwithstanding anything in clause (2) of Article 74 of the Constitution the material facts and grounds on which Article 356 (1) is invoked should be made an integral part of the proclamation issued under that Article.¹⁰⁰

The Union government did not formally accept the Sarkaria Commission’s Report. Not surprisingly, controversies over the use of Article 356 then continued, eventually prompting a second prominent case, *SR Bommai v Union of India*.¹⁰¹ This case had its genesis in the decision of the Congress-led Union government to impose President’s Rule in six States. In half these cases, Article 356 was invoked without allowing rival political parties to prove they had the support of the Legislature; in the other half, State governments led by the Bharatiya Janata Party (BJP) had been dismissed in the wake of communal

violence stemming from the destruction of the Babri Masjid. Following mixed verdicts in the relevant High Courts, the cases were brought before the Supreme Court, which was asked to clarify the constitutional position.

The *Bommai* Court followed the *Rajasthan* Court in emphasising that the Court was entitled to review the exercise of Article 356. Where the Justices differed was on the question of justiciability. AM Ahmadi, JS Verma, Yogeshwar Dayal, and K Ramaswamy JJ voiced a preference for the minimal standard established by the *Rajasthan* Court. As Verma J opined:

It would appear that situations wherein the failure of constitutional machinery has to be inferred subjectively from a variety of facts and circumstances, including some imponderables and inferences leading to a subjective political decision, judicial scrutiny of the same is not permissible for want of judicially manageable standards. These political decisions call for judicial hands off envisaging correction only by a subsequent electoral verdict, unless corrected earlier in Parliament.¹⁰²

But a slim majority composed of PB Sawant, Kuldeep Singh, BP Jeevan Reddy, SC Agrawal, and SR Pandian JJ challenged the *Rajasthan* precedent in two important respects. Though they agreed that the Court ought not to question the President's subjective satisfaction, they argued the Court was entitled to inquire into the material basis of the President's satisfaction to ascertain the *relevance* of the evidence and the *reasonableness* of the inference drawn from it. Sawant J put the point most strongly, writing:¹⁰³

[T]he existence of the objective material showing that the Government of the State cannot be carried on in accordance with the provisions of the Constitution is a condition precedent before the President issues the Proclamation. Once such material is shown to exist, the satisfaction of the President based on the material is not open to question. However, if there is no such objective material before the President, or the material before him cannot reasonably suggest that the Government of the State cannot be carried on in accordance with the provisions of the Constitution, the Proclamation issued is open to challenge.

The Justices also emphasised that should it *prima facie* appear that Article 356 had been invoked in bad faith, the Court would be entitled to demand the production of the material that had served as the basis of the President's decision. Once again Sawant J put the point most bluntly, warning the Union that it did not enjoy a blanket privilege against disclosing such evidence because:

[A]lthough Article 74(2) bars judicial review so far as the advice given by the Ministers is concerned, it does not bar scrutiny of the material on the basis of which the advice is given. The courts are not interested in either the advice given by the Ministers to the President or the reasons for such advice. The courts are, however, justified in probing as to whether there was any material on the basis of which the advice was given, and whether it was relevant for such advice and the President could have acted on it.¹⁰⁴

Applying the above standard, the *Bommai* Court declared unconstitutional the imposition of President's Rule in States where political formations had not been allowed to test their strength on the floor of the State legislature. In these cases the Union had failed to show that the States *cannot* be carried in accordance with the Constitution. To the contrary, the 'undue haste' shown by the Union in invoking Article 356 'clearly smacked of *mala fides*'.¹⁰⁵

The *Bommai* Court did not engage fully with the Sarkaria Commission's Report on the circumstances under which Article 356 may be legitimately invoked. Sawant and Singh JJ expressed their 'broad agreement' with the Commission's views, but did not enter into specifics,¹⁰⁶ whereas Jeevan Reddy and Agrawal JJ expressed some scepticism, stating that:

It is indeed difficult—nor is it advisable—to catalogue the various situations which may arise and which would be comprised within [the scope of Article 356]. It would be more appropriate to deal with concrete cases as and when they arise.¹⁰⁷

Ramaswamy J meanwhile passed over the Report and struck out on his own. Undeterred by the caution sounded by Reddy and Agrawal JJ, he identified a number of circumstances, aside from non-compliance with Union directions, where Article 356 could be lawfully invoked:

While it is not possible to exhaustively catalogue diverse situations when the constitutional breakdown may justifiably be inferred from, for instance (i) large-scale breakdown of the law and order or public order situation; (ii) gross mismanagement of affairs by a State Government; (iii) corruption or abuse of its power; (iv) danger to national integration or security of the State or aiding or abetting national disintegration or a claim for independent sovereign status and (v) subversion of the Constitution while professing to work under the Constitution or creating disunity or disaffection among the people to disintegrate democratic social fabric.¹⁰⁸

The only criterion that received support from seven of the nine members of the *Bommai* Court was that Article 356 could be invoked to dismiss a State government acting contrary to the 'basic structure' of the Constitution. As Sawant and Singh JJ pronounced:

Secularism is a part of the basic structure of the Constitution. The acts of a State Government which are calculated to subvert or sabotage secularism as enshrined in our Constitution, can lawfully be deemed to give rise to a situation in which the Government of the State cannot be carried on in accordance with the provisions of the Constitution.¹⁰⁹

Given the above, the *Bommai* Court held that the dismissal of the BJP-led State governments on account of their complicity in the destruction of the Babri Masjid, and the ensuing communal violence, was constitutional.

The foregoing review prompts three observations. First, in view of the political class's inability to develop and maintain conventions relating to the appropriate use of Article 356, the Court's decision in *Bommai* to scrutinise the procedures employed prior to the imposition of President's Rule is to be welcomed.¹¹⁰ This stance, combined with the Court's declaration that the imposition of President's Rule does not permit the dissolution of the State legislature unless Parliament concurs, provides a much-needed corrective against mala fides (as is borne out by the decline since 1994 in controversial invocations of Article 356).

Secondly, the *Bommai* Court's unwillingness to clarify the grounds on which Article 356 may be invoked is a cause of concern. As discussed earlier, the framers intended Article 356 to be employed to combat what the Sarkaria Commission described as 'internal subversion' or 'non-compliance'. By contrast, it is not clear how a political crisis (for example, a hung assembly) or physical breakdown (for example, due to extensive flooding) can be described as leading to a failure of constitutional machinery. Unless there is greater clarity on the purpose of Article 356, it may be employed to serve ends other than what the framers intended. For instance, in *Rameshwar Prasad v Union of India*, Arijit Pasayat J supported Governor Buta Singh's decision to dissolve the Bihar Assembly following allegations of horse trading on the grounds that Article 356 could be invoked to pre-empt the corruption of the political system:

When the sole object is to grab power at any cost even by apparent unfair and tainted means, the Governor cannot allow such a government to be installed. By doing so, the Governor would be acting contrary to very essence of democracy. The purity of electorate process would get polluted. The framers of the Constitution never intended that democracy or governance would be manipulated.¹¹¹

It is submitted that YK Sabharwal CJ's response was more in keeping with the framers' intentions:

The ground of maladministration by a State Government enjoying majority is not available for invoking power under Article 356. The remedy for corruption or similar ills and evils lies elsewhere and not in Article 356(1).¹¹²

A final set of observations flows from the above. In both *Rajasthan* and *Bommai* the Court permitted Article 356 to be invoked on the grounds that the States had violated the 'basic structure' of the Constitution. This approach is troubling because the normative concepts the preamble references are 'essentially contested'. The Court's expositions on these concepts (for example, on the meaning of 'secularism' in *Bommai*) are therefore unlikely to eliminate the

problem of vagueness. The preambles normative commitments may also conflict with each other. For instance, republican governments have historically featured a state-sanctioned religion, as Jean-Jacques Rousseau famously emphasises in *The Social Contract*.¹¹³ Had the *Bommai* Court been aware of this basic fact it would have struggled to reconcile the preambles commitments to Republicanism and Secularism. Finally, if violations of the ‘basic structure’ of the Constitution are sufficient grounds for the invocation of Article 356, then the Union will find the requisite evidence easy to come by because political reality rarely matches political ideals. Hence, if the Court does not want to hand the Union an excuse to employ Article 356—an excuse that has not been utilised in recent times because political fragmentation has made it harder for the Centre to secure parliamentary approval—then it ought to consider stating that Article 356 should be used only to combat internal subversion and non-compliance.

VI. CONCLUSION

This chapter has outlined the Constitution’s emergency provisions and described how they have been interpreted over time. It has suggested that the lull in the employment of these provisions may owe less to how these provisions have been constructed and interpreted, and more to contingent factors—principally, relative calm on the international front and the weakening of the Centre in an era of coalition politics. These circumstances, which may prove transient, have made it much more difficult for the political class to exploit the ambiguities in Articles 352 and 356. Hence until these provisions are tested more thoroughly on the anvil of fear and cravenness, respectively, we should not assume that the Constitution’s emergency provisions have been tamed.

* This chapter is dedicated to my father, Jyoti Sagar, who taught me to love the rule of law. I am indebted to Madhav Khosla and Varun Srikanth for their advice and help in crafting this chapter.

¹ Constitution of India 1950, art 352(1).

² Constitution of India 1950, arts 353(a) and 353(b).

³ Constitution of India 1950, art 354(1).

⁴ Constitution of India 1950, art 359(1).

⁵ Constitution of India 1950, art 352(3).

⁶ Constitution of India 1950, arts 352(4) and 352(6).

⁷ Constitution of India 1950, art 352(5).

⁸ Constitution of India 1950, arts 352(7) and 352(8).

- ⁹ Constitution of India 1950, arts 358(2), 359(1B), and 359(3).
- ¹⁰ Constitution of India 1950, art 356(1).
- ¹¹ Constitution of India 1950, arts 356(1)(a) and 356(1)(b).
- ¹² Constitution of India 1950, art 357(1)(a).
- ¹³ Constitution of India 1950, arts 357(1)(b) and 357(1)(c).
- ¹⁴ Constitution of India 1950, arts 356(3) and 356(4).
- ¹⁵ Constitution of India 1950, arts 356(5) and 356(6).
- ¹⁶ Constitution of India 1950, art 356(1).
- ¹⁷ Constitution of India 1950, art 360(1).
- ¹⁸ Constitution of India 1950, arts 360(3) and 360(4)(ii).
- ¹⁹ Constitution of India 1950, arts 360(4)(a)(i) and 360(4)(b).
- ²⁰ Constitution of India 1950, arts 360(2)(b) and 360(2)(c).
- ²¹ Merriam Webster <<http://www.merriam-webster.com/dictionary/emergency>>, accessed November 2015.
- ²² Gopal Subramaniam, 'Emergency Provisions Under the Indian Constitution' in BN Kirpal and others (eds) *Supreme But Not Infallible: Essays in Honour of the Supreme Court of India* (Oxford University Press 2004) 14.
- ²³ *Constituent Assembly Debates*, vol 9 (Lok Sabha Secretariat 1986) 173, 4 August 1949.
- ²⁴ Karl Loewenstein, 'Militant Democracy and Fundamental Rights I' (1937) 31(3) *The American Political Science Review* 417, 430–31.
- ²⁵ *Constituent Assembly Debates*, vol 9 (Lok Sabha Secretariat 1986) 177, 4 August 1949.
- ²⁶ *Constituent Assembly Debates*, vol 9 (Lok Sabha Secretariat 1986) 154, 3 August 1949.
- ²⁷ *Constituent Assembly Debates*, vol 9 (Lok Sabha Secretariat 1986) 155, 3 August 1949.
- ²⁸ *Constituent Assembly Debates*, vol 9 (Lok Sabha Secretariat 1986) 156, 3 August 1949.
- ²⁹ *Constituent Assembly Debates*, vol 9 (Lok Sabha Secretariat 1986) 176, 4 August 1949.
- ³⁰ *Constituent Assembly Debates*, vol 10 (Lok Sabha Secretariat 1986) 361, 16 October 1949.
- ³¹ *Constituent Assembly Debates*, vol 10 (Lok Sabha Secretariat 1986) 368, 16 October 1949.
- ³² *Constituent Assembly Debates*, vol 10 (Lok Sabha Secretariat 1986) 370, 16 October 1949.
- ³³ *Constituent Assembly Debates*, vol 10 (Lok Sabha Secretariat 1986) 369, 16 October 1949.
- ³⁴ *Constituent Assembly Debates*, vol 10 (Lok Sabha Secretariat 1986) 369, 16 October 1949.
- ³⁵ *Constituent Assembly Debates*, vol 10 (Lok Sabha Secretariat 1986) 371, 16 October 1949.
- ³⁸ Sree Mohan Chowdhury ([n 36](#)) [6].
- ⁴⁶ Makhan Singh Tarsikka ([n 39](#)) [47].
- ⁴⁷ Makhan Singh Tarsikka ([n 39](#)) [47].
- ⁵⁶ Ghulam Sarwar ([n 52](#)) [11].
- ⁵⁷ Ghulam Sarwar ([n 52](#)) [11].
- ⁶¹ Shivakant Shukla ([n 58](#)) [538].
- ⁶³ Shivakant Shukla ([n 58](#)) [304].
- ⁶⁵ Shivakant Shukla ([n 58](#)) [165].
- ⁶⁷ Shivakant Shukla ([n 58](#)) [487].
- ⁷⁰ Shivakant Shukla ([n 58](#)) [436].
- ⁷⁴ Minerva Mills ([n 72](#)) [101].

- ⁷⁵ *Minerva Mills* ([n 72](#)) [101].
- ⁷⁶ *Minerva Mills* ([n 72](#)) [101].
- ³⁶ AIR 1964 SC 173.
- ³⁷ *Sree Mohan Chowdhury* ([n 36](#)) [5].
- ³⁹ AIR 1964 SC 381.
- ⁴⁰ *Makhan Singh Tarsikka* ([n 39](#)) [20].
- ⁴¹ *Makhan Singh Tarsikka* ([n 39](#)) [30].
- ⁴² *Makhan Singh Tarsikka* ([n 39](#)) [36].
- ⁴³ *Makhan Singh Tarsikka* ([n 39](#)) [36].
- ⁴⁴ *Makhan Singh Tarsikka* ([n 39](#)) [37].
- ⁴⁵ *Makhan Singh Tarsikka* ([n 39](#)) [39].
- ⁴⁸ AIR 1966 SC 657.
- ⁴⁹ AIR 1966 SC 740.
- ⁵⁰ *Ananda Nambiar* ([n 48](#)) [7].
- ⁵¹ *Ram Manohar Lohia* ([n 49](#)) [55]–[58].
- ⁵² AIR 1967 SC 1335.
- ⁵³ *Ram Manohar Lohia* ([n 49](#)) [57].
- ⁵⁴ AIR 1967 SC 243 [4].
- ⁵⁵ *PL Lakhanpal* ([n 54](#)) [4].
- ⁵⁸ (1976) 2 SCC 521.
- ⁵⁹ *Shivakant Shukla* ([n 58](#)) [273].
- ⁶⁰ *Shivakant Shukla* ([n 58](#)) [596].
- ⁶² *Shivakant Shukla* ([n 58](#)) [530].
- ⁶⁴ *Shivakant Shukla* ([n 58](#)) [544].
- ⁶⁶ *Shivakant Shukla* ([n 58](#)) [544] (emphasis added).
- ⁶⁸ *Shivakant Shukla* ([n 58](#)) [130]–[132].
- ⁶⁹ *Shivakant Shukla* ([n 58](#)) [583]–[587].
- ⁷¹ *Shivakant Shukla* ([n 58](#)) [347].
- ⁷² (1980) 3 SCC 625.
- ⁷³ *Minerva Mills* ([n 72](#)) [97]–[98].
- ⁷⁷ (1981) 2 SCC 362.
- ⁷⁸ *Liversidge v Anderson* [1942] AC 243 (HL).
- ⁷⁹ *Shivakant Shukla* ([n 58](#)) [36].
- ⁸⁰ *Shivakant Shukla* ([n 58](#)) [324-A].
- ⁸¹ *Shivakant Shukla* ([n 58](#)) [347].
- ⁸² *Shivakant Shukla* ([n 58](#)) [486].
- ⁸⁵ *State of Rajasthan* ([n 83](#)) [150].
- ⁸⁷ *State of Rajasthan* ([n 83](#)) [46].
- ⁹⁰ *State of Rajasthan* ([n 83](#)) [150].
- ⁹² *State of Rajasthan* ([n 83](#)) [74].

- ⁹⁵ *Report of the Sarkaria Commission on Centre–State Relations* (n 94) para 6.1.07.
- ¹⁰² *SR Bommai* (n 101) [45].
- ¹⁰⁴ *SR Bommai* (n 101) [86].
- ¹⁰⁷ *SR Bommai* (n 101) [281].
- ¹⁰⁸ *SR Bommai* (n 101) [219].
- ¹⁰⁹ *SR Bommai* (n 101) [153].
- ¹¹¹ (2006) 2 SCC 1 [223].
- ¹¹² *Rameshwar Prasad* (n 111) [165].
- ⁸³ (1977) 3 SCC 592.
- ⁸⁴ *State of Rajasthan* (n 83) [150].
- ⁸⁶ *State of Rajasthan* (n 83) [208].
- ⁸⁸ *Kesavananda Bharati v State of Kerala* (1973) 4 SCC 225.
- ⁸⁹ *State of Rajasthan* (n 83) [48].
- ⁹¹ *State of Rajasthan* (n 83) [77].
- ⁹³ *State of Rajasthan* (n 83) [31]–[32].
- ⁹⁴ *Report of the Sarkaria Commission on Centre–State Relations* (Government of India 1988) ch 6 <<http://interstatecouncil.nic.in/Sarkaria/CHAPTERVI.pdf>>, accessed October 2015.
- ⁹⁶ *Report of the Sarkaria Commission on Centre–State Relations* (n 94) para 6.5.01.
- ⁹⁷ Constitution of India 1950, art 365.
- ⁹⁸ *Report of the Sarkaria Commission on Centre–State Relations* (n 94) para 6.5.01.
- ⁹⁹ *Report of the Sarkaria Commission on Centre–State Relations* (n 94) para 6.6.24.
- ¹⁰⁰ *Report of the Sarkaria Commission on Centre–State Relations* (n 94) para 6.6.25.
- ¹⁰¹ (1994) 3 SCC 1.
- ¹⁰³ *SR Bommai* (n 101) [59].
- ¹⁰⁵ *SR Bommai* (n 101) [118].
- ¹⁰⁶ *SR Bommai* (n 101) [80]–[82].
- ¹¹⁰ The procedures that the Court has started to scrutinise include the formulation of the Governor’s Report, the efforts of the Union Council of Ministers to ascertain relevant facts, and the President’s justification for the decision to suspend or dissolve the Legislative Assembly. On these fronts the Court has sought to examine the *cogency* of the grounds and the *necessity* of the remedy in order to *minimise* needlessly drastic action. It has, for instance, encouraged Union officers to employ objective floor tests rather than their subjective judgments to ascertain the extent of support enjoyed by claimants to office. It has also emphasised that it could reverse unjustified action, for instance, by reinstating a hastily dissolved Legislative Assembly. For such scrutiny in action, see *Rameshwar Prasad v Union of India* (2006) 2 SCC 1.
- ¹¹³ Jean-Jacques Rousseau, *The Social Contract*, tr Marice Cranston (first published 1762; Penguin 1998).

CHAPTER 14

CONSTITUTIONAL AMENDMENT

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I. INTRODUCTION

It is a standard feature of constitutions that they provide a mechanism for their amendment.¹ Yet, few constitutional democracies have had as rich and controversial an experience with the constitutional amendment power as India. The formal amendment power is found in Article 368 of the Indian Constitution. Amendments require a two-thirds majority of Parliament, present and voting, and in certain specified cases, ratification by at least half of the State legislatures. The latter include provisions involving India's federal scheme, such as Articles 245–255, which distribute power between the Union and the States. Further, some changes—like the reorganisation of States under Article 3—may take place through a simple parliamentary majority, in the same manner as the enactment of ordinary legislation.² On the one hand, Article 368 has been subject to extensive, straightforward use. The Constitution was recently amended for the hundredth time. From the abolition of privy purses to the creation of local government to radical changes to the right to property and the right to equality, amendments to the Constitution have been frequent and wide-ranging.³ On the other hand, the meaning and limits of Article 368 have invited intense constitutional adjudication and debate. In particular, the amendment power has, since 1973, been interpreted by the Supreme Court to exclude changes to the 'basic structure' of the Constitution.

Given the impassioned debate over standard judicial review, where judges assess the validity of ordinary legislation, it is hardly surprising that the review of amendments themselves should be viewed with anxiety. Recent work in democratic theory has shown the perverse uses to which entrenchment clauses have been put and the importance of legal change to democratic practice.⁴ We may take the argument against unamendability even further than highlighting its historical misuse and potential dangers. If constitutionalism is about the distinction between sovereignty and government, then judicial review can only legitimately judge government with respect to the sovereign, rather than judge

the sovereign itself.⁵ The moment judges review constitutional amendments they are reviewing the expression of sovereignty. This must therefore signify a *coup d'état*: they now occupy the position of sovereigns themselves. As Adam Smith observed in his *Lectures on Jurisprudence*, 'To suppose a sovereign subject to judgment, supposes another sovereign.'⁶ Further, if we are reluctant to accept that the review of amendments means crowning judges as sovereign, we are then faced with the equally devastating thought that it involves the creation of a lawless society, for we now have a society without any *source* of law.⁷

An alternate philosophical account of unamendability might view the judicial review of constitutional amendments less as a matter of shifting the location of sovereign authority and more as a challenge to the representation of sovereignty. Say, for instance, a legislature has the power to amend a constitution through a supermajority. The judicial review of such an amendment might be considered as a challenge to the legislature's capacity to represent popular sovereignty. The animating logic here is that sovereignty is a formal idea that cannot find instantiation. In such a scenario, judicial review serves as a check and prevents a legislative body from usurping power from the people. Such an account could draw from a view of representation made famous by Sieyès; a view involving an effort to create multiple sites of representation.⁸ An outlook of this kind would provide us with a more charitable interpretation of what judges might be doing while reviewing constitutional amendments. They are attempting to secure the conditions that can legitimate the expression of sovereignty.⁹

It is possible to imagine responses to both positions. The Hobbesian would resist this alternate account of representation, and pose the authority question. That is to say, he might emphasise that whatever the account of representation, there must, in practice, be some decisionmaking body. Insofar as this is true, it would appear that the very act of challenging such a body (by the courts or anyone else) necessarily involves assuming the role of that body. On the other hand, one could argue that the moment there is in-principle agreement on the fact that certain conditions must exist to legitimate the expression of sovereignty, then the protection of those conditions is simply an empirical question. Whether or not courts should be vested with the power to protect such conditions, and in the process review amendments, turns entirely, upon this understanding, on how well they exercise this power.

This brief conceptual background should enable us to appreciate the questions that arise in countries like India, where courts have claimed for themselves the power to review constitutional amendments. The doctrinal details of India's experience have been well covered and are widely known. Instead of providing a

worm's-eye view of the intricate legal landscape generated around the basic structure doctrine in India, this chapter has a more modest, clarifying ambition. It hopes to examine and consider how Indian courts have understood the core of the Constitution. If a constitution is not simply a bundle of provisions but instead a document with an architectural framework—a particular identity—then what are its foundations and its essential characteristics? The origins and the development of the basic structure doctrine has been, in part, an attempt to answer this question. It has been an effort to understand the principles on which constitutionalism itself must depend. As a philosophical matter, the question of identity is an old and difficult one. From the Ship of Theseus puzzle to the relationship of a body of clay to a statue, philosophers have long been perplexed by the idea of the 'material constitution'.¹⁰ When does a constitution change to such an extent that it becomes a new constitution? What composite parts of a constitution can be regarded as forming its essence? Amendment clauses might also raise their own riddles, such as the paradox of self-amendment.¹¹

This chapter does not resolve these challenging philosophical queries, but it hopes to show how they have found some degree of expression in India's constitutional landscape. The debate on unconstitutional constitutional amendments—on its normative legitimacy, its empirical practice—is a very real one. It now occupies significance in a range of jurisdictions other than India.¹² Given that no other jurisdiction has generated as impressive and large a body of case law on this matter, the Indian experience must be regarded as having particular importance.¹³ This chapter begins with an examination of the early amendment cases that created the basic structure doctrine. It then considers subsequent developments and the application of the doctrine. Through surveying how Indian courts have wrestled with the idea of an unconstitutional constitutional amendment, this chapter considers the architectural framework that the courts have imagined the Constitution as having.

II. THE EMERGENCE OF THE BASIC STRUCTURE DOCTRINE

In comparative terms, the Indian Constitution's amendment procedure adopts the middle ground. Apart from select matters, some of which require the approval of at least half of the State legislatures and others which can be changed with a simple parliamentary majority, an amendment requires a two-thirds majority of Parliament, present and voting. This approach is situated between that followed

in countries like the United States, where the degree of entrenchment is far greater, and the United Kingdom, where all legal changes can take place through a simple majority in Parliament. At the founding, this middle ground was thought to satisfy two competing ideals: the aspiration for a single canonical text, which could guide and inform State action, and the desire for a document flexible enough to enable economic growth, modernisation, and political accommodation.¹⁴

The vesting of the amendment power in the same institution that enacts ordinary legislation means that a certain creative ambiguity exists about the location of sovereignty.¹⁵ The institution is poised delicately between a Constituent Assembly and a standard legislature. Parliament is both bound by the Constitution and has the power to change it. This suggests that Parliament was conceived of as more than an ordinary legislature—it was regarded as representative in some deeper sense. The concern with an unlimited amendment power emerged in Indian constitutionalism from a change in this understanding of the relationship between Parliament and the Constitution. The status of Parliament became a matter of debate, and the recognition arose that it was from Parliament itself that the people might need protection.

It is hardly fortuitous that the basic structure doctrine emerged through cases on the right to property. Land redistribution was at once a major political agenda as well as one whose achievement implicated the right to property, a right guaranteed by [Part III](#) of the Constitution. Each of the first four cases which considered the question of an unconstitutional constitutional amendment—and ultimately developed what is now called the ‘basic structure doctrine’—involved challenges to land reform measures on the basis of, inter alia, the right to property. The question arose in *Shankari Prasad Singh Deo*, with the enactment of the very first amendment to the Constitution.¹⁶ Article 13 of the Constitution declares laws that contravene the fundamental rights contained in [Part III](#) of the Constitution to be void. In *Shankari Prasad*, the Court dismissed the suggestion that ‘law’ in Article 13 of the Constitution would include constitutional amendments. The Court’s recognition of Parliament’s exclusive and supreme power to amend the Constitution was based upon the distinction between constitutional law and ordinary legislation. The former, being an expression of constituent power, could not itself be subject to challenge. As the Constitution had vested Parliament with the authority to exercise constituent power, there was no place for any other institution or external standard to intervene in the exercise of this power.

Shankari Prasad was affirmed when the question of constitutional

unamendability resurfaced in the mid-1960s in *Sajjan Singh*.¹⁷ Strictly speaking, the challenge in *Sajjan Singh* focused on whether the proviso to Article 368 had been followed. There was no challenge, in principle, to the idea that Parliament could amend any provision in the Constitution.¹⁸ However, as *Shankari Prasad* was the subject of reconsideration, the Court revisited the more general question of constitutional unamendability. Here, unlike in *Shankari Prasad*, the Supreme Court offered a 3:2 rather than a unanimous verdict. For the majority, the matter was settled by the text: ‘the expression “amendment of the Constitution” plainly and unambiguously means amendment of all the provisions of the Constitution’.¹⁹ The framers, it was noted, had been extremely careful in outlining the nature of the amendment power. Certain provisions could, for example, be changed through a mere simple majority.²⁰ If, the Court emphasised, Article 368 had been intended to demarcate the procedure and not the substance of the amendment power, it would have said so. The distinction between constituent power and ordinary legislation was again relied upon to reject the argument that ‘law’ in Article 13 included amendments. No other theory in support of restricting the amendment power was found to be persuasive:

[S]o far as our Constitution is concerned, it would not be possible to deal with the question about the powers of Parliament to amend the Constitution under Article 368 on any theoretical concept of political science that sovereignty rests in the people and the legislatures are merely the delegate of the people. Whether or not Parliament has the power to amend the Constitution must depend solely upon the question as to whether the said power is included in Article 368. The question about the reasonableness or expediency or desirability of the amendments in question from a political point of view would be irrelevant in construing the words of Article 368.²¹

The two minority opinions of M Hidayatullah and JR Mudholkar JJ, however, expressed concern over the idea that Article 368 was absolute and could be used indiscriminately. For Hidayatullah J, the textual argument offered by the majority was unconvincing, quite simply because Article 368 did not explicitly grant the power to amend every single provision. It would be odd, Hidayatullah J observed, for the framers to have devoted such energy and attention to the fundamental rights if ‘they were the play things of a special majority’.²² Rights were understood as holding a unique status:

The rights of a society are made paramount and they are placed above those of the individual. This is as it should be. But restricting the fundamental rights by resort to clauses 2 to 6 of Article 19 is one thing and removing the rights from the Constitution or debilitating them by an amendment is quite another.²³

Mudholkar J similarly noted that ‘it would indeed be strange’ if the fundamental rights, which had been guaranteed with such care, could be ‘more easily capable of being abridged or restricted than any of the matters referred to in the proviso to Article 368’.²⁴ He took note of a decision by the Supreme Court of Pakistan, which had held universal franchise and the form of government to be beyond the power of amendment,²⁵ and made the following observation regarding the *basic features* of the Constitution:

We may also have to bear in mind the fact that ours is a written Constitution. The Constituent Assembly which was the repository of sovereignty could well have created a sovereign Parliament on the British model. But instead it enacted a written Constitution, created three organs of State, made the union executive responsible to Parliament and the State executives to the State legislatures; erected a federal structure and distributed legislative power between Parliament and the State legislatures, recognized certain rights as fundamental and provided for their enforcement; prescribed forms of oaths of office or affirmations which require those who subscribe to them to owe true allegiance to the Constitution and further require members of the Union judiciary and of the higher judiciary in the States to uphold the Constitution. Above all, it formulated a solemn and dignified preamble which appears to be an epitome of the basic features of the Constitution. Can it not be said that these are indicia of the intention of the Constituent Assembly to give permanence to the basic features of the Constitution?

It is also a matter for consideration whether making a change in the basic feature of the Constitution can be regarded merely as an amendment or would it be, in effect, rewriting a part of the Constitution; and, if the latter, would it be within the purview of Article 368?²⁶

These two minority opinions in *Sajjan Singh* give us the early origins of the basic structure doctrine in India. As the question of unamendability was not specifically at issue, both opinions were expressed with tentativeness, raising questions rather than providing answers. But two aspects of the opinions are noteworthy. First, they questioned the idea that the issue at hand could be easily resolved by relying upon the constituent power–ordinary legislation distinction. The exercise of constituent power was itself thought to depend upon certain conditions. Secondly, the opinions gesture towards what such conditions might be. Rights were noted as plausibly holding such a status; as being essential to the very making of higher laws. Mudholkar J went further and suggested that the question might be answered not narrowly in terms of rights but rather in terms of the ‘basic features of the Constitution’.

Matters took a decisive turn soon after the decision in *Sajjan Singh*. In *Golak Nath*, a narrow 6:5 majority of the Supreme Court departed from *Shankari Prasad* and *Sajjan Singh* and placed substantive limitations upon Parliament’s power to amend the Constitution.²⁷ Article 368 was now understood as merely describing the procedure for amendment. The substantive nature of the amendment power was instead thought to be found in Entry 97 of List I of the

Seventh Schedule to the Constitution. According to the Court, ‘the power of the Parliament to amend the Constitution is derived from Articles 245, 246, and 248 of the Constitution and not from Article 368 thereof which only deals with procedure’.²⁸ Central to this reasoning was the idea that a constitutional amendment was simply a legislative act like any other. Parliament was a *legislature*. ‘Amendment’, as Subba Rao CJ put it, ‘is a legislative process.’²⁹ Article 368 was not the route for the enactment of a new constitution. Rao CJ even suggested that if this was indeed the project, a new Constituent Assembly might be in order:

Nor are we impressed by the argument that if the power of amendment is not all comprehensive there will be no way to change the structure of our Constitution or abridge the fundamental rights even if the whole country demands for such a change. Firstly, this visualizes an extremely unforeseeable and extravagant demand; but even if such a contingency arises, the residuary power of the Parliament may be relied upon to call for a Constituent Assembly for making a new Constitution or radically changing it. The recent Act providing for a poll in Goa, Daman, and Diu is an instance of analogous exercise of such residuary power by the Parliament. We do not express our final opinion on this important question.³⁰

The Court found little merit in the argument based upon sovereignty or constituent power. It noted that ‘One need not cavil at the description of an amending power as sovereign power, for it is sovereign only within the scope of the power conferred by a particular constitution.’³¹ Once the argument based upon constituent power was rejected, two questions remained. The first was how limitations upon Article 368 could be justified; and the second was what such limitations would be. Both questions were answered by turning to Article 13. The provision, it was held, would apply to constitutional amendments. The word ‘law’ would include constitutional amendments rather than simply statutes or executive orders. Making constitutional amendments subject to Article 13 meant that they could no longer violate [Part III](#) of the Constitution.

The *Golak Nath* solution to the question of constitutional amendment was neat. Amendments were similar to any other law passed by Parliament and, as such, they could not encroach upon the rights guaranteed by the Constitution. Rights formed the inviolable core of the Constitution: ‘fundamental rights are given a transcendental position under our Constitution and are kept beyond the reach of Parliament.’³² It was further observed that situations in which rights could be modified or suspended had been explicitly provided for in the text, and it would have been meaningless for the Constitution to limit State action on the basis of rights and then allow it to overrun those rights.³³ Without the [Part III](#) limitation on Article 368, the Court noted, fundamental rights could be removed

without the consent of the States, whereas less significant provisions would require their approval.³⁴

While *Golak Nath* was subject to the predictable criticism that it had failed to fully grasp the meaning of constituent power, the route it embraced for making its claims attracted further trouble. It seemed odd to locate the substantive power of amendment within the Union List in Schedule VII and yet give States a role in the procedural enactment of amendments. The rationale, relying upon a comparison between parliamentary power in India and the United Kingdom, failed to capture the precise nature of the Indian scheme. The reliance upon Article 13 seemed equally unpersuasive. It opened up a range of strange possibilities. For instance, a fundamental right could not be limited, but the right to free and fair elections—which fell outside [Part III](#)—could be amended and removed. Further, the word ‘law’ was used in a wide range of provisions in the Constitution, in many instances clearly distinguishing it from the Constitution.³⁵ The *Golak Nath* answer was simple, but it was not convincing.

Expectedly, *Golak Nath* resulted in a constitutional amendment. The Twenty-fourth Amendment to the Constitution clarified Articles 13 and 368, making it clear that there were no restrictions upon Parliament in its exercise of the amendment power. The Amendment, along with the Twenty-fifth Amendment, which diluted the right to property, was itself challenged in *Kesavananda Bharati*, a decision that would come to acquire canonical status within Indian constitutional law.³⁶ The case was heard by thirteen judges, the largest ever bench of the Supreme Court of India. The verdict was narrow: a 7:6 verdict, with HR Khanna J’s opinion making the ultimate difference. The judgment, which placed substantive limitations upon Parliament’s power to amend the Constitution, is the longest Indian judicial decision to have yet been authored.

Kesavananda Bharati has invited an outpouring of scholarship. The positions taken by the different judges have raised questions about the precise *ratio* that can be discerned from the case.³⁷ Scholars have explored the various judicial philosophies at work, especially the outlook towards the question of parliamentary sovereignty.³⁸ Attention has been devoted to the heavy political drama surrounding the case—the clash between Parliament and the Supreme Court; the personalities of the political actors, lawyers, and judges involved; the non-legal factors which might have shaped the outcome; and so forth.³⁹ For present purposes, we will focus upon the Supreme Court’s ultimate ruling, that the Indian Constitution places not merely procedural but also substantive limitations upon the amendment power. *Kesavananda Bharati* overruled *Golak Nath* in important respects. It recognised the difference between constitutional

law and ordinary legislation, and rejected the idea that the substantive power to amend the Constitution lay within the Union's residuary powers of legislation. Instead of relying upon Article 13, it placed restrictions upon the amendment power by virtue of Article 368 itself. Six of the seven judges that constituted the majority found inherent or implied limitations in the nature of Article 368. Khanna J, whose opinion tipped the balance in favour of the basic structure doctrine, focused instead upon the internal character of an *amendment*. Sovereignty was located with the people, and Parliament was only authorised to *amend* the Constitution rather than enact a new one.⁴⁰ To amend a document was different from repealing it, and was similarly different from an exercise in wholesale revision. As Khanna J put it:

I am further of the opinion that amendment of the Constitution necessarily contemplates that the Constitution has not to be abrogated but only changes have to be made in it. The word 'amendment' postulates that the old Constitution survives without loss of its identity despite the change and continues even though it has been subjected to alterations. As a result of the amendment, the old Constitution cannot be destroyed and done away with; it is regained though in the amended form. What then is meant by the retention of the old Constitution? It means the retention of the basic structure or framework of the old Constitution. A mere retention of some provisions of the old Constitution even though the basic structure or framework of the Constitution has been destroyed would not amount to the retention of the old Constitution. Although it is permissible under the power of amendment to effect changes, howsoever important, and to adapt the system to the requirements of changing conditions, it is not permissible to touch the foundation or to alter the basic institutional pattern.⁴¹

Both *Golak Nath* and *Kesavananda Bharati* challenged the idea that Parliament was sovereign in its exercise of the amendment power. In both cases, the very exercise of the amendment power by Parliament could only occur against the satisfaction of certain background conditions. Only such conditions could legitimate the exercise of power. Where both cases differed was in their understanding of what these conditions were. *Kesavananda Bharati* offered a more open-ended answer than *Golak Nath* had. It shifted the focus from specific textual provisions (ie, [Part III](#)) to abstract principles, which formed the core building blocks of the Constitution. The 'basic structure or framework of the Constitution' could not be exhaustively enumerated; only an illustrative list could be provided. Different judges provided examples, which included democracy, federalism, separation of powers, individual freedom, and secularism.⁴² According to Khanna J, the rights contained in [Part III](#) were not per se immutable: 'Subject to the retention of the basic structure or framework of the Constitution ... the power of amendment is plenary and would include within itself the power to add, alter, or repeal the various articles including those

relating to fundamental rights.’⁴³ It was only by application to particular amendments that greater specificity could be provided to the content of the basic structure.

This imprecision was inevitable. The argument that the exercise of amendment was different from the exercise of wholesale revision could not be explicated on textual terms. On a plain reading of the Constitution, one could argue that some parts of the text were more important than others. There was no textual strategy, however, by which to make this prioritisation. Any attempt at making such a prioritisation was to be necessarily inventive and messy. The text itself could not unpack the distinction between legitimate and illegitimate constitutional change. This task could only be achieved by turning to two or three fixed values around which the Constitution was to be anchored. *Kesavananda Bharati* ushered in this turn into Indian constitutionalism.

III. THE APPLICATION OF THE BASIC STRUCTURE DOCTRINE

The basic structure doctrine has been applied in a wide range of cases. In this part, I focus on cases involving challenges to constitutional amendments, and exclude from my analysis cases in which the doctrine has been used to interpret existing constitutional provisions or those in which it has been applied to legislative and executive action. A diverse set of constitutional amendments have been subject to basic structure review. Despite their variety, however, these cases have by and large been about either democracy or rights. Democracy and rights have been two values around which debates on the basic structure have been framed and performed. Both present conditions upon which the expression of sovereign power might be thought to depend. The application of the basic structure doctrine has been an effort to understand what demands these conditions entail.

1. Democracy-based Challenges

In the four aforementioned cases, the question of constitutional unamendability arose in the context of the right to property. It was with regard to the dilution of this right that the Supreme Court reflected upon the extent to which rights and the Constitution could change. The first case to apply the basic structure doctrine, however, involved a democracy-based challenge: it arose from the fear of authoritarianism. The Thirty-ninth Amendment to the Constitution voided a High Court decision that had set aside Indira Gandhi's election as a Member of Parliament, took away the right to any potential appeal from the High Court's decision, and removed the election of the Prime Minister from judicial review. The Amendment became the subject of challenge in *Indira Nehru Gandhi v Raj Narain*.⁴⁴

Indira Nehru Gandhi is an interesting case because one of the grounds on which the Thirty-ninth Amendment was attacked was that the amending power could not be used to decide a specific legal dispute. The Chief Justice, AN Ray, noted how the impugned provision Article 329A validated an election by passing 'a declaratory judgment and not a law'.⁴⁵ KK Mathew J put the point in sharp terms:

A judgment or sentence which is the result of the exercise of judicial power or of despotic discretion is not a law as it has not got the generality which is an essential characteristic of law. A despotic decision without ascertaining the facts of a case and applying the law to them, though dressed in the garb of law, is like a bill of attainder. It is a legislative judgment.⁴⁶

The more straightforward challenge in *Indira Nehru Gandhi* focused upon the separation of powers and ingredients of democratic rule. Legislatively validating an invalid election, without changing the law that made the election invalid and without any judicial application to the facts of the case, would, Mathew J observed, 'toll the death knell of the democratic structure of the Constitution'.⁴⁷ The impugned provision took away 'the mechanism for determining the real representative of the people in an election as contemplated by the Constitution'.⁴⁸ Khanna J similarly noted that to make an election immune from challenge and to prevent any questioning of the election before any forum whatsoever, however serious the improprieties and violations might be, would be 'subversive of the principle of free and fair election in a democracy'.⁴⁹

In *Charan Lal Sahu*, a case that soon followed, the Supreme Court distinguished the facts in *Indira Nehru Gandhi* with Article 71(3) of the

Constitution.⁵⁰ As per this provision, ‘Subject to the provisions of this Constitution, Parliament may by law regulate any matter relating to or connected with the election of a President or Vice President.’⁵¹ The Court observed that while, in *Indira Nehru Gandhi*, Article 329A(4) ‘took away the jurisdiction of this Court to decide disputes pending in appeals before it, because Parliament had, after practically deciding these disputes, directed this Court to carry out whatever was laid down in the form of a constitutional amendment’,⁵² Article 71(3) did not take away the jurisdiction to decide a matter pending before the Court. Instead, it simply dealt with the regulation of Presidential elections and excluded from review a law falling under Article 71(1). Given that the Court was the body before which the election of the President could be questioned, Article 71(3) was permissible, for it merely gave effect to ‘a well-known general principle which is applied by this Court that a Court or Tribunal functioning or exercising its jurisdiction under an enactment will not question the validity of that very enactment which is the source of its powers’.⁵³ The Court’s self-description was one of an election tribunal constituted by Parliament under Article 71(1).

This reasoning assumes away rather than answers the basic structure challenge, but the decision in *Charan Lal Sahu* might be understood by the fact that the election of the Prime Minister was a direct attack on democracy in a way that the election of the President was not. In *Indira Nehru Gandhi*, the attack posed a special danger given the political context, a context that played an important role in the decision.⁵⁴ It is also worth noting that *Indira Nehru Gandhi* did not only involve a limitation upon judicial power—it also involved Parliament’s own exercise of judicial power in non-judicial ways.

Judicial power—whether it be the structures that facilitate judicial independence or the matters on which jurisdiction is exercised and judicial review is performed—has dominated democracy-based basic structure challenges. In *P Sambamurthy v State of Andhra Pradesh*,⁵⁵ for example, Article 371-D(5) was under challenge. This provision empowered the State government to modify or annul the verdict of an administrative tribunal (established under clause (3) to adjudicate a range of public employment matters). This meant that it ‘would be open to the State government, after it has lost before the administrative tribunal, to set at naught the decision given by the administrative tribunal against it’.⁵⁶ Such a scenario, the Court held, violated the rule of law—which was a basic feature of the Constitution. According to the Court,

the exercise of power by the executive or any other authority must not only be conditioned by the Constitution but must also be in accordance with law, and the power of judicial review is conferred

by the Constitution with a view to ensuring that the law is observed and there is compliance with the requirement of law on the part of the executive and other authorities.⁵⁷

The Court drew an important link between judicial review and the rule of law, holding that the presence of the former made the observance of the latter possible. Consequently, if the State government had the power to set aside the exercise of judicial review by modifying or annulling the decision of an administrative tribunal, ‘it would sound the death knell of the rule of law’.⁵⁸

The importance of judicial power has also been at issue in cases relating to tribunals. In *Sampath Kumar*, the Supreme Court considered whether limitations could be placed upon the High Courts’ powers under Articles 226 and 227 of the Constitution.⁵⁹ In permitting the transfer of power from the High Courts to the tribunals, the Court made two important points. First, the Supreme Court’s powers as an appellate institution were unaffected: ‘judicial review by this Court is left wholly unaffected and thus there is a forum where matters of importance and grave injustice can be brought for determination or rectification’.⁶⁰ Secondly, and more importantly, the creation of tribunals was not so much an exclusion of judicial review as a transfer of that power from one institution to another. The key requirement, therefore, was that ‘the Tribunal should be a real substitute for the High Court—not only in form and *de jure* but in content and *de facto*’.⁶¹ A decade later, *Chandra Kumar* sought to reconcile a host of post-*Sampath Kumar* decisions and considered the operation of administrative tribunals.⁶² Upon surveying the relevant statutory framework, the Supreme Court noted that the tribunals under examination ‘were intended to perform a substitutional role as opposed to ... a supplemental role with regard to the High Courts’.⁶³ Departing from the *Sampath Kumar* approach—that the power of the High Court under Article 226 could be limited so long as an effective alternative institution existed—the Court observed that the Constitution contained provisions that not only outlined the power that the Supreme Court and High Courts could exercise, but also those dealing with the tenure, appointment, salaries, and so forth of judges. As these ‘constitutional safeguards which ensure the independence of the judges of the superior judiciary’ did not exist for subordinate judges or those in tribunals, tribunal members ‘can never be considered full and effective substitutes for the superior judiciary in discharging the function of constitutional interpretation’.⁶⁴ It is for this reason that the Court held that the power of the Supreme Court and High Courts to examine the constitutionality of legislation under Articles 32 and 226 could not be limited. Tribunals could only perform ‘a supplemental—as opposed to a substitutional—

role ...’⁶⁵

A second kind of democracy-based basic structure challenge to have emerged in Indian constitutionalism is linked to representation. While in the case of judicial power, the animating theme has been that Parliament cannot claim to be beyond supervision, challenges based upon representation have forced the Supreme Court to confront the precise terms of electoral politics. In *Kihoto Hollohan*, the topic of representation came up in the context of an anti-defection amendment to the Constitution.⁶⁶ The Court considered whether limitations could be placed upon the voting preferences of legislators, by tying them to the views of their political party through an anti-defection law. The Court concluded that rather than undermining the principles of democratic government, such a law in fact strengthened democracy by bringing stability to electoral politics. Built into the Court’s reasoning was the importance of political parties and a belief that they are the vehicle through which democratic politics is mediated. The stability of a political party, the Court noted, ‘depends on such shared beliefs and concerted action of its Members in furtherance of those commonly held principles’.⁶⁷ Consequently, the ‘freedom of its Members to vote as they please independently of the political party’s declared policies will not only embarrass its public image and popularity’.⁶⁸ It would also, as per the Court’s reasoning, ‘undermine public confidence’ in the party and thus impact ‘its very survival’.⁶⁹

In *RC Poudyal*, the question of representation arose in a different context.⁷⁰ Here, the Supreme Court considered the conditions under which new States could be created under Article 2 of the Constitution. Sikkim was being admitted into the Indian Union with a structure of legislative representation that granted special treatment to certain communities. Importantly, the extent of this treatment was disproportionate to their population; it was higher than proportionate preferential treatment would have been, inviting the charge that this violated the principle for special treatment enshrined in Article 332 of the Constitution and the ideal of one person, one vote. In upholding the impugned provision, the Court adopted a rather relaxed definition of political participation. It found that ‘the concept of “one person one vote” is in its very nature considerably tolerant of imbalances and departures from a very strict application and enforcement’ and that ‘proportionality of representation’ was ‘not intended to be expressed with arithmetical precision’.⁷¹ Remarkably enough, the Court observed that ‘[a]ccommodations and adjustments, having regard to the political maturity, awareness and degree of political development in different parts of India, might supply the justification for even non-elected Assemblies wholly or

in part, in certain parts of the country’.⁷²

Both *Kihoto Hollohan* and *RC Poudyal* suggest that the Supreme Court has been deferential towards Parliament in determining how the abstract ideal of self-government must find expression in practice. The Court’s approach towards separation-of-powers claims, and in particular those involving judicial power, has been more rigorous and searching. We see this in the Court’s recent decision to invalidate the Ninety-ninth Amendment to the Constitution.⁷³ This Amendment established a federal commission for the appointment of judges to the higher judiciary that would have replaced the previous collegium framework for appointments. The composition of the proposed commission was found to be faulty on several grounds, the most serious of which was that it took away judicial primacy in the appointments process. By doing so, the measure was found to infringe upon judicial independence and thereby violate the basic structure doctrine. One way to view this approach of the Court charitably—rather than cynically reducing it to a judicial attempt to preserve judicial power—is to see it as emanating from and preserving the principle that Parliament’s powers are never sovereign: they must always be subject to justification.

2. Rights-based Challenges

A second set of challenges involving the basic structure doctrine has focused upon rights—on the extent to which a constitutional amendment can infringe upon or restrict a right. These challenges have often arisen in the context of Articles 31A–C, savings clauses which permit Parliament to enact certain kinds of legislation which are immune from rights-based challenges. A major, early case in this context is *Minerva Mills*, which dealt with a nationalisation statute that had been inserted into the Ninth Schedule.⁷⁴ Here, two provisions of the Forty-second Amendment to the Constitution were under challenge. The first amended Article 31C, to immunise all laws in furtherance of the Directive Principles from Articles 14 and 19 challenges, while the second further clarified Parliament’s supreme power under Article 368 and excluded amendments from judicial review. The change to Article 368 was easily dismissed, for it was ‘the function of the judges, nay their duty, to pronounce upon the validity of laws’⁷⁵ and the ‘donee of a limited power cannot by the exercise of that power convert the limited power into an unlimited one’.⁷⁶ It was the amendment to Article 31C that dominated the Supreme Court’s attention.

Given *Kesavananda*, the Court noted that it was ‘only if the rights conferred by these two Articles are not a part of the basic structure of the Constitution that they can be allowed to be abrogated by a constitutional amendment’.⁷⁷ In striking down the provision, the Court held that the balance between Parts III and IV—between rights and directive principles—was central to the Constitution’s architecture. While [Part IV](#) provided the *ends* of government, [Part III](#) laid out the *means* through which those ends could be achieved. The Court went as far as to note that ‘the Indian Constitution is founded on the bedrock of the balance between Parts III and IV’.⁷⁸ In doing so, *Minerva Mills* made it clear that (a) the right to equality and the liberties guaranteed by Article 19 were part of the Constitution’s basic structure; and (b) to privilege the directive principles over rights or vice versa would mean to alter the identity of the Constitution.

One of the interesting arguments offered by the State in *Minerva Mills* was that Article 31C should be declared constitutional, as Article 31A had been previously so declared. The Court rejected this, holding that Article 31A applied to a specific set of laws, whereas Article 31C had no such limitations. While this difference is indeed accurate, and although Article 31A was not itself under challenge, it is worth asking whether the validity of Article 31A—given its

exclusion of Articles 14 and 19—could indeed have been sustained given the Court’s view of the equal relationship between Parts III and IV. This matter was to resurface in *Waman Rao*, where Articles 31A, 31B, and 31C (as unamended) were under challenge.⁷⁹ Here the Court emphasised that ‘every case in which the protection of a fundamental right is withdrawn will not necessarily result in damaging or destroying the basic structure of the Constitution’.⁸⁰ The matter would turn on ‘which particular Article of [Part III](#) is in issue and whether what is withdrawn is quintessential to the basic structure of the Constitution’.⁸¹

Surveying a range of parliamentary speeches and historical documents, the Court concluded that agrarian reform was a major constitutional ideal. As a result, ‘if Article 31-A were not enacted, some of the main purposes of the Constitution would have been delayed and eventually defeated ...’⁸² In fact, the Court observed, somewhat at odds with the very premise of the basic structure doctrine—which rests upon a conceptual distinction between amendments and the original text—that the impugned amendments ‘were made so closely on the heels of the Constitution that they ought indeed to be considered as a part and parcel of the Constitution itself’.⁸³ While it made broad statements on India’s constitutional philosophy, the Court said very little about how this conclusion might be harmonised with the [Part III–Part IV](#) balance of which *Minerva Mills* had so strongly spoken.

Article 31B had a different character to 31A.⁸⁴ In the case of Article 31A, any law passed within the framework of clauses (a) to (e) receives protection and cannot be challenged as violative of Articles 14 and 19. Article 31B, on the other hand, is more catholic. It does not outline any specific category of laws immune from challenge and provides protection against all [Part III](#) challenges. However, additions to the Ninth Schedule must take place through a constitutional amendment; the protection does not become operative through an ordinary legislative enactment, as in the case of Article 31A. Treating *Kesavananda Bharati* as setting the relevant timeline, the Court held that ‘insofar as the validity of Article 31-B read with the Ninth Schedule is concerned, we hold that all Acts and Regulations included in the Ninth Schedule prior to April 24, 1973, will receive the full protection of Article 31-B’.⁸⁵ However, all additions to the Ninth Schedule after this date would be ‘valid only if they do not damage or destroy the basic structure of the Constitution’.⁸⁶

The third savings clause under consideration in *Waman Rao* was Article 31C. This provision protected laws from Articles 14, 19, and 31 challenges if they furthered the goals outlined in Articles 39(b) and (c) of the Constitution.⁸⁷ The

Court held that:

[I]f we are right in upholding the validity of Article 31-A on its own merits, it must follow logically that the unamended Article 31-C is also valid. The unamended portion of Article 31-C is not like an uncharted sea. It gives protection to a defined and limited category of laws which are passed for giving effect to the policy of the State towards securing the principles specified in clause (b) or clause (c) of Article 39... Whatever we have said in respect of the defined category of laws envisaged by Article 31-A must hold good, perhaps with greater force, in respect of laws passed for the purpose of giving effect to clauses (b) and (c) of Article 39. It is impossible to conceive that any law passed for such a purpose can at all violate Article 14 or Article 19. Article 31 is now out of harm's way. In fact, far from damaging the basic structure of the Constitution, laws passed truly and bona fide for giving effect to directive principles contained in clauses (b) and (c) of Article 39 will fortify that structure.⁸⁸

As we can see, *Waman Rao* approached the relationship between the fundamental rights and directive principles in a different way to *Minerva Mills*. The former outlook was followed in *Sanjeev Coke*, where the Court went far enough to doubt the soundness and validity of the decision in *Minerva Mills*.⁸⁹ In the more recent case of *IR Coelho*, the Supreme Court considered the question of whether all laws inserted into Article 31B (read with the Ninth Schedule) were immune from judicial review, given the validity of this savings clause.⁹⁰ The Court chose not to revisit the constitutionality of Article 31B and treated the provision as valid. It held, however, that the validity of Article 31B did not automatically validate all legislation inserted into the Ninth Schedule. Any law inserted after the date of the decision in *Kesavananda Bharati* (24 April 1973) would be tested against the standard of the basic structure doctrine, as the insertion of this law into the Ninth Schedule would be a constitutional amendment. The Court carefully noted that while Articles 31A and 31C provide certain criteria as regards their exercise, Article 31B simply excludes laws from [Part III](#) challenges: 'insertion in the Ninth Schedule is not controlled by any defined criteria or standards by which the exercise of power may be evaluated. The consequence of insertion is that it nullifies entire [Part III](#) of the Constitution.'⁹¹ It also considered how the provision had been used: 'the unchecked and rampant exercise of this power, the number having gone from 13 to 284, shows that it is no longer a mere exception.'⁹² What this effectively meant was that Parliament had given itself powers under Article 31B that it did not have under Article 368:

If constituent power under Article 368, the other name for amending power, cannot be made unlimited, it follows that Article 31-B cannot be so used as to confer unlimited power. Article 31-B cannot go beyond the limited amending power contained in Article 368. The power to amend Ninth Schedule flows from Article 368. This power of amendment has to be compatible with the limits on the power of amendment. This limit came with *Kesavananda Bharati*. Therefore Article 31-B after

24-4-1973 despite its wide language cannot confer unlimited or unregulated immunity.⁹³

While *IR Coelho* has thus shifted the ground to a certain extent and the Ninth Schedule is no longer a kind of black hole, the Supreme Court's general approach to rights has been to treat them as instrumental in character, as means towards some larger social goal. Even when we move beyond savings clauses and see specific challenges, such as the equality-based challenges to amendments to Articles 15 and 16, we find that the Court's attention is less on technical infractions of the concerned right and more on whether the impugned measure can be defended on the basis of some broader social purpose. The basic structure of the Constitution has been understood less in terms of rights—as necessary means towards certain goals, which can legitimate the exercise of higher lawmaking—and more in terms of those goals themselves.

IV. CONCLUSION

The basic structure doctrine aims to put forth an interpretive approach that is distinct from the ones that we typically associate with the task of constitutional interpretation; it is an approach that asks what values and principles must exist for constitutionalism itself to exist. Constitutions cannot provide for their own validity. Just as constitutionalism itself must rest on presuppositions that are not internal to a constitutional document, the process of a constitutional amendment too can be understood as operating at a level antecedent to the formal prescribed criterion.⁹⁴ The basic structure doctrine emerged, as Upendra Baxi once argued, from the fear that 'if you do not apply brakes, the engine of amending power would soon overrun the Constitution'.⁹⁵ Debates on the doctrine, whether involving democracy-based challenges or rights-based ones, have sought to grasp which kinds of breaks are required to maintain the ground below constitutionalism's feet.

Although this chapter has focused upon constitutional amendments, such cases do not exhaust the use of the doctrine. At times, the doctrine has been used as an interpretive aid towards understanding the meaning of specific constitutional provisions. Prominent examples include *SR Bommai* and *Supreme Court Advocates-on-Record Association*.⁹⁶ A different set of basic structure cases not involving constitutional amendments are those relating to statutes and executive action. An important area of contention has been whether the doctrine should apply to such state action. This question was attempted to be settled in

Kuldip Nayar, which held that the basic structure doctrine would be limited to constitutional amendments.⁹⁷ On the one hand, this reasoning seems unpersuasive, for it suggests that a lower law would be allowed to achieve what a higher law cannot. On the other hand, any call for expanding the application of the basic structure doctrine must explain why lower law violations cannot be addressed through standard constitutional and administrative law doctrines.⁹⁸ In other words, they would need to explain what purpose basic structure review would serve in such instances. There can be a political answer to this question: it would show how egregious a statutory violation might be. The violation would be so serious that the measure does not simply violate a provision of the Constitution, but rather the Basic Structure of the document. Cases like *R Gandhi*, where the Court reviewed the constitutionality of a statute on standard grounds like legislative competence, but also referenced the basic structure doctrine, might be gesturing towards such an outlook.⁹⁹ In legal terms, however, the precise doctrinal role that the basic structure doctrine would play if it were applied to statutes, in comparison with what is already achieved by ordinary judicial review, is not entirely clear.¹⁰⁰

The success of the basic structure doctrine turns on the judiciary's capacity to claim that it can protect the conditions for the expression of sovereignty more responsibly than Parliament. This task is easier within India's constitutional framework than in some others, for it is easier to make competing representative claims in situations where amendments are not enacted by the people themselves (unlike, say, in cases where the people may amend a constitution directly through a referendum or plebiscite). But the formal rules of the amendment power can only help so much. Ultimately, whether the basic structure doctrine remains an integral and vibrant feature of Indian constitutionalism will depend neither on the technical distinction between sovereignty and government nor the rules for amending the Constitution, but quite simply on how persuasively the doctrine is applied. The authority of courts will turn on how the use of their power is received. 'Here', as HLA Hart once observed in a different but not entirely unrelated context, 'all that succeeds is success.'¹⁰¹

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¹ For a helpful overview of constitutional amendment rules, see Rosalind Dixon, 'Constitutional Amendment Rules: A Comparative Perspective' in Tom Ginsburg and Rosalind Dixon (eds) *Comparative Constitutional Law* (Edward Elgar 2011) 96.

² These changes are not, strictly speaking, regarded as amendments.

³ See Rukmini S, 'How has the Indian Constitution Evolved Over the Years?' (*The Hindu*, 30 May 2015) <<http://www.thehindu.com/data/how-the-constitution-has-evolved-over-the-years/article7263635.ece>>, accessed October 2015.

⁴ See Melissa Schwartzberg, *Democracy and Legal Change* (Cambridge University Press 2007).

⁵ For a historical account of the sovereignty–government distinction, see Richard Tuck, *The Sleeping Sovereign: The Invention of Modern Democracy* (Cambridge University Press 2015).

⁶ Adam Smith, *Lectures on Jurisprudence* (first published 1766, RL Meek and others eds, Liberty Fund 1982) 433.

⁷ This discussion assumes situations in which constitutional unamendability goes with the judicial review of amendments. But these two issues are, of course, theoretically distinct. A constitution can have unamendable provisions without any institutional body that can strike down the amendment of such provisions as unconstitutional. An example might be something like judicial review in the United Kingdom under the Human Rights Act 1998, though this of course raises its own philosophical and practical concerns.

⁸ See Bryan Garsten, 'Representative Government and Popular Sovereignty' in Ian Shapiro and others (eds) *Political Representation* (Cambridge University Press 2010) 90.

⁹ See Pratap Bhanu Mehta, 'The Inner Conflict of Constitutionalism: Judicial Review and the Basic Structure' in Zoya Hasan, E Sridharan, and R Sudarshan (eds) *India's Living Constitution: Ideas, Practices, Controversies* (Permanent Black 2002) 179.

¹⁰ See Michael C Rea, 'The Problem of Material Constitution' (1995) 104 *Philosophical Review* 4.

¹¹ See Peter Suber, *The Paradox of Self-Amendment: A Study of Logic, Law, Omnipotence, and Change* (Peter Lang 1990).

¹² See Gary Jeffrey Jacobsohn, *Constitutional Identity* (Harvard University Press 2010) 34–83; Aharon Barak, 'Unconstitutional Constitutional Amendments' (2011) 44 *Israel Law Review* 321; Gábor Halmai, 'Unconstitutional Constitutional Amendments: Constitutional Courts as Guardians of the Constitution?' (2012) 19 *Constellations* 182; Yaniv Roznai and Serkan Yolcu, 'An Unconstitutional Constitutional Amendment—The Turkish Perspective: A Comment on the Turkish Constitutional Court's Headscarf Decision' (2012) 10 *International Journal of Constitutional Law* 175; Yaniv Roznai, 'Unconstitutional Constitutional Amendments—The Migration and Success of a Constitutional Idea' (2013) 61 *American Journal of Comparative Law* 657; Carlos Bernal, 'Unconstitutional Constitutional Amendments in the Case Study of Colombia: An Analysis of the Justification and Meaning of the Constitutional Replacement Doctrine' (2013) 11 *International Journal of Constitutional Law* 339.

¹³ In South Asia, India's basic structure doctrine has had direct influence. See Osama Siddique, 'Across the Border' (2010) 615 *Seminar* 52; Ridwanul Hoque, 'Constitutionalism and the Judiciary in Bangladesh' in Sunil Khilnani, Vikram Raghavan, and Arun K. Thiruvengadam (eds) *Comparative Constitutionalism in South Asia* (Oxford University Press 2013) 302, 313–18; Mark Tushnet and Madhav Khosla (eds), *Unstable Constitutionalism: Law and Politics in South Asia* (Cambridge University Press 2015). A recent landmark decision of the Supreme Court of Pakistan has confirmed the Court's powers to review constitutional amendments: *District Bar Association, Rawalpindi v Federation of Pakistan* Constitution Petition No 12 of 2010 and others (5 August 2015).

¹⁴ For an excellent overview of the founding debates on the amendment procedure, see Granville Austin, *The Indian Constitution: Cornerstone of a Nation* (Oxford University Press 1966) 317–29.

¹⁵ This naturally raises the question—one that I can only pose, rather than answer, on this occasion—of whether the sovereignty–government distinction even applies to India. On the institutional requirements for the sovereign–government distinction to exist, see Tuck ([n 5](#)).

¹⁶ *Shankari Prasad Singh Deo v Union of India* AIR 1951 SC 458.

¹⁷ *Sajjan Singh v State of Rajasthan* AIR 1965 SC 845.

¹⁸ *Sajjan Singh* ([n 17](#)) [23].

¹⁹ *Sajjan Singh* ([n 17](#)) [27].

²⁰ *Sajjan Singh* ([n 17](#)) [30].

²¹ *Sajjan Singh* ([n 17](#)) [29].

²² *Sajjan Singh* ([n 17](#)) [46].

²³ *Sajjan Singh* ([n 17](#)) [44].

²⁴ *Sajjan Singh* ([n 17](#)) [54].

²⁵ *Fazlul Quader Chowdhry v Mohd Abdul Haque* 1963 PLD 486.

²⁶ *Sajjan Singh* ([n 17](#)) [55]–[56].

²⁷ *Golak Nath v State of Punjab* AIR 1967 SC 1643. For an important philosophical reflection upon limitations on the amendment power, see Dieter Conrad, ‘Limitation of Amendment Procedures and the Constituent Power’ (1970) 15–16 *Indian Yearbook of International Affairs* 375. Conrad’s contribution, prompted by the decision in *Golak Nath*, was subsequently cited and relied upon by the Supreme Court in *Kesavananda Bharati*.

²⁸ *Golak Nath* ([n 27](#)) [53].

²⁹ *Golak Nath* ([n 27](#)) [53].

³⁰ *Golak Nath* ([n 27](#)) [55].

³¹ *Golak Nath* ([n 27](#)) [38].

³² *Golak Nath* ([n 27](#)) [19].

³³ *Golak Nath* ([n 27](#)) [18].

³⁴ *Golak Nath* ([n 27](#)) [23].

³⁵ For these and other criticisms, see PK Tripathi, *Some Insights into Fundamental Rights* (University of Bombay 1972) 1–44.

³⁶ *Kesavananda Bharati v State of Kerala* (1973) 4 SCC 225.

³⁷ See PK Tripathi, ‘*Kesavananda Bharati v State of Kerala*: Who Wins?’ (1974) 1 SCC Journal 3. See also Upendra Baxi, ‘The Constitutional Quicksands of *Kesavananda Bharati* and the Twenty-Fifth Amendment’ (1974) 1 SCC Journal 45.

³⁸ See Rajeev Dhavan, *The Supreme Court of India and Parliamentary Sovereignty: A Critique of its Approach to the Recent Constitutional Crisis* (Sterling Publishers 1976).

³⁹ See Granville Austin, *Working a Democratic Constitution: A History of the Indian Experience* (Oxford University Press 1999) 258–77. See also TR Andhyarujina, *The Kesavananda Bharati Case: The Untold Story of Struggle for Supremacy by Supreme Court and Parliament* (Universal Law Publishing 2011); Soli J Sorabjee and Arvind P Datar, *Nani Palkhivala: Courtroom Genius* (LexisNexis Butterworths Wadhwa 2012) 103–42.

⁴⁰ *Kesavananda Bharati* ([n 36](#)) [1433].

⁴¹ *Kesavananda Bharati* ([n 36](#)) [1426].

⁴² *Kesavananda Bharati* ([n 36](#)) [292] (SM Sikri CJ), [582] (JM Shelat and AN Grover JJ), [632] (KS Hegde and AK Mukherjea JJ), [1426] (HR Khanna J).

⁴³ *Kesavananda Bharati* ([n 36](#)) [1434].

⁴⁶ *Indira Nehru Gandhi* ([n 44](#)) [283].

⁵⁷ *P Sambamurthy* ([n 55](#)) [4].

⁴⁴ (1975) Supp SCC 1. See also HM Seervai, *Constitutional Law of India*, vol 3 (4th edn, Universal Book Traders 2002) 3114–70.

- ⁴⁵ *Indira Nehru Gandhi* ([n 44](#)) [62].
- ⁴⁷ *Indira Nehru Gandhi* ([n 44](#)) [308].
- ⁴⁸ *Indira Nehru Gandhi* ([n 44](#)) [308].
- ⁴⁹ *Indira Nehru Gandhi* ([n 44](#)) [202].
- ⁵⁰ *Charan Lal Sahu v Neelam Sanjeeva Reddy* (1978) 2 SCC 500.
- ⁵¹ Constitution of India 1950, art 71(3).
- ⁵² *Charan Lal Sahu* ([n 50](#)) [11].
- ⁵³ *Charan Lal Sahu* ([n 50](#)) [11].
- ⁵⁴ See Sujit Choudhry, 'How to Do Constitutional Law and Politics in South Asia' in Mark Tushnet and Madhav Khosla (eds) *Unstable Constitutionalism: Law and Politics in South Asia* (Cambridge University Press 2015) 18, 25–29.
- ⁵⁵ (1987) 1 SCC 362.
- ⁵⁶ *P Sambamurthy* ([n 55](#)) [3].
- ⁵⁸ *P Sambamurthy* ([n 55](#)) [4].
- ⁵⁹ *SP Sampath Kumar v Union of India* (1987) 1 SCC 124.
- ⁶⁰ *SP Sampath Kumar* ([n 59](#)) [16].
- ⁶¹ *SP Sampath Kumar* ([n 59](#)) [17].
- ⁶² *L Chandra Kumar v Union of India* (1997) 3 SCC 261.
- ⁶³ *L Chandra Kumar* ([n 62](#)) [20].
- ⁶⁴ *L Chandra Kumar* ([n 62](#)) [78].
- ⁶⁵ *L Chandra Kumar* ([n 62](#)) [80]. For a recent re-examination of this question, see *Madras Bar Association v Union of India* (2014) 10 SCC 1.
- ⁶⁶ *Kihoto Hollohan v Zachillu* (1992) Supp (2) SCC 651. See also SP Sathe, 'Conflict between Parliament and Judiciary: The Basic Structure Doctrine' in Sathya Narayan (ed), *Selected Works of SP Sathe*, vol 1 (Oxford University Press 2015) 406, 409–10. It is to be noted that the Court found one portion of the Amendment—paragraph 7 of the Tenth Schedule—to be unconstitutional on the procedural ground that it had not been ratified by half of the State legislatures. In declaring this but upholding the remaining provisions introduced by the Amendment, the Court held that the principle of severability would apply to constitutional amendments.
- ⁶⁷ *Kihoto Hollohan* ([n 66](#)) [44].
- ⁶⁸ *Kihoto Hollohan* ([n 66](#)) [44].
- ⁶⁹ *Kihoto Hollohan* ([n 66](#)) [44].
- ⁷⁰ *RC Poudyal v Union of India* (1994) Supp (1) SCC 324.
- ⁷¹ *RC Poudyal* ([n 70](#)) [126].
- ⁷² *RC Poudyal* ([n 70](#)) [126].
- ⁷³ *Supreme Court Advocates-on-Record Association v Union of India* 2015 SCC OnLine SC 964. See Madhav Khosla, 'Pick and Choose: Judicial Appointments in India' (ConstitutionNet, 30 October 2015) <http://www.constitutionnet.org/news/pick-and-choose-judicial-appointments-india?utm_content=buffer9a31d&utm_medium=social&utm_source=twitter.com&utm_campaign=buffer>, accessed November 2015; BN Srikrishna, 'Judicial Independence' (chapter 20, this volume).
- ⁸⁸ *Waman Rao* ([n 79](#)) [54].
- ⁹³ *IR Coelho* ([n 90](#)) [126]. An important question that arises is how a rights-based violation is to be

discerned. In *IR Coelho*, the Court placed emphasis upon the impact upon the concerned right in [Part III](#), whereas in *M Nagaraj* and other earlier cases, there was a clearer attempt to link specific provisions to overarching principles. See *M Nagaraj v Union of India* (2006) 8 SCC 212.

⁷⁴ *Minerva Mills v Union of India* (1980) 3 SCC 625.

⁷⁵ *Minerva Mills* ([n 74](#)) [21].

⁷⁶ *Minerva Mills* ([n 74](#)) [17].

⁷⁷ *Minerva Mills* ([n 74](#)) [41].

⁷⁸ *Minerva Mills* ([n 74](#)) [56].

⁷⁹ *Waman Rao v Union of India* (1981) 2 SCC 362.

⁸⁰ *Waman Rao* ([n 79](#)) [14].

⁸¹ *Waman Rao* ([n 79](#)) [14].

⁸² *Waman Rao* ([n 79](#)) [24].

⁸³ *Waman Rao* ([n 79](#)) [25].

⁸⁴ Both provisions were inserted by the First Amendment to the Constitution in 1951.

⁸⁵ *Waman Rao* ([n 79](#)) [51].

⁸⁶ *Waman Rao* ([n 79](#)) [51]. The Court issued the clarification that the review of laws placed in the Ninth Schedule ‘will become otiose ...’ if those laws ‘fall within the scope and purview of Article 31-A or the unamended Article 31-C. If those laws are saved by these Articles, it would be unnecessary to determine whether they also receive the protection of Article 31-B read with the Ninth Schedule’: *Waman Rao* ([n 79](#)) [55].

⁸⁷ Part of this provision, which related to certain declarations being conclusive, was struck down in *Kesavananda Bharati*.

⁸⁹ *Sanjeev Coke v Bharat Coking Coal* (1983) 1 SCC 147.

⁹⁰ *IR Coelho v State of Tamil Nadu* (2007) 2 SCC 1.

⁹¹ *IR Coelho* ([n 90](#)) [98].

⁹² *IR Coelho* ([n 90](#)) [103].

⁹⁴ Frederick Schauer, ‘Amending the Presuppositions of a Constitution’ in Sanford Levinson (ed) *Responding to Imperfection: The Theory and Practice of Constitutional Amendment* (University Press 1995) 145.

⁹⁵ Upendra Baxi, *Courage, Craft, and Contention: The Indian Supreme Court in the Eighties* (NM Tripathi 1985) 68.

⁹⁶ *SR Bommai v Union of India*, (1994) 3 SCC 1; *Supreme Court Advocates-on-Record Association v Union of India* (1993) 4 SCC 441. In *SR Bommai*, secularism was held to be part of the basic structure of the Constitution, any violation of which would be a valid ground for the imposition of a regional emergency under art 356. In *Supreme Court Advocates-on-Record Association*, judicial independence was regarded as part of the basic structure, and the judicial appointments process was thereby interpreted as granting primacy to judges.

⁹⁷ *Kuldip Nayar v Union of India* (2006) 7 SCC 1.

⁹⁸ Raju Ramachandran, ‘The Supreme Court and the Basic Structure Doctrine’ in BN Kirpal and others (eds), *Supreme but not Infallible: Essays in Honour of the Supreme Court of India* (Oxford University Press 2000) 107, 123. For a contrasting view, see Sudhir Krishnaswamy, *Democracy and Constitutionalism in India: A Study of the Basic Structure Doctrine* (Oxford University Press 2009).

⁹⁹ *Union of India v R Gandhi* (2010) 11 SCC 1. See also *Madras Bar Association* ([n 65](#)).

¹⁰⁰ See Madhav Khosla, *The Indian Constitution* (Oxford University Press 2012) 154–55. Beg CJ, who

famously sought to subject statutes to the Basic Structure doctrine, does appear to have noticed some of the difficulties involved in such a task, in *State of Karnataka v Union of India* (1977) 4 SCC 608 [125]:

No doubt, as a set of inferences from a document (ie the Constitution), the doctrine of ‘the basic structure’ arose out of and relates to the Constitution only and does not, in that sense, appertain to the sphere of ordinary statutes or arise for application to them in the same way. But, if, as a result of the doctrine, certain imperatives are inherent in or logically and necessarily flow from the Constitution’s ‘basic structure’, just as though they are its express mandates, they can be and have to be used to test the validity of ordinary laws just as other parts of the Constitution are so used.

In the Supreme Court’s recent decision invalidating the Ninety-ninth Amendment, Khehar J seems to have offered a simple and persuasive response to this matter by stating that because the Basic Structure must be drawn from the provisions of the Constitution, a Basic Structure challenge to a statute is effectively a challenge based upon a collection of Articles in the constitutional text which the statute violates. One could just as well challenge the statute on any one of those Articles. Thus, a challenge to a statute based on the Basic Structure doctrine would be valid because this would simply mean a challenge based on a set of Articles, and a challenge based on those Articles is of course valid. See *Supreme Court Advocates-on-Record Association* (n 73) [348–49]. Khehar J’s view on this narrow point, however, is not part of the ratio of the case. Of the other three judges who form part of the majority opinion, Lokur J offered a contrary view, while Goel and Joseph JJ refrained from addressing the question as it was unnecessary given that the amendment that created the statute was itself held unconstitutional. Chelameshwar J, who authored the dissenting opinion, also chose not to consider the constitutionality of the statute.

¹⁰¹ HLA Hart, *The Concept of Law* (2nd edn, Oxford University Press 1994) 153.

PART IV

SEPARATION OF POWERS

CHAPTER 15

SEPARATION OF POWERS

JUSTICE (RETD) RUMA PAL

I. INTRODUCTION

LATELY the issue of separation of powers has become increasingly the subject matter of debate—whether it is the Government’s move to protect convicted Members of Parliament, or in the matter of appointment of Supreme Court judges, or indeed a difference of opinion within the judiciary itself.¹ Much of the turf war stems from a confusion as to the meaning of ‘power’ and, as Seervai put it, to the ‘mistaken belief that power is property’. Power in fact ‘is a means to an end, and it must be conferred on that authority which can best achieve that end’.² In other words, the separation is of functions and the classical theory of separation of powers is nothing more than a ‘doctrine of functional specialization’.³ But no one who values political freedom can dispute Montesquieu’s idea that monopoly of powers, however defined, by any one of the different organs created and functioning under a Constitution, written or unwritten, leads to tyranny,⁴ and that separation of powers of governance in some form is necessary with each of the separate authorities acting as a check and balance on the exercise of power of the others. The questions that then arise are: (a) whether the separation of powers is a principle in Indian constitutional law; and (b) if so, what sort of doctrine of separation of powers the Indian Constitution embraces.

Generally speaking the areas of governance have been classified into the executive or the administrative branch (including the enforcement of laws); the legislative or the enactment of laws; and the judicial or the resolution of disputes relating to the enactment, enforcement, and application of laws. Of the two models of separation commonly followed, one provides for a rigid separation of powers between these three authorities following Montesquieu’s dictum. An example of this is the American Constitution under which:

Separate departments ... [are] created for the exercise of legislative, executive and judicial power, and care taken to keep the three as separate and distinct as possible, except so far as each is made a check upon the other to keep it within proper bounds, or to prevent hasty and improvident action. The executive is a check upon the legislature in the veto power ... the legislature is a check upon both the

other departments through its power to prescribe rules for the exercise of their authority, and through its power to impeach their officers; and the judiciary is a check upon the legislature by means of its authority to annul unconstitutional laws.⁵

The second model is of a looser separation or the Westminster model, which is based on the principle of the supremacy of Parliament. This model, though unwritten, was followed by England prior to its joining the European Union, allowing Parliament 'to change the law in any way it pleases. No statute can be attacked on the ground that it trespasses on a field reserved to another organ of the State.'⁶ The power of judicial review of legislative action was consequently limited to questioning delegated legislation to the extent that the delegation is excessive, beyond the scope of the statute seeking to delegate the power of legislation to the executive, or unreasonable.⁷ A distinction was made between the legislative and executive wings '[b]ut behind this façade lay the "efficient secret" of the English Constitution',⁸ the close association of these two wings. The earlier concept of parliamentary sovereignty and the scope of judicial review of legislative action have undergone changes subsequent to the acceptance by Britain of the European Communities Act 1972. Now 'under the terms of the 1972 Act it has always been clear that it [is] the duty of a United Kingdom Court, when delivering final judgment, to override any rule of national law found to be in conflict with any directly enforceable rule of Community law'.⁹ Executive and legislative powers, however, continue to be interlinked, and the British cabinet is a 'hyphen which joins, a buckle which fastens, the legislative part of the State to the executive part'.¹⁰

The Indian Constitution provides a third model of separation of powers. While there is recognition of legislative, executive, and judicial bodies, it does not expressly vest the different kinds of power in the different organs of the State¹¹ (except the executive powers in the President and governors),¹² nor is there any exclusivity in the nature of functions to be performed by them. Unlike Westminster, Parliament in India being limited by a written constitution is not supreme and it does not possess the sovereign character of the British Parliament.¹³ In India the Constitution is supreme and legislation contrary to constitutional provisions is void. Despite the Supreme Court's observations to the contrary,¹⁴ separation of powers under the Constitution between the three organs of the State is not equal and the executive has been given dominant powers. The constitutional allocation of powers must be seen in the background of the Constituent Assembly debates where the discussion on separation of powers was limited to separation of the executive from the judiciary because, in

a parliamentary democracy as sought to be set up by the framers of the constitution, those who form the majority in the legislative bodies necessarily govern the country. As Acharya Kripalani stated during the early years of the Lok Sabha:

Let there be no camouflage. Legislature practically means the executive. It is absurd to say that the Legislature is a free body of persons. Today the Executive is the legislature but the legislature may not be the Executive. The executive is the legislature in a party system democracy. In a centralized democracy there is no difference.¹⁵

Like the Westminster model, there is no real ‘separation’ as such between the executive and legislative authorities under our Constitution. But it has gone further in providing for a functional overlap between the legislative, executive, and judicial wings of government,¹⁶ so that there is in fact no strict separation of powers with each of these organs empowered to carry out functions which would generally be considered within the purview of the other. For example, since the Constitution provides wide powers of judicial review of administrative, legislative, and judicial action, the judiciary is often called upon to discharge what may be termed as quasi-legislative or executive actions. Again, executive functions have been distributed to authorities that are required to function independently of all three organs of governance such as the Election Commission and the Comptroller and Auditor General,¹⁷ and legislative functions have been granted to independent statutory bodies. The present chapter is limited to expounding this lack of separation and the functional overlap in the Indian constitutional context. The issue of separation of powers has received a somewhat erratic interpretation by courts in India.¹⁸ This chapter therefore begins with the constitutional provisions showing the functional overlap before considering the judicial approach.

II. THE LEGISLATURE

As stated earlier, unlike England, the Indian Constitution, by virtue of being written, has firmly rejected the theory of parliamentary sovereignty. However, subject to abiding by constitutional limitations enforced through judicial review, the powers of Parliament and State legislatures to enact laws are plenary. Parliament has the right to legislate on the constitution, organisation, jurisdiction, and powers of the Supreme Court and High Courts.¹⁹ State legislatures have a similar power with regard to the District and Subordinate

Judiciary,²⁰ as well as the power to determine the jurisdiction of all courts within its territory.²¹ Parliament can also determine the number of judges to be appointed in the Supreme Court,²² and has the power to remove judges of the Supreme and High Courts by impeachment.²³ Terms and conditions of service, including salaries of judges, are also subject to legislative control.²⁴

1. Judicial Powers

Legislatures exercise judicial powers under the Constitution. Examples include the case of impeachment of judges²⁵ and contempt of legislatures.²⁶ Further, the Speakers/Chairmen, while exercising powers and discharging functions under the Tenth Schedule to the Constitution, act as a tribunal.²⁷ Legislatures can also change the basis on which a decision is given by a court and thus in effect nullify the impact of a judicial decision. Such retrospective validation of a law declared by a court to be invalid is usually resorted to after a tax is declared as illegally collected under an ineffective or an invalid law.²⁸ However, the cause for ineffectiveness or invalidity must be removed before validation can be said to take place effectively:

The most important condition, of course, is that the Legislature must possess the power to impose the tax, for, if it does not, the action must ever remain ineffective and illegal. Granted legislative competence, it is not sufficient to declare merely that the decision of the court shall not bind for that is tantamount to reversing the decision in exercise of judicial power which the legislature does not possess or exercise.²⁹

Also, no legislature can set aside an individual decision *inter partes* and affect their rights and liabilities alone. 'Such an act on the part of the legislature' has been held by the Supreme Court to amount to 'exercising the judicial power by the State and to function as an appellate court or tribunal, which is against the concept of separation of power'.³⁰

2. Legislative Control of the Judiciary

To counter early successful legal challenges to land reform measure and to limit the power of judicial review, the Constitution was amended by the Constitution (First Amendment) Act 1951. Article 31B, which was added to the Constitution, along with the Ninth Schedule, provides that none of the Acts and Regulations specified in the Ninth Schedule can be challenged on the grounds that they are inconsistent with or abridge the rights conferred by [Part III](#), notwithstanding any judgment or decree of any court or tribunal to the contrary. This allows statutes in violation of fundamental rights and held to be void by a court to continue in force by the simple expedient of being included in the Ninth Schedule by way of a constitutional amendment.^{[31](#)}

Another important example of the legislature holding powers traditionally reserved for the judiciary came by way of the Forty-second Amendment, enacted in 1976. The Amendment introduced Articles 323A and 323B, which authorise Parliament and the State legislatures, respectively, to create tribunals to which the power of adjudication of disputes on various subjects can be transferred while excluding the jurisdiction of the courts in respect of those subjects. Both Articles also made it possible to totally exclude the powers of judicial review under Articles 32 and 226 and vest such powers in tribunals legislatively. Finally, the power of impeachment of judges is reserved to Parliament, although it ultimately depends on parliamentary majorities to determine the outcome of the procedure.^{[32](#)}

III. THE EXECUTIVE

Theoretically, under a strict separation of powers the executive should only carry out administrative functions including the implementation of laws and maintenance of law and order. However, the ‘functional overlap’ prevailing under the Indian Constitution allows the executive to perform, in addition to administration, key legislative and judicial functions.

1. Legislative Powers

While Article 245 empowers Parliament and State legislatures to make laws for the whole of the territory of India and of a State, respectively, the executive has the primary responsibility for the formulation of governmental policy and its transmission into law. Bills originate with the executive and with a majority in Parliament or the State legislatures, it follows that the executive predominates in the legislative process.³³ Additionally, Article 245 does not provide or prohibit legislation by the executive. In fact, the powers of the executive at the Centre on matters in respect of which Parliament has the power to make laws are, under Article 73, coextensive with Parliament. The power is exercised in the name of the President, who is to act on the advice of his ministers. A similar power is given under Article 162 to the Governor, coextensive with the State legislature. Executive orders under either of these Articles have an equal efficacy as an Act of the Parliament or State legislature, as the case may be.³⁴ Executive legislation consequently covers a broad spectrum and is extensively used. The executive exercises such power when there is no legislation covering the field or as a delegate of the legislative bodies.³⁵

As far as delegated legislation is concerned, there are mainly two checks in this country on the power of the legislature to delegate. There can be no delegation which amounts to ‘abdication and self-effacement’ by the concerned legislative body.³⁶ Judicial determination of the line beyond which the legislative power cannot be delegated has wavered, but rarely have the courts struck down an executive order on the ground that there exists excessive delegation.³⁷ In order to make the power valid, courts have generally construed the power, where possible, in such manner that it does not suffer from the vice of delegation of excessive legislative authority.³⁸ The position has been further complicated by the judicially evolved doctrine of ‘conditional legislation’. Thus, the decision of the executive for extension of laws to areas not covered by a law ‘with such restrictions and modifications as it thinks fit’ by notification in the Official Gazette has been termed to be conditional legislation and not delegated legislation and held to be valid.³⁹ Other instances of the exercise of delegated legislative power by the executive include the imposition of tax,⁴⁰ extending the coverage of statutes,⁴¹ fixing the maximum price for drugs,⁴² deciding when a statute, including a constitutional amendment, will become enforceable,⁴³ banning the import or export of essential commodities—for example, control

orders made under the Essential Supplies (Temporary Powers) Act 1946 regulating sale of iron and steel⁴⁴—or the export and movement of rice and of rice and paddy products,⁴⁵ to name a few. As the Supreme Court once noted, ‘with the proliferation of delegated legislation, there is a tendency for the line between legislation and administration to vanish into an illusion’.⁴⁶

The Constitution also expressly recognises the legislative powers of the executive in Chapter III of Part V the heading of which is ‘Legislative Powers of the President’. Clause (2) of Article 123 in that chapter provides that an ordinance promulgated under Article 123 ‘shall have the same force and effect as an Act of Parliament’. Similarly Chapter IV’s heading refers to ‘The Legislative Powers of the Governor’ and Article 213 has granted power to the Governor to promulgate ordinances when the Legislative Assembly is not in session. There is no limit on the subjects on which such ordinances may not be issued, nor is the prior approval of the concerned legislature required.⁴⁷ Governance by ordinance has been often resorted to by the executive as a means of bypassing the normal process of legislation.⁴⁸ The executive, through the President, also determines whether a State law will prevail in case of inconsistency between laws made by Parliament and laws made by the legislature of a State.⁴⁹

But perhaps the most egregious form of legislative power granted under the Constitution to the executive are those listed under emergency provisions. This is the subject of a separate chapter in this Handbook, and I will restrict myself for the present purposes to what is commonly termed as President’s Rule declared under Article 356. Article 356 provides that when the President on receipt of a report from the Governor of the State or otherwise is satisfied that the government of that State cannot be carried on in accordance with the provisions of the Constitution, she may by Proclamation not only dissolve the State Assembly by assuming all the functions of the government of that State, but may also declare that the powers of the legislature of the State shall be exercisable by or under the authority of Parliament.⁵⁰ When a declaration is made to this effect by the President, it shall be competent for Parliament to direct that the legislative power of the State legislature shall be exercised by the President himself or by any other authority to whom such power may be delegated by the President under Article 357(1).⁵¹ Laws so made by Parliament or the President continue even after the Proclamation under Article 356 has ceased to operate until it is altered, repealed, or amended by a competent legislature or authority.⁵² In making the report to the President the Governor acts

according to his discretion.⁵³

Given the wide powers of the executive, a leading commentator has remarked that parliamentary supremacy, in the context of the practical working of the parliamentary system, is:

[O]nly a 'myth' or 'fiction' which 'actually boils down to supremacy of the executive government of the day' and '[w]hen a government shouts from the housetop to uphold 'sovereignty of Parliament', what, in effect, it is seeking is to have complete, uncontrolled, freedom of action itself to do what it likes as it knows the majority in Parliament would always support it.⁵⁴

2. Judicial Powers

The executive exercises judicial powers under several provisions. For instance, it has the ability (in the name of the President) to decide whether a Member of a House of Parliament has become disqualified to continue as such.^{[55](#)} It has the right to advise the President/Governor, advice he is bound to accept, to grant pardon to or modify the punishment of a convicted person.^{[56](#)} Article 311 allows the executive to hold an inquiry into charges against any person holding a civil post under the Union or the State and to award punishment. Besides, several statutes—for example, laws dealing with licensing, levy of taxes, or imposition of duties—give the administrative authority the power to decide rights affecting a claimant or competing claims.^{[57](#)} The executive also staffs administrative tribunals set up under Article 323A as well as other tribunals set up under Article 323B to discharge functions earlier carried on by courts.^{[58](#)}

3. Executive Control of the Judiciary

Under the Constitution, it is ostensibly left to the President to decide the number of judges to be appointed to the High Courts,^{[59](#)} as well as to decide finally on who is to be appointed as a judge, whether of the Supreme Court or the High Courts.^{[60](#)} Regulations also empower the executive to control the appointment and service conditions of the District Judiciary.^{[61](#)} Further, the executive has the power to prosecute judges for offences under the Prevention of Corruption Act 1947.^{[62](#)}

IV. THE JUDICIARY

1. Judicial Power and Independence

As a check on the seemingly unbridled power of the other two organs, the Supreme Court and the High Courts have been given wide powers of judicial review by the Constitution to test whether legislative or executive action is contrary to the provisions of the Constitution.⁶³ [Part III](#) of the Constitution, which contains the fundamental rights, also contains a prohibition on all authorities within the territory of India from making any law which takes away or abridges rights conferred by [Part III](#). Any law in contravention of this is void to the extent of such contravention.⁶⁴ The right to move the Supreme Court to enforce all rights in [Part III](#) is contained in [Part III](#) and is itself also a fundamental right. Another constitutional limitation of the power of legislation arises out of the delineation of legislative powers between Parliament and the State legislatures.⁶⁵ As the Supreme Court once observed, ‘In this regard, the courts in India possess a power not known to the English Courts ... The range of judicial review recognized in the superior judiciary of India is perhaps the widest and the most extensive known to the world of law.’⁶⁶

However, the position of the judiciary was, until 1993, seen as being subject to extensive legislative and executive control and as constitutionally weak. It is also clear from the earlier discussion that the only effective constitutional balance to executive dominance with parliamentary or legislative majorities can and has been the judiciary. The twofold consequence of this has been, first, an assault on the functioning of the judiciary by the executive–legislative,⁶⁷ and, secondly, an assertion of judicial independence by the judiciary—the former being destructive of, and the latter being indispensable to, the separation of powers. Independence was asserted by the judiciary functionally (used in the sense of freedom from legislative and executive interference) and administratively (used in the sense of jurisdictional and organisational independence of the judicial set-up). Perhaps the earliest case of assertion of functional independence came in 1965, with a serious conflict between a High Court and a State legislature when the Supreme Court said that legislatures could not interfere in any manner with the discharge of functions by the judiciary and ‘that provisions of the Constitution ... are intended to safeguard the independence of the Judicature in this country’.⁶⁸

Administrative independence of the judiciary was under threat from the executive because it had the final say in the appointment,⁶⁹ transfer,⁷⁰ and

promotion of a judge⁷¹ after consultation with the Chief Justice and such judges of the Supreme Court or High Courts as the President thinks necessary.⁷² In 1993, the Supreme Court secured the independence of the judiciary from executive control or interference by judicially prescribing procedural norms for transfer and appointment of judges by a collegium of senior judges together with the Chief Justice of the High Court or Supreme Court, as the case may be.⁷³ 'From being a mere consultant, the Chief Justice of India and the Supreme Court collegium now have the final word.'⁷⁴ As far as the District Judiciary is concerned, administrative separation of the judiciary from the executive was secured by interpreting Article 233(1) and striking down Rules framed by the Governor which allowed the Governor to appoint persons outside the judicial service as District Judges. One of the reasons for holding that the Rules framed were unconstitutional was the concept of an independent judiciary under the doctrine of separation of powers.⁷⁵ This was followed by a series of judgments by which the administrative functioning of the judicial system at all levels of the judiciary was ensured.⁷⁶ In recent years, judicial independence has been heavily debated in the context of tribunals and their composition, a topic covered by a different chapter in this Handbook.

2. Judicial Control of the Legislature

‘Control’ by the judiciary of the other organs follows from the existence of a written constitution and the judicial review, interpretation, and application of constitutional provisions. Courts have not taken kindly to statutory provisions limiting the jurisdiction of courts to decide disputes and a provision that seeks to exclude the jurisdiction of courts is strictly construed. This principle is equally applicable to constitutional provisions. Thus, in *Kihoto Hollohan v Zachillhu*,⁷⁷ the Supreme Court construed Paragraph 6(1) of the Tenth Schedule to the Constitution, which seeks to impart finality to the decision of the Speakers/Chairmen as to whether a member of a House has become subject to disqualification on the ground of defection, to mean that the finality ‘[did] not detract from or abrogate judicial review of the decision under Articles 136, 226, and 227 of the Constitution insofar as infirmities based on violations of constitutional mandates, *mala fides*, non-compliance with Rules of Natural Justice and perversity, are concerned’.⁷⁸

Decisions that have set aside legislation (both Central and State) on the ground of a lack of jurisdiction are legion. The Supreme Court’s control has not been restricted to the lawmaking powers of legislatures and has extended to judicial overview of actions within the legislative bodies. The recent decision, *Raja Ram Pal v Speaker, Lok Sabha*, is illustrative of this:

[W]henver Parliament, or for that matter any State Legislature, claims any power or privilege in terms of the provisions contained in Article 105(3), or Article 194(3), as the case may be, it is the Court which has the authority and the jurisdiction to examine, on grievance being brought before it, to find out if the particular power or privilege that has been claimed or asserted by the legislature is one that was contemplated by the said constitutional provisions.⁷⁹

Constitutional concepts judicially developed by a process of interpretive evolution have also circumscribed legislative powers. On 24 April 1973, the Supreme Court held in *Kesavananda Bharati* that the power to amend the Constitution under Article 368 did not extend to amending the ‘basic structure’ of the Constitution, though it was not unanimous in defining what the ‘basic structure’ was.⁸⁰ The theory of the basic structure applies only to constitutional amendments and not to ordinary legislation.⁸¹ In 1981, *Waman Rao v Union of India* held that amendments to the Constitution made on or after 24 April 1973, by which time the Ninth Schedule was amended from time to time by inclusion of various statutes, were open to challenge on the ground that they damage the

basic or essential features of the Constitution.⁸² The key question whether the basic structure test would include judicial review of the Ninth Schedule laws on the touchstone of fundamental rights was considered exhaustively by a recent nine-judge decision of the Supreme Court.⁸³ The issue was answered in the affirmative.⁸⁴

A second concept that has served this role is ‘due process of law’, introduced into Articles 14 and 21. As an important commentator remarks with regard to due process, ‘The judiciary in India has thereby acquired vast power to supervise and invalidate any union or state action ... perceived by the Court to be “arbitrary” or “unreasonable”.’⁸⁵ While Article 21 has been stretched to cover every possible situation relating to human existence, Article 14 has been more restrictively applied to strike down legislation. Neither has the Court ‘at any time set aside economic and business regulations by recourse to substantive due process’, nor has ‘primary legislation been invalidated merely on the ground of arbitrariness or unreasonableness’.⁸⁶

Decisions/Directions have also been given by Courts in the recent past affecting prospective and sitting members of legislatures. The following decision will serve by way of illustration. In 2002, the Supreme Court held in *Union of India v Association for Democratic Reforms* that voters had a right to know who they were electing.⁸⁷ The outcome of this decision was that detailed information relating to a candidate as prescribed by the Supreme Court must be given to every voter. More recently, the Supreme Court was called upon to consider when a Member of Parliament or the State Assembly would be disqualified from continuing as such under Articles 102 and 191, respectively.⁸⁸ The Court held that the disqualification would take effect immediately upon conviction but cease to operate from the date of order of stay of conviction passed by the appellate court under Section 389 of the Code of Criminal Procedure 1973 or the High Court under Section 482 of the Code.⁸⁹ In an attempt to overturn this decision, the Government sought to pass a Representation of the People (Second Amendment and Validation) Bill 2013 and an ordinance. Neither attempt was, however, proceeded with.⁹⁰

Finally, where there is a legislative vacuum, on occasion binding directives have also been issued under Article 142 until appropriate legislation has been made,⁹¹ although courts have generally been reluctant to use this power.⁹² The directives, when given, have rarely been overturned by legislation to the contrary. On the other hand, judicial directions have often been incorporated in subsequent statutes,⁹³ unless they otherwise affected executive powers.⁹⁴

3. Judicial Control of the Executive

In exercise of the powers of judicial review, the judiciary has given directions to the executive to implement constitutional, statutory, or policy measures but has generally been reluctant to interfere in matters of policy.^{[95](#)} Occasionally it has set up committees to monitor and oversee the implementation of such directions.^{[96](#)}

V. AUTONOMOUS BODIES

Fortifying the definition of ‘power’ in the phrase ‘separation of powers’ as a division along functional lines, and contrary to the traditional concept of such separation being amongst only three organs of governance, the Indian Constitution has provided for the allocation of powers relating to governance to authorities who are required to be independent of the legislatures and the executive.

1. The Election Commission

While under the Government of India Act 1935, the conduct of elections was vested in an executive authority, under the Constitution of India, an autonomous constitutional authority was created under Article 324 for the superintendence, direction, and conduct of elections. This body is called the Election Commission, and is 'totally independent and impartial, and is free from any interference of the executive',⁹⁷ Parliament is empowered to make law as regards matters relating to conduct of election of either Parliament or State legislatures, without affecting the plenary powers of the Election Commission under Article 324.⁹⁸ There is also a 'blanket ban on litigative interference during the process of the election, clamped down by Article 329(b) of the Constitution',⁹⁹ The Election Commission is, for the purposes of discharging its functions, invested with executive, quasi-judicial, and legislative powers.¹⁰⁰ Article 243K has vested similar powers in the State Election Commissioner in respect of Panchayat elections.¹⁰¹ These plenary powers include the power of postponing an election if the circumstances warrant.¹⁰² However, in practical terms the independent action of the Election Commission is frequently thwarted by the executive. Although Clause (6) of Article 324 mandates that the President or the Governor of a State, shall, when so requested by the Election Commission, make available to the Election Commission or to a Regional Commissioner such staff as may be necessary for the discharge of the functions conferred on the Election Commission, such requests are often sought to be obstructed by governments both in the Centre and States, leading to a deadlock. The judiciary has generally upheld the plenary powers of the Election Commission in the resultant litigation.

2. Comptroller and Auditor General

Described ‘as the most important officer in the Constitution of India’ with duties ‘far more important than the duties even of the judiciary’ by BR Ambedkar,¹⁰³ the Comptroller and Auditor General (CAG) is required:

[T]o audit all receipts which are payable into the Consolidated Fund of India and of each State and of each Union Territory having a Legislative Assembly and to satisfy himself that the rules and procedures in that behalf are designed to secure an effective check on the assessment, collection and proper allocation of revenue and are being duly observed and to make for this purpose such examination of the accounts as he thinks fit and report thereon.¹⁰⁴

However, the CAG is not required to examine expenditures even before they are deployed. So when political parties in their manifestos promised various free gifts to the electorate if they were voted into power, the Supreme Court held that the CAG had no role to play at that juncture.¹⁰⁵ The powers of auditing the receipts and expenditure of the Union and the States are subject to the CAG’s independent authority, although the office has not been given the same independence as the judiciary. For one, there is no constitutionally prescribed criterion for selection of a candidate for appointment as CAG who is appointed by the President on the ‘recommendation’ of the Prime Minister. Secondly, the Supreme Court has the exclusive powers to appoint its officers and servants,¹⁰⁶ while the CAG heads the Indian Audit and Accounts Department but does not have such powers.¹⁰⁷ The conditions of service of persons serving in the Indian Audit and Accounts Department and the administrative powers of the CAG are prescribed by rules made by the President after consultation with the CAG.¹⁰⁸ Finally, the independence of the CAG is seriously impaired, as the CAG is not assured of tenure unlike the judiciary where the age of retirement is provided for in the Constitution.¹⁰⁹

The CAG also has no power to take action on its own report. All that is constitutionally required is the placing of the report before Parliament¹¹⁰ or the State Assembly,¹¹¹ as the case may be. It is therefore possible for the executive commanding a majority to disregard the CAG’s objections to unjustified expenditure. Recently, however, on the basis of the adverse report of the CAG, the Supreme Court in exercise of its powers of judicial review directed investigation into grant of unified access service licence with 2G spectrum and ultimately set it aside.

Executive functions have also been constitutionally farmed out to other

autonomous bodies, more as facilitating executive functioning rather than as independent centres. For instance, the Union Public Service Commission acts in an advisory capacity as to service matters of central civil servants, including recruitment and disciplinary matters.¹¹² While the President is, by Article 320 of the Constitution, required to consult the Public Service Commission (except in certain cases), the President is not bound by the advice of the Commission.¹¹³ Similarly, provision has also been made by Article 280 for the appointment by the President of a Finance Commission to make recommendations to the President as to the distribution amongst the Union and the States of the net proceeds of taxes and duties and as to the principles which should govern the grants-in-aid of the revenue of the States out of the Consolidated Fund of India.¹¹⁴ Courts have rarely interfered with such recommendations.¹¹⁵

VI. CONCLUSION

Despite such overlap, until today a broad ‘constitutional organization of legal powers’¹¹⁶ continues to be generally maintained by the legislature, executive, and judiciary with the recognition of the need for checks and balances to ensure that the constitutional objectives as delineated in the Directive Principles are achieved. However, Montesquieu’s theory of an equal Trinitarian separation of powers has been expressly rejected by the Constitution, most importantly by conceding the powers of judicial review over legislative and executive action.¹¹⁷ There has been a discernible move towards the creation of more autonomous bodies both legislatively (such as the National Judicial Appointments Commission Bill 2014) and judicially (such as directions for setting up of a State Security Commission, a Police Establishment Board, and Police Complaints Authorities)¹¹⁸ towards ensuring checks on the exercise of power. As Ackerman observes, ‘A better understanding of the separation of powers would recognize that [autonomous] agencies ... deserve special recognition as a distinct part of the system of checks and balances.’¹¹⁹

The advantages of a written constitution with its prescription of the objectives, the ambit of functions, and fetters on the exercise of such functions by different authorities for attaining these objectives cannot be overemphasised in a country like ours. However, although the Indian model of distribution of functions is still at the evolutionary stage, if we are to remain true to the Constitution in the evolutionary process, the judiciary as an independent interpreter of the

Constitution must remain the keystone.

¹ *State of Uttar Pradesh v Jeet S Bisht* (2007) 6 SCC 586.

² HM Seervai, *The Position of the Judiciary under the Constitution of India* (Sir Chimanlal Setalvad Lectures) (University of Bombay 1970).

³ Bruce Ackerman, 'The New Separation of Powers' (2000) 113(3) Harvard Law Review 633, 688.

⁴ *Re Delhi Laws Act 1912* AIR 1951 SC 332 [64], citing Montesquieu, *The Spirit of Laws*, trans Thoma Nugent and JV Prichard, vol 1 (G Bell & Sons 1914) 162–63:

When the legislative and the executive powers are united in the same person, or in the same body of Magistrates, there can be no liberty; because apprehensions may rise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner. Again, there is no liberty, if the judiciary power be not separated from the legislative and the executive.

⁵ Thomas Cooley, *A Treatise on the Constitutional Limitations* (Da Capo Press 1972) 35.

⁶ George Paton, *A Textbook of Jurisprudence* (4th edn, Oxford University Press 2004) 332.

⁷ *Kruse v Johnson* [1898] 2 QB 91 (HCJ).

⁸ Jeffrey Jowell and Dawn Oliver, *The Changing Constitution* (7th edn, Oxford University Press 2011) 191.

⁹ *R v Secretary of State for Transport* [1991] 1 AC 603, 658–59 (Bridge LJ). See also Jowell and Oliver ([n 8](#)) 115.

¹⁰ *Re Delhi Laws Act 1912* ([n 4](#)) [285].

¹¹ *Re Delhi Laws Act 1912* ([n 4](#)) [285]: 'the Indian Constitution does not expressly vest the different sets of powers in the different organs of the State.'

¹² Constitution of India 1950, arts 53 and 154.

¹³ *Re Delhi Laws Act 1912* ([n 4](#)) [133].

¹⁴ *Jeet S Bisht* ([n 1](#)) [49].

¹⁵ *Parliamentary Debates*, vol 3 (Lok Sabha Secretariat 1955) 4990, 1955.

¹⁶ Seervai ([n 2](#)) 81: 'I may say at once that our Constitution is not based on the separation of powers.'

¹⁷ Bruce Ackerman has called such separation of powers 'constrained parliamentarism' and has lauded it 'as the most promising framework for future development of the separation of powers'. Ackerman ([n 3](#)) 640.

¹⁸ In 1951 the Supreme Court said: 'It does not admit of any serious dispute that the doctrine of separation of powers has, strictly speaking, no place in the system of government that India has at the present day under her own Constitution or which she had during the British rule' (*Re Delhi Laws Act 1912* ([n 4](#)) [285]). In 2011 the Supreme Court said: 'There is distinct and rigid separation of powers under the Indian Constitution' (*State of Uttar Pradesh v Sanjay Kumar* (2012) 8 SCC 537 [16]).

¹⁹ Constitution of India 1950, sch 7, List 1, Entries 77–79.

²⁰ Constitution of India 1950, sch 7, List 2, Entries 3, 65; List 3, Entries 11-A, 14, and 46.

²¹ *Jamshed N Guzdar v State of Maharashtra* (2005) 2 SCC 591 [39]; *Nahar Industrial Enterprises Ltd v Hong Kong and Shanghai Banking Corporation* (2009) 8 SCC 646 [115].

²² Constitution of India 1950, art 124.

²³ Constitution of India 1950, arts 124(4), 124(5), and 218.

²⁴ Constitution of India 1950, arts 125 and 221; The Supreme Court Judges (Salaries and Conditions of Service) Act 1958; The High Court Judges (Salaries and Conditions of Service) Act 1954.

²⁹ *Shri Prithvi Cotton Mills Ltd v Broach Borough Municipality* (1969) 2 SCC 283 [4].

²⁵ Constitution of India 1950, arts 124(5) and 217.

²⁶ Constitution of India 1950, art 194(3). See also *Special Reference No 1 of 1964* AIR 1965 SC 745 [133].

²⁷ *Kihoto Hollohan v Zachillhu* (1992) Supp (2) SCC 651 [111].

²⁸ The recent resolution of a tax dispute in favour of the Vodafone Group by the Supreme Court in *Vodafone International Holdings BV v Union of India* (2012) 6 SCC 613 and the subsequent retrospective change of the law by Parliament is an example of this.

³⁰ *State Bank's Staff Union (Madras Circle) v Union of India* (2005) 7 SCC 584 [31].

³¹ There are at present 284 Statutes included in the Ninth Schedule.

³² When Ramaswamy J of the Supreme Court was sought to be impeached in 1993, the Congress Party, which commanded a majority in Parliament, abstained from voting, thus defeating the motion of impeachment. This after three senior judges appointed by the Ninth Lok Sabha had found him guilty of misconduct on eleven counts and 'misbehaviour' was 'proved' within the meaning of art 124(4).

³³ *Ram Jawaya Kapur v State of Punjab* AIR 1955 SC 549 [14]: 'The Cabinet enjoying, as it does, a majority in the legislature concentrates in itself the virtual control of both legislative and executive functions.'

³⁴ *Indra Sawhney v Union of India* (1992) Supp (3) SCC 217 [526]. The earlier understanding of the scope of art 162 in *GJ Fernandez v State of Mysore* AIR 1967 SC 1753 [12] was that:

Article 162 does not confer any power on the State Government to frame rules and it only indicates the scope of the executive power of the State. Of course, under such executive power, the State can give administrative instructions to its servants how to act in certain circumstances; but that will not make such instructions statutory rules which are justiciable in certain circumstances. In order that such executive instructions have the force of statutory rules it must be shown that they have been issued either under the authority conferred on the State Government by some statute or under some provision of the Constitution providing therefor.

³⁵ *Ram Jawaya Kapur* ([n 33](#)) [7]: 'the language of Article 172 clearly indicates that the powers of the State executive do extend to matters upon which the State Legislature is competent to legislate and are not confined to matters over which legislation has been passed already. The same principle underlies Article 73 of the Constitution.'

³⁶ *Re Delhi Laws Act 1912* ([n 4](#)) [93].

³⁷ 'Guidelines' justifying delegated legislation have been found by courts even from the preamble of a statute. See *Pannalal Binraj v Union of India* AIR 1957 SC 397 [25]: 'No rules or directions having been laid down in regard to the exercise of that power in particular cases, the appropriate authority has to determine what are the proper cases in which such power should be exercised having regard to the object of the Act and the ends to be achieved.'

³⁸ *Ajoy Kumar Banerjee v Union of India* (1984) 3 SCC 127 [27].

³⁹ *Re Delhi Laws Act 1912* ([n 4](#)) [93]. It has been later held by the Supreme Court that the distinction between the two is without a difference and that conditional legislation is delegated legislation: *Lachmi Narain v Union of India* (1976) 2 SCC 953 [49].

⁴⁰ *Banarsi Das Bhanot v State of Madhya Pradesh* AIR 1958 SC 909; *Narinder Chand Hem Raj v Lt Governor, Union Territory, Himachal Pradesh* (1971) 2 SCC 747; cf *Bimal Chandra Banerjee v State of*

Madhya Pradesh (1970) 2 SCC 467.

⁴¹ *Edward Mills Co Ltd v State of Ajmer* AIR 1955 SC 25: The Minimum Wages Act 1948 (although the statute did not provide for any criterion to do so).

⁴² *Union of India v Cynamide India Ltd* (1987) 2 SCC 720.

⁴³ *AK Roy v Union of India* (1982) 1 SCC 271 [45].

⁴⁴ *Union of India v Bhanamal Gulzarimal Ltd* AIR 1960 SC 475.

⁴⁵ *Chinta Lingam v Govt of India* (1970) 3 SCC 768 [3].

⁴⁶ *Cynamide India Ltd* (n 42) [7].

⁴⁷ *T Venkata Reddy v State of Andhra Pradesh* (1985) 3 SCC 198 [9].

⁴⁸ This was noted by the Supreme Court in *AK Roy* (n 43) [8]:

In India, that power [of the executive to issue ordinances] has a historical origin and the executive, at all times, has resorted to it freely as and when it considered it necessary to do so. One of the larger States in India has manifested its addiction to that power by making an overgenerous use of it—so generous indeed, that ordinances which lapsed by efflux of time were renewed successively by a chain of kindred creatures, one after another. And, the ordinances embrace everything under the sun, from Prince to pauper and crimes to contracts. The Union Government too, so we are informed, passed about 200 ordinances between 1960 and 1980, out of which 19 were passed in 1980.

Between 2000 and 2011 the Union government promulgated 75 ordinances. See *List of Ordinances issued by Government of India* (Legislative I Section, Legislative Department, Ministry of Law and Justice 2012) <lawmin.nic.in/ld/folder1/listord.doc>, accessed October 2015.

⁴⁹ Constitution of India 1950, art 254.

⁵⁰ Constitution of India 1950, art 356(1)(b).

⁵¹ *Ram Prasad v State of Punjab* AIR 1966 SC 1607.

⁵² Constitution of India 1950, art 357(2).

⁵³ Since a practice has developed of the Centre appointing a person with a political background as a governor, the discretion has on occasion been used for political reasons (*SR Bommai v Union of India* (1994) 3 SCC 1) and occasionally governors and the State executive have come into conflict (*State of Gujarat v RA Mehta* (2013) 3 SCC 1).

⁵⁴ MP Jain, *Indian Constitutional Law* (5th edn, Wadhwa & Co 2003) 1635.

⁵⁵ Constitution of India 1950, art 103.

⁵⁶ Constitution of India 1950, arts 72 and 161.

⁵⁷ *East India Commercial Co Ltd v Collector of Customs* AIR 1962 SC 1893.

⁵⁸ This is discussed in greater detail below.

⁵⁹ Constitution of India 1950, art 216.

⁶⁰ Constitution of India 1950, arts 124(2) and 217(1).

⁶¹ Constitution of India 1950, art 233.

⁶² *K Veeraswami v Union of India* (1991) 3 SCC 655 [61].

⁶³ Constitution of India 1950, arts 32 and 226.

⁶⁴ Constitution of India 1950, arts 12 and 13(2).

⁶⁵ Constitution of India 1950, arts 245 and 246.

⁶⁶ *Union of India v Raghubir Singh* (1989) 2 SCC 754 [7].

⁶⁷ The discharge of judicial functions by the executive when India was under British administration of the Constitution perhaps historically accounts for the persistent efforts of the political executive to curb the

judiciary.

⁶⁸ *Special Reference No 1 of 1964* (n 26) [67]. The power of courts to judicially review parliamentary privileges and powers has been reiterated subsequently in *Kihoto Hollohan* (n 27); *Raja Ram Pal v Speaker, Lok Sabha* (2007) 3 SCC 184; *Amarinder Singh v Punjab Vidhan Sabha* (2010) 6 SCC 113.

⁶⁹ Constitution of India 1950, art 124(2) in the case of Supreme Court judges and art 217 in the case of High Court judges.

⁷⁰ Constitution of India 1950, art 222.

⁷¹ As the Chief Justice of a State High Court or as the Chief Justice of India.

⁷² See Justice Ruma Pal, 'An Independent Judiciary: Fifth Tarkunde Memorial Lecture' (New Delhi, 10 November 2011):

Post the decision in *Kesavananda Bharati* limiting the power of constitutional amendment, the majority, all senior judges, were superseded and the dissenter was rewarded with the high office of the Chief Justice of India. The superseded judges resigned in protest. In 1975 Emergency was declared. Judicial review for infringement of fundamental rights including the right to life and liberty were severely curtailed allowing the Executive virtually unbridled power to deprive citizens to detain citizens with impunity. Several High Courts held that the Governments could not. In retaliation in 1976, 16 High Court judges were transferred by the Executive to other High Courts. The majority in the Supreme Court disagreed with the High Courts and upheld the Government's powers. There was one dissenter—Justice H.R. Khanna. The Executive again 'punished' him by superseding him for appointment as the Chief Justice of India although he was then the seniormost judge in the Supreme Court and would have in the normal course been so appointed. Justice Khanna resigned. Small wonder then that after this, a battered judiciary (after an initial regrettable hiccup in the form of the decision in *S.P. Gupta's case* (1981 Supp SCC 87)) picked itself up and with all the interpretative tools at its command—termed by many as an unacceptable feat of judicial activism—by a composite judgment in several public interest litigations virtually wrested the powers of appointment, confirmation and transfer of judges from the Executive.

See also *Union of India v Sankalchand Himatlal Sheth* (1977) 4 SCC 193 [41].

⁷³ *Supreme Court Advocates-on-Record Association v Union of India* (1993) 4 SCC 441; *Special Reference No 1 of 1998* (1998) 7 SCC 739.

⁷⁴ Excerpted from Justice Ruma Pal (n 72). Recently, the Ninety-ninth Amendment to the Constitution—which sought to replace the collegium system of appointments—was struck by the Supreme Court for violating judicial independence. See *Supreme Court Advocates-on-Record Association v Union of India* 2015 SCC OnLine SC 964; [BN Srikrishna, 'Judicial Independence'](#) (chapter 20, this volume).

⁷⁵ *Chandra Mohan v State of Uttar Pradesh* AIR 1966 SC 1987 [18].

⁷⁶ See eg, *All-India Judges' Association v Union of India* (1992) 1 SCC 119 [63]. The directions included steps to bring about uniformity in designation of officers both in the civil and the criminal side; raising retirement age of judicial officers to 60 years; providing a working library at the residence of every judicial officer; providing sumptuary allowance and residential accommodation to every judicial officer; providing every District Judge and Chief Judicial Magistrate a State vehicle, judicial officers in sets of five to have a pool vehicle; and setting up an In-service Institute at the Central and State or Union territory level.

⁷⁹ *Raja Ram Pal* (n 68) [62].

⁷⁷ *Kihoto Hollohan* (n 27); see also *Amarinder Singh* (n 68).

⁷⁸ *Kihoto Hollohan* (n 27) [111].

⁸⁰ *Kesavananda Bharati v State of Kerala* (1973) 4 SCC 225.

⁸¹ *Indira Nehru Gandhi v Raj Narain* (1975) Supp SCC 1.

⁸² (1981) 2 SCC 362.

⁸³ *IR Coelho v State of Tamil Nadu* (2007) 2 SCC 1.

⁸⁴ *IR Coelho* (n 83) [116]. The Court said ‘every addition to the Ninth Schedule triggers Article 32 as part of the basic structure and is consequently subject to the review of the fundamental rights as they stand in [Part III](#)’.

⁸⁵ TR Andhyarujina, ‘The Evolution of Due Process of Law by the Supreme Court’ in BN Kirpal and others (eds) *Supreme but Not Infallible: Essays in Honour of the Supreme Court of India* (Oxford University Press 2004) 193.

⁸⁶ TR Andhyarujina (n 85) 210.

⁸⁷ (2002) 5 SCC 294. The information was to be given on affidavit by each candidate seeking election to Parliament or a State legislature as a necessary part of his/her nomination paper. This needed amendment of the Representation of the People Act 1951. Parliament amended the law under which the candidate was not required to disclose (a) the cases in which he was acquitted or discharged of criminal offence(s); (b) his assets and liabilities; or (c) his educational qualification as directed by the Supreme Court. In *People’s Union for Civil Liberties (PUCL) v Union of India* (2003) 4 SCC 399 [9] the Court said ‘the legislature in this country has no power to ask the instrumentalities of the State to disobey or disregard the decisions given by the courts’. The amendment was accordingly held to be ‘illegal, null and void’.

⁸⁸ *Lily Thomas v Union of India* (2013) 7 SCC 653. Representation of the People Act 1951, s 8(4) provided that persons convicted of specified offences would not be disqualified from continuing as Members of Parliament or the State legislatures, in the case of a person who files an appeal or a revision in respect of the conviction or the sentence within three months until the appeal or revision is disposed of by the court. Subsection (4) of s 8 of the Act was accordingly held to be unconstitutional and struck down.

⁸⁹ *Lily Thomas* (n 88) [34]–[35]. However, the Court made it clear that sitting Members of Parliament and the State legislature who had been convicted for any of the specified offences mentioned in Section 8 of the Act and who had filed appeals or revisions which were pending would not be affected by the judgment: *Lily Thomas* (n 88) [348].

⁹⁰ ‘No “Nonsense”’ *The Indian Express* (New Delhi, 5 October 2013) <<http://archive.indianexpress.com/news/no-nonsense/1178575/>>, accessed October 2015, criticised ‘parties pandering to public emotion’ regarding the disqualification of MPs convicted of crimes. The primary reason for such criticism was that the parties had failed in ‘their higher bipartisan responsibility to secure the institutional integrity of the legislature’ and that it would ‘damage the institutional balance that sustains our democracy’.

⁹¹ See eg, *Re Measures for Prevention of Fatal Accidents of Small Children due to Their Falling into Abandoned Borewells and Tubewells* (2010) 15 SCC 224; *Gainda Ram v MCD* (2010) 10 SCC 715; *Kalyaneshwari v Union of India* (2011) 3 SCC 287; *Lafarge Umiam Mining (P) Ltd v Union of India* (2011) 7 SCC 338; *Delhi Jal Board v National Campaign for Dignity & Rights of Sewerage & Allied Workers* (2011) 8 SCC 568; *University of Kerala v Council of Principals of Colleges, Kerala* (2011) 14 SCC 357; *Dayaram v Sudhir Batham* (2012) 1 SCC 333; *Inspector General of Police v S Samuthiram* (2013) 1 SCC 598. The justification for this is outside the scope of the present discourse. Suffice it to say that the directions have been given in matters as diverse as the myriad social and economic problems faced by the country. See Justice Ruma Pal, ‘Judicial Oversight or Overreach: The Role of the Judiciary in Contemporary India’ (2008) 7 SCC J 9; Justice Ruma Pal, ‘The Court as a Social Auditor: Tenth Dr. Amitabha Chowdury Memorial Lecture’ (Gauhati, December 2013).

⁹² *P Ramachandra Rao v State of Karnataka* (2002) 4 SCC 578 [27].

⁹³ Eg, directions given in *Vishaka v State of Rajasthan* (1997) 6 SCC 241 incorporated in the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act 2013.

⁹⁴ Eg, *Prakash Singh v Union of India* (2006) 8 SCC 1 and *Prakash Singh v Union of India* (2009) 17 SCC 329 on police reforms. See also 'Police Reforms: India' (Commonwealth Human Rights Initiative) <http://humanrightsinitiative.org/index.php?option=com_content&view=article&id=87&Itemid=98>, accessed October 2015.

⁹⁵ *BALCO Employees' Union v Union of India* (2002) 2 SCC 333; *Special Reference No 1 of 2012* (2012) 10 SCC 1.

⁹⁶ See eg, *TN Godavarman Thirumulpad v Union of India* (1997) 2 SCC 267; *Ram Jethmalani v Union of India* (2011) 8 SCC 1.

⁹⁷ *Special Reference No 1 of 2012* ([n 95](#)) [27].

⁹⁸ *Special Reference No 1 of 2012* ([n 95](#)) [126] (Pasayat J).

⁹⁹ *Mohinder Singh Gill v Chief Election Commissioner* (1978) 1 SCC 405 [9].

¹⁰⁰ *Mohinder Singh Gill* ([n 99](#)) [45]. See also *Indian National Congress (I) v Institute of Social Welfare* (2002) 5 SCC 685 [25]. These plenary powers include the power of postponing an election if the circumstances so warrant (*Election Commission of India v State of Tamil Nadu* (1995) Supp (3) SCC 379). However, in practical terms the independent action of the Election Commission is frequently thwarted by the executive. Although clause (6) of art 324 mandates that the President, or the Governor of a State, shall, when so requested by the Election Commission, make available to the Election Commission or to a Regional Commissioner such staff as may be necessary for the discharge of the functions conferred on the Election Commission, such requests are often sought to be obstructed by governments both in the Centre and States, leading to a deadlock. The judiciary has generally upheld the plenary powers of the Election Commission in the resultant litigation.

¹⁰¹ See *West Bengal State Election Commission v State of West Bengal* (2013) 3 Cal LT 110.

¹⁰² *Election Commission of India* ([n 100](#)).

¹⁰⁴ Comptroller and Auditor-General's (Duties, Powers and Conditions of Service) Act 1971, s 16.

¹⁰³ *Constituent Assembly Debates*, vol 8 (Lok Sabha Secretariat 1986), 30 May 1949.

¹⁰⁵ *S Subramaniam Balaji v State of Tamil Nadu* (2013) 9 SCC 659.

¹⁰⁶ Constitution of India 1950, art 146.

¹⁰⁷ Constitution of India 1950, art 148(5).

¹⁰⁸ Constitution of India 1950, art 148(5).

¹⁰⁹ See eg, Constitution of India 1950, arts 124(2), 217(1), and 149 read with Comptroller and Auditor General's (Duties, Powers and Conditions of Service) Act 1971, s 16. The Indian Audit and Accounts Department is under its control. On the basis of the CAG's report as laid before the Parliament or State Legislature, it is open to the executive to take such action as may be required. Recently the adverse report of the CAG the Supreme Court in exercise of its powers of judicial review directed investigation into grant of unified access service licence with 2G spectrum and ultimately set it aside (*Centre for Public Interest Litigation v Union of India* (2012) 3 SCC 1).

¹¹⁰ Constitution of India 1950, art 151(1).

¹¹¹ Constitution of India 1950, art 151(2).

¹¹² Constitution of India 1950, art 320(3).

¹¹³ *AN D'Silva v Union of India* AIR 1962 SC 1130.

¹¹⁴ *Special Reference No 1 of 1962* AIR 1963 SC 1760.

¹¹⁵ *All India Judges' Association v Union of India* (2002) 4 SCC 247 [20]; *Brij Mohan Lal v Union of India* (2007) 15 SCC 614; *Brij Mohan Lal v Union of India* (2012) 6 SCC 502.

¹¹⁶ George H Sabine, *A History of Political Theory* (4th edn, Oxford University Press 1973) 514.

¹¹⁷ Unfortunately not consistently by the judiciary.

¹¹⁸ *Prakash Singh* ([n 94](#)).

¹¹⁹ Ackerman ([n 3](#)) 718.

CHAPTER 16

LEGISLATURE

composition, qualifications, and disqualifications

MR MADHAVAN

I. INTRODUCTION

INDIA'S parliamentary democracy is federal in character, with legislatures at the Union and State levels. The Indian Parliament consists of the President of India and two Houses: the Rajya Sabha (the Council of States) and the Lok Sabha (the House of the People).¹ The two Houses are formed on different principles, and their roles and powers have some key differences.

The Rajya Sabha is an indirectly elected House. Members of the Rajya Sabha represent various States and Union Territories. The Constitution places an upper limit of 238 such members (only two Union Territories, Delhi and Puducherry, have representatives in this House).² The allocation of seats to different States and Union Territories is specified in the Constitution—these add up to 233 seats at present.³ Members of the Rajya Sabha are elected through single transferable vote by the elected members of the respective State assemblies, and have a term of six years. In addition, the President may nominate up to twelve members who have special knowledge or practical experience in the fields of literature, science, art, or social service.⁴ The Rajya Sabha is a continuing House, with one-third of its members retiring every two years. The Lok Sabha is composed of directly elected members from territorial constituencies. There is an upper limit of 530 members from States and twenty from Union Territories.⁵ At present, there are a total of 543 such constituencies.⁶ In addition, the President may nominate two Anglo-Indian representatives if their representation is seen as inadequate.⁷ The term of the Lok Sabha is a maximum of five years.

The two Houses have similar legislative powers. All legislation, with the exception of money Bills, need the approval of each House.⁸ The Constitution provides for a joint sitting to be called if the Houses cannot agree on a Bill but this mechanism has been used only thrice.⁹ Given that the Lok Sabha has 2.2 times the number of members that the Rajya Sabha has, it has an advantage if a

joint sitting is called. The Lok Sabha has the final authority on all money Bills, with the Rajya Sabha given only recommendatory powers.¹⁰ The Lok Sabha determines who forms the government. The Council of Ministers is collectively responsible to the Lok Sabha.¹¹ In other words, this House has the power to remove the Council of Ministers. The Rajya Sabha was envisioned as the Council of States. It can, by a resolution, enable a legislation to be passed on a subject that falls under List II (State List) of the Seventh Schedule to the Constitution.¹² It can also resolve to create All-India Services.¹³ While exercising the constituent power—that is, amending the Constitution—the two Houses have equal powers. Every amendment to the Constitution needs to be passed by a majority of the membership and two-thirds of those present and voting.¹⁴ There is no concept of a joint sitting. In some cases, half the State legislatures also have to ratify the amendment.

All States have a Legislative Assembly, which is analogous to the Lok Sabha. It has similar powers as the Lok Sabha, and is composed of territorial constituencies.¹⁵ The Constitution also provides for a second House at the State level called the Legislative Council. Currently, seven States have such a Council.¹⁶ Parliament may by law create or abolish the Legislative Council for a State if the State's Legislative Assembly has passed such a resolution with the support of a majority of its membership and two-thirds of the members present and voting.¹⁷ Legislative Councils have less power than the Legislative Assemblies. They have only a recommendatory role in money Bills.¹⁸ In the case of ordinary Bills too, the Legislative Assembly can override any amendments made by the Legislative Council.¹⁹

In this chapter, we first discuss some of the issues related to composition of the legislatures. We then turn to the qualifications and disqualifications of members of the legislatures. The relevant constitutional provisions here are Articles 79 to 104 (Parliament) and Articles 168 to 193 (State legislatures).

II. COMPOSITION

The members of the Rajya Sabha are elected on the basis of a single transferable vote by the elected members of the State Legislative Assembly. Unlike the United States Senate, the States do not have equal representation. The number of seats is specified in the Fourth Schedule, and is based on the population of each State, with a higher weightage given to smaller States. The States were allocated

one seat per million people for the first five million and one seat per each additional two million or part thereof exceeding one million, based on the 1941 census. In 1956, the Seventh Amendment abolished the classification of States into three categories. It reorganised India into various States and Union Territories. It also amended the Fourth Schedule keeping the same formula but updating it with the data from the 1951 census.²⁰ The same formula has been adhered to in later reorganisations of States.

In the Lok Sabha, members are elected from territorial constituencies through direct election. The Constitution initially provided that the ratio between the number of members in each constituency and the population of the constituency should be the same across all constituencies, to the extent practicable. The Seventh Amendment (1956) changed this to state that (a) the number of seats allocated to a State should be in proportion to its population; and (b) the ratio of seats in a constituency and the number of members should be constant within each State to the extent practicable.²¹ Note that at this time, multi-member constituencies were permitted, which were abolished only in 1961.²²

The Constitution also provides that territorial constituencies should be adjusted after every census. This was undertaken until 1972 (using the 1971 census). In 1976, the Constitution was amended such that there would be no further adjustment until the first census after the year 2000.²³ The Constitution was again amended in a way that until the first census after 2026, there would be no change in interState distribution of seats. Also intraState adjustments will be made based on the 2001 census, which would also not be altered until the first census after 2026.²⁴ The reason for these changes was ‘to boost family planning norms’ and work ‘as a motivational measure to enable the State Government to pursue the agenda for population stabilisation’.²⁵ That is, States that were more successful in reducing the population growth rate would end up with a lower number of seats in the Lok Sabha under the earlier formula, so the seat share was frozen at the earlier level.

The Legislative Assembly of a State has provisions analogous to the Lok Sabha. The provisions related to readjustment of the territorial constituencies are also similar to those for the Lok Sabha.²⁶ The number of members of a Legislative Council cannot exceed one-third of the number of members in the Legislative Assembly. The composition of the Council is as follows: one-third of the members elected by members of municipalities, district boards, and local authorities; one-twelfth elected by residents who have been graduates for at least three years; one-twelfth elected by teachers in educational institutions in the State, not lower in standard than secondary schools; one-third elected by

members of the Legislative Assembly; and the remaining nominated by the Governor from among persons having special knowledge or practical experience in literature, science, art, cooperative movement, or social service. Parliament may, by law, change this scheme of composition of Legislative Councils.²⁷ As things presently stand, Parliament has not made any such law.

Parliament may make laws relating to the conduct of elections to Parliament and State legislatures, including preparation of electoral rolls and delimitation of constituencies.²⁸ If provisions are not made by Parliament, a State legislature may also make law related to conduct of elections to the House(s) of that State's legislature, including preparation of electoral rolls.²⁹ The validity of any law related to delimitation of constituencies or allotment of seats to any constituency may not be called in question in any court.³⁰ Indeed, the fact that the Delimitation Commission's decision to reserve a seat cannot be questioned in a court was reaffirmed by the Supreme Court.³¹ In another case, the Supreme Court held that Article 329 provided a blanket ban on legal challenges to electoral steps taken by the Election Commission and its officers to complete an election.³²

III. QUALIFICATIONS

To be chosen as a Member of Parliament include (a) to be a citizen of India and to make an oath or affirmation to bear true faith and allegiance to the Constitution of India and uphold the sovereignty and integrity of India; (b) to be of 25 years of age in the case of the Lok Sabha and 30 years in the case of the Rajya Sabha; and (c) to possess any other qualification that Parliament may make by law.³³

The Supreme Court has confirmed the requirement that the person needs to make the required oath or affirmation after nomination and before the scrutiny of nominations.³⁴ Before taking his seat, every member has to make the required oath or affirmation before the President (Governor) or some person appointed by him.³⁵ If a person sits or votes in Parliament (State legislature) without taking such oath, or if he knows that he is not qualified or is disqualified from membership, he is liable to pay a fine of Rs 500 per day.³⁶

Parliament has by law required that to be chosen as a Member of Parliament, a person has to be an elector for any parliamentary constituency in India. The word 'elector' is defined as being registered on the electoral roll and not subject

to certain disqualifications. Similarly in the case of a Legislative Assembly or a Legislative Council of a State, the person must be registered on the electoral roll of any constituency of the State. There are special requirements for a person to be elected to a seat reserved for the Scheduled Castes or for Scheduled Tribes, and for some communities in some States.³⁷

The Representation of the People Act 1950 lists three disqualifications to be on the electoral roll: (a) if the person is not a citizen of India; (b) if he is of unsound mind and stands so declared by a competent court; and (c) if he is disqualified from voting under any law relating to corrupt practices and other offences in relation to elections.³⁸ The Representation of the People Act 1951 also lists a few conditions that would disqualify an elector from voting.³⁹ This includes, inter alia, that a person confined in a prison or in the lawful custody of the police (other than in preventive detention) is not eligible to vote. In 2013, the Supreme Court conflated these two conditions, and declared that anyone in the lawful custody of police would be ineligible to contest elections.⁴⁰ The argument offered by the Court was that such a person is ineligible to vote, and therefore will not be an elector. This interpretation failed to notice that the two Acts of 1950 and 1951 had differentiated between an elector and the right to vote. However, this condition was removed through an explanation inserted by the Representation of the People (Amendment and Validation) Act 2013.

The eligibility requirement for a member of the Rajya Sabha was slightly different. It required that the member had to be an elector for a parliamentary constituency in that State or Union Territory.⁴¹ This condition was removed in 2003, and the law now states that the person has to be an elector in any parliamentary constituency in India.⁴² This amendment was challenged and was examined by a constitutional bench of the Supreme Court.⁴³ The main argument made by the petitioners was that the Rajya Sabha as the Council of States was envisioned to represent the interests of States. Any deviation from this principle would violate the principle of federalism, which was a part of the basic structure of the Constitution. The removal of the requirement that the member should be an elector of the State (which also meant that he should be 'ordinarily resident' in that State) would deviate from the principle of federalism. The Court rejected this contention, stating that the only change the amendment had made was that it had enlarged the choice of the electors, who are elected members of the State Legislative Assembly.⁴⁴ If they chose to do so, they could elect a person who had a nexus with the State of residence, as argued by the petitioners. Thus, according to the Court, Indian federalism did not demand that members of the Rajya Sabha belong to the State they represent.

IV. DISQUALIFICATIONS

The Constitution lists six disqualifications for a person for being chosen as and for being a Member of Parliament:

1. If he holds any office of profit under the Government of India or the Government of any State other than an office declared by Parliament not to disqualify its holder. There is an explanation that states that the office of a Minister is not an office of profit.
2. If he is of unsound mind and stands so declared by a competent court.
3. If he is an undischarged insolvent.
4. If he is not a citizen of India or has voluntarily acquired the citizenship of a foreign state, or is under any acknowledgement of allegiance or adherence to a foreign state.
5. If he is disqualified under any law made by Parliament.
6. If he is disqualified under the Tenth Schedule (the anti-defection law).⁴⁵

There are similar provisions for State legislatures.⁴⁶ In the case of office of profit, the State legislature can declare any office not to disqualify its holder. Note that the power to make additional disqualifications (point 5 above) vests in Parliament even for membership to State legislatures.

In this chapter, we examine the first, fifth, and the sixth conditions in detail. It is worth noting that the anti-defection law differs from the other five conditions in a fundamental way. Unlike the others, this brings in the aspect of a Member of Parliament or State legislature also being elected as a candidate of a political party, and therefore being bound by party discipline.

1. Office of Profit

The idea of office of profit is as follows. There is a delicate balance between the legislature and the executive. Legislators should be able to carry out their parliamentary duties in a free manner without any obligation to the government of the day. Therefore, there is a need to ensure that they are independent of the executive. However, there may still be some offices, such as ministries, which have a dual role in a parliamentary democracy, and they need to be exempt from this requirement. There may be other offices where a need for exemption may arise, and there needs to be a provision to enable such exemptions. The Constitution states that any person who holds an office of profit under the Central or State government cannot be chosen as or be a member of the House. An explanation states that ministers of the Union or a State are exempt from this rule. It also enables Parliament to make law to expand the list of exempt offices.⁴⁷ Therefore, four conditions are to be met for a person to be disqualified: (i) he should hold an office; (ii) the office should be one of profit; (iii) the office should be under the Union or State government; (iv) the office is not in the list that is excluded from disqualification by a law made by Parliament.

The Supreme Court has held that ‘office’ has an independent existence from its ‘holder’. The word ‘office’ means:

[A]n office or employment which was a subsisting, permanent, substantive position, which had an existence independent from the person who filled it, which went on and was filled in succession by successive holders; and if you merely had a man who was engaged on whatever terms, to do duties which were assigned to him, his employment to do those duties did not create an office to which those duties were attached.⁴⁸

In this particular case, the Court held that a Special Government Pleader would not be said to hold an office of profit as the office did not exist independent of the person who was appointed for the particular purpose. Earlier judgments had similarly held that there is no ‘office’ in the case of a person holding a permit to ply buses,⁴⁹ or a licensed stamp vendor or a deed writer,⁵⁰ or a shareholder in a company transporting postal articles and mailbags.⁵¹

To be an office ‘of profit’, there should be some pecuniary gain attached to it. The gain may be in forms other than money. The term must be interpreted reasonably, and it is the substance and not the form of payment that is important. For example, the Court has ruled that when land is allocated to a person by way of remuneration for services rendered or he can deduct his compensation from

revenue collected on behalf of the government, it would be considered to be pecuniary gain for this purpose.⁵² However, if the payment is for meeting out-of-pocket expenses and not for the loss of remunerative time, it would not be considered to lead to profit. Thus, a member of a government-appointed committee who draws a fee to meet his out-of-office expenses to attend a committee meeting is seen to receive only a compensatory allowance, and therefore does not hold an office of profit.⁵³ The key question is whether the compensation receivable could bring the holder of the office under the influence of the executive.⁵⁴

The amount *received* may not be relevant but the amount *receivable* could be so in deciding whether the office is one of profit. In *Jaya Bachchan*,⁵⁵ the Supreme Court ruled that it is not important whether the person actually receives pecuniary gain or whether the gain was negligible. What is relevant is whether the office is capable of yielding a profit or pecuniary gain. In another case, when a person was appointed to a post in an honorary capacity without any remuneration, though the post carried remuneration, the Court ruled that the person did not hold an office of profit.⁵⁶ That is, while appointing the person, the office should not be capable of yielding profit to that person.

There are several tests laid down to determine whether the office is under the government. These include: (a) whether the government makes the appointment; (b) whether it has the right to remove or dismiss the holder of the office; (c) whether the government pays the remuneration; (d) whether the functions are carried out for the government; and (e) whether the government has control over the duties and functions of the holder.⁵⁷ For example, the Vice Chancellor of a University who is appointed by the Governor in his capacity as the Chancellor has been judged not to hold an office of profit as the government does not have the authority to appoint or remove him.⁵⁸ The same rationale applies to a person employed by a government company,⁵⁹ or a school run by a government agency if the government does not have the direct power to appoint or dismiss that person.⁶⁰ On the other hand, even if an office is hereditary, it could be an office of profit under the government if the government appoints the holder, he works under the control and supervision of the government, government lands are allotted to the office by way of remuneration, and he is removable by the government.⁶¹

The determination of whether the function is under the control of the government and the power to appoint and dismiss the person is important to decide whether the office is under the government. So, for example, the auditor

of a government company was held to hold an office of profit under the government. He was appointed and could be removed by the government. His functions were under the control of the Comptroller and Auditor-General, who is appointed and whose administrative powers are controlled by the rules made by the President. The Supreme Court emphasised the importance of the substance, and not the form, of the office. For the office to be under the government, there need not be any relationship of master and servant between the government and the holder of the office, and the remuneration could be paid by the company, and not out of government revenues.⁶²

Parliament enacted three Acts in 1950, 1951, and 1954 listing some offices that were exempted from disqualification. These three Acts were replaced by the Parliament (Prevention of Disqualification) Act 1959, which has been amended a number of times. Until 2006, the Act included a number of offices, including any office held by a minister, deputy minister, or minister of State, Leader of the Opposition, leader or deputy leader of a party or group in Parliament, chief whip, deputy chief whip, or whip in Parliament. It also included the Deputy Chairman of the Planning Commission, the Chairperson of the National Commission for Minorities, the National Commission for the Scheduled Castes and Scheduled Tribes (now split into two bodies, and both Chairpersons exempted), and the National Commission for Women. The list has several other categories. The Act also had a Schedule listing some bodies; the chairman, director, or member of all bodies not listed were exempt if they did not get any remuneration other than compensatory allowance.⁶³ The Act was amended in 2006. The Amendment Act added several offices to the exempted list: (a) Chairperson of the National Advisory Council; (b) chairman, deputy chairman, secretary, and members of fifty-five bodies listed in a new table; (c) chairman, deputy chairman, secretary, and members of any trust that was not specified in the Schedule; and (d) chairman, president, vice-president, principal secretary, or the secretary of the governing body of any society that is not specified in the Schedule.⁶⁴ This Amendment has expanded the list considerably. It has also effectively removed the condition that there should be no remuneration other than compensatory allowance for chairmen, trustees, and secretaries of trusts and societies not included in the Schedule.

In sum, the Supreme Court has held that three conditions need to be satisfied to disqualify a person: holding an office; office being of profit; or office being under the Union or State government. The office of a minister or any other office so declared by Parliament will be exempt from being a condition for disqualification. The main rationale behind this provision is the separation of

powers. Members of Parliament (and State legislatures) have an oversight role over the Union (State) government, and therefore should not be influenced by any pecuniary considerations of an office controlled by the concerned government. The 2006 Amendment now provides for such a wide-ranging list of exempted offices—such as the Indian Statistical Institute, Calcutta (an academic institution), the Irrigation and Flood Control Commission, Uttar Pradesh (an executive body), KRIBHCO (a farmer's cooperative), the Dalit Sena (a socio-political body), WBIDC (an industrial development corporation)—that it is clear that there does not seem to be any underlying common principle to choose these bodies. Indeed, the government's justification was that about forty sitting Members of Parliament were facing disqualifications as they were holding some of these posts, and vacation of seats by them would necessitate the holding of by-elections and consequent expenditure and financial burden.⁶⁵ This Amendment also has the unique distinction of having been returned for reconsideration by the President before being passed again and enacted.⁶⁶ The Parliament (Prevention of Disqualification) Act 1959 needs to be revisited. The principles to determine which offices should be exempt should be discussed and clearly spelt out. Based on these, the list of exempted offices can be decided. Only by a rationalisation and pruning down of this list can the idea of separation of powers be preserved and remain practical in a parliamentary system.

2. Defection

In 1985, the Constitution (Fifty-second) Amendment Act added Article 102(2) and the Tenth Schedule to the Constitution. These provided new grounds for disqualification on the basis of defection, and are known as the anti-defection law. The main features of the law are as follows:^{[67](#)}

1. The anti-defection law applies to members of Houses of Parliament, State Legislative Assembly or State Legislative Council (if the State has one).
2. A member belonging to a political party shall be disqualified from the membership of the House if (a) he has voluntarily given up his membership of the House; or (b) if he votes or abstains from voting in the House contrary to any direction issued by the political party to which he belongs or by any person or authority authorised by it in this behalf, without taking prior permission or if his action is not condoned by the party within fifteen days. The person is deemed to belong to that political party which gave him the candidature for the election.
3. In the case of a nominated member, he would be deemed to belong to the political party of which he was a member on the date of nomination. If he was not a member of any political party, he may join a party within six months of taking his seat, and he will be deemed to belong to that party. If a nominated member joins a party later than six months after taking his seat, he will be disqualified. If an independent member joins a party, he will be disqualified.
4. The Speaker and Deputy Speaker of the Lok Sabha, Deputy Chairman of the Rajya Sabha, Speaker and Deputy Speaker of a State Legislative Assembly and Chairman and Deputy Chairman of a State Legislative Council shall not incur disqualification if (a) on their election to such a post, they resign from their party and do not join another party or their original party while holding the office; or (b) if they so resigned, rejoin their original party after they cease to hold such office.
5. The law originally exempted splits, that is, if one-third of the members in the House from a party decided to split, then they would not incur disqualification. This provision was removed in 2003.^{[68](#)}
6. If two-thirds of the members of a party in the House decide to merge with another political party, they will not be disqualified. Also, the

members who decide not to accept the merger and function as a separate group will not incur disqualification.

7. Any question as to whether a member became subject to disqualification shall be referred to the Chairman or the Speaker, whose decision will be final. If the question is that of disqualification of the Speaker or the Chairman, the House may elect another member for this purpose, and his decision shall be final. All proceedings in this regard are deemed to be proceedings in Parliament within the meaning of Article 122 or the State legislature within the meaning of Article 212. (These articles state that the validity of the proceedings cannot be questioned on grounds of alleged irregularity, and that no officer in whom power is vested for regulating procedure or conducting business shall be subject to the jurisdiction of any court in the exercise of these powers.)

8. The Schedule also states that no court shall have jurisdiction with regard to any matter related to the disqualification under the Schedule. This provision was struck down by the Supreme Court (see discussion below).

Several aspects of the anti-defection law have been clarified through judicial decisions. Paragraph 7 of the Tenth Schedule bars courts from having jurisdiction on any matter related to disqualification under the Schedule. When the Supreme Court considered this provision, it ruled that this provision brought about a change in the operation and effect of Articles 136, 226, and 227 of the Constitution.⁶⁹ Under Article 368(2), any Constitution Amendment Bill that sought to make any change in these Articles would need to be ratified by the legislatures of half the States before it was sent to the President for his assent. As this procedure of ratification by State legislatures was not undertaken before obtaining the President's assent, the Court said this paragraph was liable to be struck down.⁷⁰

A more serious challenge to the constitutionality of the anti-defection law was on the grounds of democracy. It was argued that the anti-defection law, by imposing restrictions on legislators on their freedom to vote according to their conscience, violated the principles of parliamentary democracy. The Supreme Court, however, rejected this challenge, holding as follows:

On the one hand there is the real and imminent threat to the very fabric of Indian democracy posed by certain levels of political behaviour conspicuous by their utter and total disregard of well recognised political proprieties and morality ... On the other hand, there are, as in all political and economic experimentations, certain side effects and fallout which might affect and hurt even honest dissenters and conscientious objectors. These are the usual plus and minus of all areas of experimental legislation.⁷¹

In such cases, the Court concluded, the judiciary should defer to the legislature.

The anti-defection law leads to disqualification of a member who votes or abstains in a manner that is contrary to directions from his party. According to Article 105(1), 'Subject to the provisions of this Constitution and to the rules and standing orders regulating the procedure of Parliament, there shall be freedom of speech in Parliament.' Article 105(2) protects Members of Parliament from being liable to any proceedings in any court with respect to anything said or any vote given by them in Parliament. The question is whether the anti-defection law impinges on these rights and immunities. The Supreme Court has ruled that the Tenth Schedule does not impinge on these rights and immunities. This is both because the freedom of speech under Article 105 is not an absolute freedom, and because the Tenth Schedule does not purport to make any member liable in any court for anything said or vote given.⁷²

As per Paragraph 6(1) of the Tenth Schedule, the decision of the Speaker or Chairman shall be final. Paragraph 6(2) states that the proceedings in this respect shall be deemed to be within the meaning of Articles 122 or 212; that is, the validity cannot be questioned on grounds of alleged irregularity. The Court has ruled that Paragraph 6(1), to the extent it seeks to impart finality to the decisions of the Chairman or Speaker, is valid. But the concept of finality does not detract from or abrogate judicial review under Articles 136, 226, or 227 insofar as infirmities based on violations of constitutional mandates, mala fides, non-compliance with rules of natural justice, and perversity are concerned. The deeming provision in Paragraph 6(2) attracts an immunity to protect the validity of proceedings in Parliament from mere irregularities of procedure. The Chairman/Speaker, while exercising powers and discharging functions under the Tenth Schedule, acts as a tribunal adjudicating rights and privileges, and their decisions in that capacity are amenable to judicial review. However, judicial review should not cover any stage prior to the making of a decision by the Chairman/Speaker.⁷³

In the absence of a member explicitly resigning from a party, can there be circumstances in which he may be judged to have voluntarily given up membership? The Supreme Court has held that the phrase 'voluntarily given up his membership' can have a wider connotation than 'resignation'.⁷⁴ Even in the absence of a formal resignation, an inference can be drawn from the conduct of the member that he has voluntarily given up his membership. The Court also said that the Speaker could draw an inference based on photographs published in newspapers and statements made by members.⁷⁵ Indeed, the principle that newspaper reports can be taken as an indication of the conduct of a member has

been used by Speakers. For example, the Speaker of the Lok Sabha disqualified a member belonging to the Bahujan Samaj Party based on reports in several newspapers that he had taken part in a public meeting of the Samajwadi Party in which he had exhorted the people to vote for the Samajwadi Party.⁷⁶

The Tenth Schedule disqualifies a member who voluntarily gives up membership of his party. But how is the member to be treated if the party expels him? Can the member be treated as ‘unattached’? Will he incur disqualification if he joins another party? The Supreme Court has clarified that there is nothing like an ‘unattached member’ within the meaning of the Tenth Schedule.⁷⁷ The Explanation to Paragraph 2(1) makes it clear that an elected member is deemed to belong to the political party, if any, by which he was set up as a candidate for the election. The decision of the party in expelling the member is between the party and the member and finds no place in the scheme of the Tenth Schedule. The person will continue to belong to the original political party, and shall face disqualification if he joins another party.⁷⁸

Under the Tenth Schedule, the power of review is vested in the Speaker, and a key question is whether the Speaker can review an earlier decision. This question arose after an interesting series of events. Elections were held to the Goa Legislative Assembly in November 1989. In January 1991, Ravi Naik assumed the office of Chief Minister. Another member moved a petition for his disqualification under the Tenth Schedule, which was upheld by the Speaker. Ravi Naik obtained a stay on its implementation from the High Court. While the stay was in operation, a new Deputy Speaker was elected and the Speaker was removed from office. The Deputy Speaker, acting as the Speaker, reviewed the disqualification order and reversed it. This process was challenged in the Supreme Court. The Court said that the Speaker’s order is final, subject to judicial review as held in *Kihoto Hollohan*. Therefore, there was no inherent power given to the Speaker to review an earlier decision.⁷⁹

In sum, we see that political parties are now recognised by the Indian Constitution. The Constitution did not mention the term ‘political parties’ for the first thirty-five years of the Republic. The existence of political parties was not only recognised but accorded a central role in 1985 with the inclusion of the anti-defection law. This law has fundamentally changed the way of functioning of our parliamentary democracy by shifting power away from the individual legislator to the leadership of political parties. In *Kihoto Hollohan*, the Supreme Court upheld the principle that individual legislators should follow the whips issued by the party. Venkatachaliah J, speaking for the majority, held that:

[A] political party functions on the strength of shared beliefs ... Any freedom of its members to vote

as they please independently of the political party's declared policies will not only embarrass its public image and popularity but also undermine public confidence in it which, in the ultimate analysis, is its source of sustenance—nay, indeed, its very survival.⁸⁰

The judgment went on to note that the Tenth Schedule recognises two exceptions: one where the Member obtains prior permission to vote or abstain from voting and the other when the party condones his action after the vote. This reasoning led the judges to uphold the constitutionality of the anti-defection law against the charge that 'to punish an elected representative for what really amounts to an expression of conscience negates the very democratic principles which the Tenth Schedule is supposed to preserve and sustain'.⁸¹

We now have the benefit of hindsight to see how the anti-defection law has worked in the past three decades. Political parties issue whips on most issues, not just those that affect the stability of the government. Even on contentious policy issues, where there may be significant difference of opinion within political parties, Members of Parliament are often compelled to toe the line decided by the party leadership. This effectively converts each Member of Parliament to a mere number that the party leader can count on. For example, in December 2012, Parliament debated the issue of allowing foreign direct investment in retail trade. News reports indicate that both the government and the leading opposition party were trying to convince leaders of other parties; there was no attempt to convince other Members of Parliament.⁸² This implies that to win a motion one has to only convince a handful of party leaders. If a single party has a majority in the House, the party leadership can get any motion approved, regardless of whether there is widespread support for the issue within the party. The anti-defection law was introduced to counter 'The evil of political defections ...' ⁸³ The irony is that while it has discouraged honest debate on contentious issues, it has not deterred cross-voting when a government's survival is at stake. For example, during the confidence vote in July 1998, twenty-one Members of Parliament defied the whips issued by their parties.⁸⁴

While the constitutionality of the anti-defection law has been upheld, one can debate whether it has achieved the purpose of curtailing unprincipled defections without stifling genuine difference of opinion. Perhaps, a Private Member's Bill introduced in 2010 (which has since lapsed) finds a middle ground.⁸⁵ The proposal in that Bill was to restrict the applicability of the anti-defection law to motions of no confidence (and confidence) in the government, adjournment motions, and money Bills—all of which lead to the fall of the government if it loses the vote. Such a treatment would also mean that independent members, as well as those in the Rajya Sabha and State Legislative Councils, would not be

covered by the Tenth Schedule. After all, the composition of the Upper House does not determine the stability of the government.

3. Disqualification By or Under a Law Made by Parliament

Article 102(1)(e) enables Parliament to make law which can specify disqualifications other than those specified in the Constitution. The Representation of the People Act 1951 has specified several such disqualifications. Section 7(b) defines 'disqualified' as disqualified for being chosen as or being a member of either House of Parliament or the Legislative Assembly or Legislative Council of a State. The disqualifications include the following grounds:

1. Conviction of certain offences will disqualify a person from the time of conviction, and if the sentence includes imprisonment, the person will continue to be disqualified for a period of six years after his release. The offences are of three categories:

(a) Promoting enmity between groups, bribery, undue influence in an election, rape, cruelty to a woman by her husband or his relative, etc (Indian Penal Code 1860); preaching and practising untouchability (Civil Rights Act 1955); importing or exporting prohibited goods (Customs Act 1962); membership or dealing in funds of an unlawful group (Unlawful Activities (Prevention) Act 1967); offences under the Narcotic Drugs and Psychotropic Substances Act 1985; offences under the Religious Institutions (Prevention of Misuse Act) 1988; certain election-related offences (Representation of the People Act 1951); conversion of a place of worship (Places of Worship (Special Provisions) Act 1991); insulting the national flag or the Constitution of India or preventing the singing of the national anthem (Prevention of Insults to National Honour Act 1971); offences under the Commission of Sati (Prevention) Act 1988; offences under the Prevention of Corruption Act 1988.^{[86](#)}

(b) Any law relating to prevention of hoarding or profiteering, or adulteration of food or drugs, or any provisions of the Dowry Prohibition Act 1961, if the person is sentenced to imprisonment of at least six months.^{[87](#)}

(c) Any offence, other than those listed above, if the conviction is for

imprisonment of at least two years.⁸⁸

(d) In all the above cases, if the conviction is of a sitting legislator, the disqualification will not come into effect for a period of three months, and if the person files an appeal or application for revision during that period, until the appeal or application is disposed of by the court.⁸⁹ This subsection has been struck down by the Supreme Court.⁹⁰

2. A person who has been dismissed from an office held under the Central or a State government and has been dismissed for corruption or disloyalty to the State is disqualified for a period of five years from the date of such dismissal.⁹¹

3. A person who has entered into a contract with the Union government (State government) for the supply of goods or execution of works is disqualified to Parliament (State legislature) as long as the contract subsists.⁹²

4. A managing agent, manager, or secretary of a company or corporation (other than a cooperative society) in which the Union government (State government) holds a 25 per cent shareholding is disqualified to Parliament (State legislature).⁹³

5. If the Election Commission is satisfied that a person has failed to lodge election expenses in the time and manner required and has no good justification for the failure, it shall declare him to be disqualified, and he shall be disqualified for a period of three years from the date of such order.⁹⁴

The Supreme Court has clarified that Article 102(1) has disqualifications for a person 'being chosen as, and for being a member' of the House. The determination in the case of being chosen will be done in accordance with the Representation of the People Act 1951. The pertinent dates to decide such disqualification are the date of scrutiny of nominations and the date of election.⁹⁵

There is another important question in this regard: if on a date subsequent to the date of election, an appellate court overturns a conviction by a trial court that resulted in disqualification, would the disqualification be wiped out from a back date? A two-judge bench had stated that in case of acquittal, the conviction and sentence are deemed to be set aside from the date they are recorded; therefore the person would be deemed not to be disqualified.⁹⁶ However, a constitutional bench of the Supreme Court subsequently reversed this position. It held that the designated election judge could not take note of a subsequent event (acquittal) and apply it to an event (nomination for election) which had happened earlier.

The decision of acquittal would not have the effect of wiping out the disqualification on the date of election.⁹⁷ If several offences are tried together and the trial results in conviction, with sentences of imprisonment of various periods for the different offences that are ordered to run consecutively, the different periods shall be added up; if the total exceeds two years, the disqualification provision is attracted. The Court ruled that the phrase ‘any offence’ in Section 8(3) of the Representation of the People Act 1951 refers to the nature of offence and not the number of offences. It is immaterial if the conviction is in respect of one offence or several offences.⁹⁸

The exception clause in Section 8(4) of the Representation of the People Act 1951 has also been challenged. As per this Section, in the case of the conviction of a sitting member, disqualification will not take effect for a period of three months, and if an appeal or application for revision is filed, until the appeal or application is disposed of by the courts. Upon examination, the Supreme Court held that this exception does not violate the equality guarantee under the Constitution as it classifies persons into two classes—(a) a person who on the date of conviction is a Member of Parliament or State legislature; and (b) a person who is not such a Member—that are clearly defined and have a reasonable nexus with the purpose sought to be achieved. The stress is not merely on the right of an individual to contest an election or continue to be a member of a House, but also on the very existence and continuity of a House democratically constituted. As different classes can be treated differently under Article 14, this provision does not violate that Article.⁹⁹ That said, the protection is available only to a sitting member, and will not be available if he contests election.¹⁰⁰

Subsequently, a two-judge bench of the Supreme Court struck down Section 8(4) of the Representation of the People Act 1951. The Court emphasised that Article 102(1)(e) states that ‘A person shall be disqualified for being chosen as, and for being, a member of either House of Parliament if he is so disqualified by or under any law made by Parliament.’ The Representation of the People Act 1951 was made by Parliament using this power. Article 102(1) lays down the same set of disqualifications for election as well as being a member. But Parliament does not have power under this Article to make different laws for a person to be disqualified for being chosen as, and for being, a member. Further, as per Article 101(3)(a), ‘If a member of either House of Parliament becomes subject to any of the disqualifications mentioned in clause (1) or clause (2) of Article 102, his seat shall thereupon become vacant.’ This means that once a sitting member becomes disqualified by or under any law made by Parliament,

his seat becomes vacant automatically. Parliament cannot make a provision to defer the date on which the disqualification of a sitting member will have effect and prevent the seat becoming vacant. On these two grounds, the Court held that Section 8(4) violates the Constitution.¹⁰¹

In sum, we see that the Representation of the People Act 1951 seeks to disqualify any person who has been convicted of some specified offences, with a general provision that any person convicted for a term of two years or more under any law will be disqualified. The Supreme Court has struck down the provision that allowed sitting legislators to obtain a stay on the sentence and continue to hold their membership until the appellate court decided the matter. The objective of this provision is to prevent criminalisation of politics. However, given that there is considerable time between the commission of an alleged offence and the determination by the courts, a number of persons with serious criminal cases against them are elected to Parliament and State legislatures.

In 2011, a petition was filed in the Supreme Court pleading that those charged with serious offences should be debarred from contesting elections.¹⁰² In December 2013, the Court asked the opinion of the Law Commission of India on whether disqualification should be triggered on conviction as it exists today, or upon framing of charges by the court, or upon presentation of the report by the Investigating Officer.¹⁰³ The Law Commission, in February 2014, recommended that the Representation of the People Act 1951 be amended. In cases where the maximum punishment is imprisonment of five years or more, a person may be disqualified for a period of six years (unless he is acquitted in this period) from the time of framing of charges by a court; however, this disqualification would not apply for the first year after charges are framed, in order to protect against false charges ahead of an election. It also recommended that in the case of sitting Members of Parliament and State legislatures, the Supreme Court may order that trial be conducted on a day-to-day basis and completed within one year. If the trial is not conducted within one year, the trial court would have to furnish reasons to the concerned High Court. The Law Commission also gave two alternatives if the trial was not completed in one year: the member should be automatically disqualified, or the right to vote, salary, and perquisites should be suspended.¹⁰⁴

The Supreme Court considered these recommendations and, in March 2014, it held that all trial courts should complete the trial against sitting members within one year, and if they are unable to do so, they would have to give reasons to the Chief Justice of the concerned High Court. It also said that consideration is required on the question whether the Court can prescribe any disqualifications

beyond Article 102(1)(a) to (d) and the law made by Parliament under Article 102(1)(e).¹⁰⁵

If these recommendations are brought into effect, an accused person would have to face certain consequences (disqualification) if charges are framed against him, even before being convicted of an offence. This would address the issue of persons with serious criminal cases against them being elected to legislatures. However, this recommendation misses the point that the main problem is due to delays in trials in such cases. The failure of the criminal justice system in completing trials within a short period is sought to be countered by a special provision that would disqualify a person if a court decides that there is a prima facie case to proceed with the trial. Though, as the Law Commission points out, the innocence or guilt of the person is not affected by this amendment and there is no bearing on the criminal case, the fact that a person who is innocent (as he is not yet proven guilty of an offence) is being disqualified should raise concern. Another important issue regarding these recommendations is that they differentiate between sitting legislators and candidates. The *Lily Thomas* judgment struck down this differentiation, stating that it contravened Article 102(1)(e). Therefore, the recommendations made by the Law Commission may also fall foul of the Constitution as interpreted in *Lily Thomas*. Any such differentiation would need an amendment to Article 102.

4. Vacation of Seats and Decisions on Disqualification

Article 103(1) states that if there is any question regarding the disqualification of a member of either House of Parliament under Article 102(1), it shall be referred to the President and his decision shall be final. Article 103(2) requires the President to obtain the opinion of the Election Commission on all such references, and he shall act in accordance with such opinion. The reference to the President applies only to disqualification under Article 102(1) and not the cases covered under the anti-defection law (Article 102(2)). In the latter case, the Speaker/Chairman makes the decision, which is final. There are analogous provisions for members of the State legislatures and the reference is to be made to the Governor of the State.

Article 102(1) disqualifies a person for being chosen as, and for being, a member. However, Article 103 refers only to members, and not to candidates. Therefore, the process is applicable only for disqualifications that have arisen after the person has become a member. Once a person becomes a member and

then incurs a disqualification, the decision is made in accordance with Article 103. If there is no challenge at the time of election, and a person who is disqualified at that time becomes a member, Article 103 cannot be invoked. This would be determined under law made by Parliament.¹⁰⁶ Indeed, the Supreme Court has reiterated that if a person who has incurred a disqualification offers himself as a candidate and if no one objects and the Returning Officer accepts his candidature and if he is elected and there is no petition challenging the election, then he would continue as a member despite the disqualification.¹⁰⁷

This principle can lead to an interesting situation. A person was found to have falsely declared himself to be on the electoral rolls (by impersonating another person with the same name) while filing nominations to the Tamil Nadu Legislative Assembly. He was elected and became a member of the assembly. Another contestant discovered this false declaration a year later. By that time, the statutory limitation of forty-five days for filing an election petition had expired. He approached the High Court with a writ petition under Article 226. A single judge held the writ was not maintainable given the bar on courts under Article 329. On appeal, the division bench set aside the election using its powers under Article 226. On further appeal, the Supreme Court ruled that the power under Article 226 has to be interpreted widely and can be exercised when there is any Act that is against any provision of law or violative of constitutional provisions and when recourse cannot be had to the provisions of the Act for the appropriate relief. The appellant was not entitled to sit in the assembly. The period of the assembly was over; otherwise, the Election Commission could have been intimated to declare the seat vacant. The Court held that it was for the State government to recover the penalty under Article 193 for his sitting in the assembly while knowing that he was not qualified to do so.¹⁰⁸

There are several elements to this process of disqualification: (a) there must be a question regarding the disqualification, which is referred to the President; (b) the President obtains the opinion of the Election Commission; and (c) his decision is final. It is only after the President takes the decision that the seat becomes vacant. The question of whether a particular member has incurred a disqualification can be referred for the decision of the President by any citizen by means of making an application to the President. In this case, the President does not act in accordance with the advice of the Council of Ministers as specified in Article 74(1). He is bound to obtain the opinion of the Election Commission and act in accordance with such opinion.¹⁰⁹ It is the opinion of the Election Commission that is in substance decisive, and the Election Commission may inquire into the matter before giving its opinion.¹¹⁰ The Supreme Court has

ruled that the Election Commission acts in a quasi-judicial capacity while adjudicating upon the disqualification of a sitting member, and has to follow principles of natural justice.¹¹¹

Article 101 lays down several ways in which a seat may become vacant. As per Article 101(1), if a person becomes a member of both Houses, Parliament may by law determine the vacation of the seat in one House.¹¹² Article 101(2) specifies that the seat of a member of either House of Parliament will become vacant if he is elected to a State legislature, unless he resigns from the seat in the State legislature within a time to be specified in rules made by the President.¹¹³ Article 101(3)(a) states that the seat will become vacant on a member being subject to any disqualification under Articles 102(1) or 102(2). Article 101(3)(b) allows a member to resign from his seat by writing under his hand addressed to the Speaker/Chairman, and the seat will become vacant when the Speaker or Chairman accepts the resignation. The Speaker/Chairman may make an inquiry and reject the resignation if he finds that it was not voluntary or genuine. Article 101(4) allows the House to declare a seat vacant if a member is absent for a period of sixty days, not counting any period when the House is prorogued or adjourned for four or more consecutive days.

The vacation of a seat will occur only after the disqualification is decided. If the vacation is being effected under Articles 101(1), 101(2), 101(3)(b), or 101(4), there is no process of adjudication and the seat is vacated automatically at the time of disqualification. In the case of Article 101(3)(a), there may be a question on whether the member has incurred disqualification. If the member accepts disqualification, then the seat is immediately vacated. Otherwise, it is vacated when the decision is made by the President in the case of disqualification under Article 102(1) or by the Chairman/Speaker in the case of disqualification under Article 102(2).¹¹⁴ However, the member is treated as having ceased to be a member of the House on the date when he became subject to disqualification.¹¹⁵

V. CONCLUSION

The provisions in the Constitution regarding the composition of legislatures and the qualifications and disqualifications of their members have evolved over time. The main change in the provisions related to composition is that the number of seats in the Lok Sabha allocated to each State is frozen on the basis of the 1971

census. This has led to significant deviation from the principle that every Member of Parliament in the Lok Sabha should represent roughly the same number of citizens. Based on the 2011 census, we see that each Member of Parliament from Kerala represents about 1.67 million persons, while one from Rajasthan represents 2.74 million persons, a variation of 64 per cent.¹¹⁶ The primary change in terms of qualification relates to the Rajya Sabha, with Parliament removing the restriction that the candidate has to be an elector from the State that he seeks to represent.

Both Parliament and the courts have effected changes related to disqualification. We have examined three categories of disqualifiers: office of profit, anti-defection law, and a law made by Parliament. It is interesting to see that Parliament and courts have acted in different ways in these three areas. While courts have focused on clarifying the conditions under which a person is considered to hold an office of profit (and occasionally expanded the purview), Parliament has progressively relaxed the conditions by expanding the list of offices that are exempt for this purpose. In the case of the anti-defection law, Parliament has progressively made it more difficult for a Member of Parliament to differ from the party line; the facility of declaring a split in a party has been removed. In the case of conviction in a criminal case, the courts have tended to widen the ambit, while Parliament has tried to restrict the disqualifying conditions.

The anti-defection provision requires reconsideration. It has distorted the behaviour of legislators by taking away their choice to vote according to their conscience, and making them follow the party whip on all issues. Perhaps, one could find a compromise between the objectives of providing political stability and that of the freedom of legislators to vote according to their beliefs by restricting disqualifications to violations of the whip on issues that can bring down the government: confidence and adjournment motions, and money Bills.

¹ Constitution of India 1950, art 79.

² Constitution of India 1950, art 80.

³ Constitution of India 1950, sch 4.

⁴ Constitution of India 1950, art 80.

⁵ Constitution of India 1950, art 81.

⁶ Representation of the People Act 1950, s 3, sch 1.

⁷ Constitution of India 1950, art 331.

⁸ Constitution of India 1950, art 107.

⁹ Constitution of India 1950, art 108. The three Bills were the Dowry Prohibition Bill 1961, the Banking Service Commission (Repeal) Bill 1978, and the Prevention of Terrorism Bill 2002.

- ¹⁰ Constitution of India 1950, art 109.
- ¹¹ Constitution of India 1950, art 75(3).
- ¹² Constitution of India 1950, art 249.
- ¹³ Constitution of India 1950, art 312.
- ¹⁴ Constitution of India 1950, art 368.
- ¹⁵ Constitution of India 1950, arts 168(1) and 170.
- ¹⁶ Constitution of India 1950, art 168(2). The States are Andhra Pradesh, Bihar, Jammu and Kashmir, Karnataka, Maharashtra, Telangana, and Uttar Pradesh.
- ¹⁷ Constitution of India 1950, art 169.
- ¹⁸ Constitution of India 1950, art 198.
- ¹⁹ Constitution of India 1950, art 197.
- ²⁰ Constitution (Seventh Amendment) Act 1956, Statement of Objects and Reasons.
- ²¹ Constitution of India 1950, art 81.
- ²² Two-Member Constituencies (Abolition) Act 1961.
- ²³ Constitution (Forty-second Amendment) Act 1976.
- ²⁴ Constitution (Eighty-fourth Amendment) Act 2002 changed this to the 1991 census. However, before the Amendment was brought into effect, Constitution (Eighty-seventh Amendment) Act 2003 changed the reference to the 2001 census.
- ²⁵ Constitution (Eighty-fourth Amendment) Act 2002, Statement of Objects and Reasons.
- ²⁶ Constitution of India 1950, art 170.
- ²⁷ Constitution of India 1950, art 171.
- ²⁸ Constitution of India 1950, art 327.
- ²⁹ Constitution of India 1950, art 328.
- ³⁰ Constitution of India 1950, art 329.
- ³¹ *Meghraj Kothari v Delimitation Commission* AIR 1967 SC 669.
- ³² *NP Ponnuswami v Returning Officer, Namakkal* AIR 1952 SC 64; *Mohinder Singh Gill v Chief Election Commissioner* (1978) 1 SCC 405.
- ³³ Constitution of India 1950, art 84.
- ³⁴ *Pashupati Nath Singh vs Harihar Prasad Singh* AIR 1968 SC 1064.
- ³⁵ Constitution of India 1950, arts 99 and 188.
- ³⁶ Constitution of India 1950, arts 104 and 193.
- ³⁷ Representation of the People Act 1951, ss 2, 3, 4, 5, 5A, and 6.
- ³⁸ Representation of the People Act 1950, s 16.
- ³⁹ Representation of the People Act 1951, s 62.
- ⁴⁰ *Chief Election Commissioner v Jan Chaukidar* (2013) 7 SCC 507.
- ⁴¹ In the Representation of the People Act 1951, as it was originally enacted, it specified different conditions for Part A, Part B, Part C States and Ajmer, Coorg, Manipur, and Tripura.
- ⁴² Representation of the People Act 1951, s 3. The Section was amended through the Representation of the People (Amendment) Act 2003.
- ⁴³ *Kuldip Nayar v Union of India* (2006) 7 SCC 1.
- ⁴⁴ *Kuldip Nayar* ([n 43](#)) [308].
- ⁴⁵ Constitution of India 1950, art 102.
- ⁴⁶ Constitution of India 1950, art 191.
- ⁴⁸ *Srimati Kanta Kathuria v Manak Chand Surana* (1969) 3 SCC 268 [26], citing *Great Western Railway Company v Bater* [1922] AC 1.
- ⁴⁷ Constitution of India 1950, art 102(1)(a) and Explanation to art 102(1).

- ⁴⁹ *Yugal Kishore Sinha v Nagendra Prasad Yadav* AIR 1964 Pat 543.
- ⁵⁰ *Banomali Behera v Markanda Mahapatra* AIR 1961 Ori 205.
- ⁵¹ *Satya Prakash v Bashir Ahmed Qureshi* AIR 1963 MP 316.
- ⁵² *Ramappa v Sangappa* AIR 1958 SC 937.
- ⁵³ *Gatti Ravanna v GS Kaggeerappa* AIR 1954 SC 653.
- ⁵⁴ *Shibu Soren v Dayanand Sahay* (2001) 7 SCC 425.
- ⁵⁵ *Jaya Bachchan v Union of India* (2006) 5 SCC 266.
- ⁵⁶ *Divya Prakash v Kultar Chand Rana* (1975) 1 SCC 264.
- ⁵⁷ *Biharilal Dobray v Roshan Lal Dobray* (1984) 1 SCC 551.
- ⁵⁸ *Joti Prasad Upadhyaya v Kalka Prasad Bhatnagar* AIR 1962 All 128.
- ⁵⁹ *DR Gurushantappa v Abdul Khuddus Anwar* (1969) 1 SCC 466.
- ⁶⁰ *Satrucharla Chandrasekhar Raju v Vyricherla Pradeep Kumar Dev* (1992) 4 SCC 404.
- ⁶¹ *Ramappa v Sangappa* AIR 1958 SC 937.
- ⁶² *Guru Gobinda Basu v Sankari Prasad Ghosal* AIR 1964 SC 254.
- ⁶³ Parliament (Prevention of Disqualification) Act 1959.
- ⁶⁴ Parliament (Prevention of Disqualification) Amendment Act 2006.
- ⁶⁵ Parliament (Prevention of Disqualification) Amendment Act 2006, Statement of Objects and Reasons.
- ⁶⁶ ‘Kalam sends back Office of Profit Bill’ *Business Standard* (New Delhi, 31 May 2006) <http://www.business-standard.com/article/economy-policy/kalam-sends-back-office-of-profit-bill-106053101011_1.html>, accessed October 2015.
- ⁷¹ *Kihoto Hollohan* (n 70) [33]–[34].
- ⁸⁰ *Kihoto Hollohan* (n 70) [44].
- ⁶⁷ Constitution of India 1950, sch X.
- ⁶⁸ The Constitution (Ninety-first) Amendment Act 2003.
- ⁶⁹ These Articles provide the Supreme Court with the power to grant special leave to appeal from the decision of any court or tribunal, and High Courts to issue writs and the power of superintendence over all courts within its territorial jurisdiction.
- ⁷⁰ *Kihoto Hollohan v Zachillhu* (1992) Supp (2) SCC 651.
- ⁷² *Kihoto Hollohan* (n 70).
- ⁷³ *Kihoto Hollohan* (n 70) [110].
- ⁷⁴ *Ravi S Naik v Union of India* (1994) Supp (2) SCC 641 [11].
- ⁷⁵ *Ravi S Naik* (n 74) [25].
- ⁷⁶ ‘Decision of the Hon’ble Speaker, Lok Sabha on the petition given by Shri Rajesh Verma, MP against Shri Mohd. Shahid Akhlaque, MP under the Tenth Schedule to the Constitution’, Lok Sabha Bulletin-Part II, No 4424, dated 28 January 2008.
- ⁷⁷ *G Vishwanathan v Hon’ble Speaker Tamil Nadu Legislative Assembly* (1996) 2 SCC 353 [12].
- ⁷⁸ *G Vishwanathan* (n 77) [13].
- ⁷⁹ *Dr Kashinath G Jalmi v The Speaker* (1993) 2 SCC 703.
- ⁸¹ *Kihoto Hollohan* (n 70) [30].
- ⁸² ‘Rajnath Singh urges Mulayam, Mayawati to oppose FDI in Retail’ (ANI, 4 December 2012) <<http://www.aninews.in/newsdetail2/story87843/rajnath-singh-urges-mulayam-mayawati-to-oppose-fdi-in-retail.html>>, accessed October 2015; ‘FDI in Retail: Government wins vote in Lok Sabha with help from

Mulayam Singh Yadav, Mayawati' (NDTV, 5 December 2012) <<http://www.ndtv.com/article/cheat-sheet/fdi-in-retail-government-wins-vote-in-lok-sabha-with-help-from-mulayam-singh-yadav-mayawati-301449>>, accessed October 2015.

⁸³ Constitution (Fifty-second Amendment) Bill 1985, Statement of Objects and Reasons.

⁸⁴ '21 MPs cross-voted during Parliament trust motion' *The Economic Times* (New Delhi, 23 July 2008) <<http://economictimes.indiatimes.com/news/politics-and-nation/21-mps-cross-voted-during-parliament-trust-motion/articleshow/3268181.cms>>, accessed October 2015.

⁸⁵ The Constitution (Amendment) Bill 2010 (Bill No 16 of 2010) introduced by Manish Tewari, MP.

⁸⁶ Representation of the People Act 1951, s 8(1).

⁸⁷ Representation of the People Act 1951, s 8(2).

⁸⁸ Representation of the People Act 1951, s 8(3).

⁸⁹ Representation of the People Act 1951, s 8(4).

⁹⁰ *Lily Thomas v Union of India* (2013) 7 SCC 653.

⁹¹ Representation of the People Act 1951, s 9.

⁹² Representation of the People Act 1951, s 9A.

⁹³ Representation of the People Act 1951, s 10.

⁹⁴ Representation of the People Act 1951, s 10A.

⁹⁵ *K Prabhakaran v P Jayarajan* (2005) 1 SCC 754 [42].

⁹⁶ *Manni Lal v Parmai Lal* (1970) 2 SCC 462.

⁹⁷ *K Prabhakaran* (n 95) [44].

⁹⁸ *K Prabhakaran* (n 95) [52].

⁹⁹ *K Prabhakaran* (n 95) [57]–[60].

¹⁰⁰ *K Prabhakaran* (n 95) [61].

¹⁰¹ *Lily Thomas* (n 90). The judgment makes a distinction between obtaining a stay on the sentence and a stay on the conviction, and states that in the latter case, the disqualification ceases to be operative from the date of order of stay of conviction [22]. However, the Court also notes that the seat is vacated immediately upon disqualification according to Article 101(3)(a) read with Article 102(1)(e) [20–21]. This gives rise to the question of what happens to a Member of Parliament if he obtains a stay on the conviction. Does the vacation of the seat become nullified (and does he regain his seat), or is the effect only that of him being eligible for contesting elections again? Unfortunately, the judgment does not provide clarity on this question.

¹⁰² *Public Interest Foundation v Union of India*, Supreme Court Writ Petition (Civil) No 536/2011.

¹⁰³ *Public Interest Foundation v Union of India*, Supreme Court Writ Petition (Civil) No 536/2011, order dated 16 December 2013.

¹⁰⁴ Law Commission of India, *Electoral Disqualifications* (Law Com No 244, 2014) 50–51 <<http://lawcommissionofindia.nic.in/reports/Report244.pdf>>, accessed October 2015.

¹⁰⁵ *Public Interest Foundation v Union of India*, Supreme Court Writ Petition (Civil) No 536/2011, order dated 10 March 2014.

¹⁰⁶ *Election Commission v Saka Venkata Subba Rao* AIR 1953 SC 210. At the time of this judgment, there was no law that provided for such cases. Subsequent amendments to the Representation of the People Act 1951 enable the High Court to declare the election of a returned candidate to be void if he is found to have been disqualified on the date of his election (s 100).

¹⁰⁷ *Consumer Education and Research Society v Union of India* (2009) 9 SCC 648.

¹⁰⁸ *K Venkatachalam v A Swamickan* (1999) 4 SCC 526.

¹⁰⁹ *Election Commission of India v NG Ranga* (1978) 4 SCC 181.

¹¹⁰ *Brundaban Nayak v Election Commission of India* AIR 1965 SC 1892. This was with respect to the analogous provisions with respect to State legislatures in art 192.

¹¹¹ *Election Commission of India v Dr Subramanian Swamy* (1996) 4 SCC 104.

¹¹² The Representation of the People Act 1951 states that (a) if a person who has not taken his seat in either House gets chosen to both Houses, he may intimate to the Election Commission which House he wishes to serve within 10 days of the later of the dates on which he is chosen; in the absence of such intimation, his seat in the Rajya Sabha will become vacant (s 68); (b) if a person who is the member of one House gets chosen to the other House, his seat in the first House is declared vacant on the date he is so chosen (s 69). If a person is elected to more than one seat in either House, he has to resign all but one seats within 14 days of the last of the dates of being so elected, failing which all seats will be declared vacant (s 70 and Rule 91 of the Conduct of Election Rules 1961).

¹¹³ The Prohibition of Simultaneous Membership Rules 1950 provides 15 days to resign from the State legislature.

¹¹⁴ *Consumer Education and Research Society* ([n 107](#)).

¹¹⁵ *PV Narasimha Rao v State (CBI/SPE)* (1998) 4 SCC 626.

¹¹⁶ According to the 2011 census, Kerala's population is 33.4 million, while that of Rajasthan is 68.55 million. Kerala has 20 twenty seats and Rajasthan has 25 seats in the Lok Sabha.

CHAPTER 17

LEGISLATURE

privileges and process

SIDHARTH CHAUHAN

I. INTRODUCTION

THE core of the rationale for recognising legislative privileges is to protect lawmakers from interference by others in the discharge of their essential functions. This broadly entails their use as a shield against undue intrusions by the executive branch, the courts, and private parties. In medieval England, they were initially asserted by legislators to resist arrest and prosecution on account of words spoken on the floor of the house. They include a legislative chamber's powers to control the publication of its proceedings, since unauthorised publication could expose legislators to unwelcome scrutiny and hamper their performance. They have also been used punitively, including instances of imprisonment and fines being imposed on non-members, as well as to remove members. In the framework of representative democracy, their scope is intrinsically linked to the objective of ensuring unfettered deliberation inside the legislature. In India's post-Independence period, their invocation has been controversial in several instances and the open-textured nature of the relevant constitutional provisions has precipitated calls for codification.¹

The Indian Supreme Court's rulings in this area have exacerbated the uncertainty about their relationship with fundamental rights, especially speech and personal liberty. This prompts us to ask whether the exercise of legislative privileges is justiciable and if so, to what extent. While constitutional bench decisions have favoured limited judicial scrutiny, there is room for debate in light of the broader principle of 'separation of powers'. A strict separationist view would favour an absolute bar on judicial scrutiny, an intermediate position would allow for a historical inquiry into the existence of a privilege, and an expansive view would imply that courts can inquire both into the existence of a privilege and the merits of its use.²

Incumbents have invoked legislative privileges to target political opponents and critics, often in cases that are better suited for adjudication by the courts.

They have also been used as a method of disciplinary control in response to allegations of wrongdoing by lawmakers. The doctrinal debate has centred on whether this is proper when there are other remedies available. Such substitution appears to be a faster response to corrupt practices by legislators when compared with the slow pace and dilatory nature of judicial proceedings. Accordingly, privileges can be viewed as instruments to combat wrongdoing within the legislature apart from serving as a shield against undue external pressures. However, the discretionary use of privileges by legislative committees has often deviated from the procedural safeguards expected of adversarial settings. The stakes are high when they adopt inquisitorial methods to suspend or remove serving legislators.

There is considerable writing on the functioning of legislative bodies in India,³ including book-length studies on the present subject.⁴ It is not possible for this chapter to comprehensively survey these materials. Section II presents an overview of the justifications for legislative privileges and Section III engages with prominent judgments related to their scope. This part also references some instances where their invocation has been politically contentious but not litigated.

II. THE JUSTIFICATIONS FOR LEGISLATIVE PRIVILEGES

The ideal of the ‘rule of law’ implies that lawmakers should be subjected to the laws which they create, just as they would bind other citizens. By that standard, the conferral and exercise of legislative privileges appears to be an anomaly. However, the differential treatment accorded to incumbent legislators is justified in light of their duties as a particular class of public officials. The ability to speak and vote inside the legislature without the fear of intimidation or punishment is considered to be intrinsic to the role of an elected representative.⁵ In the United Kingdom, parliamentary privileges were first asserted as pre-existing rights that were enforceable against the prerogatives of the Crown as well as judicial authority. For the House of Commons, they included protections against the special rights of the House of Lords. This can be characterised as an effort to resist the powers of the other branches that were closely aligned with royal authority. Through the decades leading up to the English Civil War and thereafter, parliamentary privileges emerged as a significant check on excesses by the Crown. They evolved through specific assertions, often recognised by way of litigation.⁶ Their early history suggests that they were chiefly used to

protect legislators from arbitrary arrests, prosecution, and suspensions at the behest of the monarch. As a reflection of this history, Article 9 of the Bill of Rights of 1689 provided ‘That the freedom of speech and debates and proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament’. Similar language can be found in Article 1(6) of the United States Constitution, which was framed nearly a century later. Subsequent history includes situations where the British Parliament invoked its privileges to impose penal consequences such as imprisonment and fines on outsiders, as well as expulsion of its own members.

In the Indian context, legislatures created during the colonial period looked to British parliamentary practices. The earliest instances of the use of legislative privileges have been traced back to the rule of the East India Company in Bengal. During the direct rule of the British government, the provincial legislatures invoked them to insulate themselves from judicial scrutiny, particularly to protect serving legislators from impending arrests.⁷ Section 71 of the Government of India Act 1935 was the precursor to the relevant provisions in the Indian Constitution. During the Constituent Assembly debates, some members led by HV Kamath had demanded the codification of legislative privileges in order to mark a clean break from the British precedents. Responding to these demands, BR Ambedkar described the difficulty of including a detailed schedule to list out permissible actions and defended the incorporation of the privileges available to the House of Commons at the time, while also empowering the future Indian Parliament to legislate on the subject.⁸

In the Constitution, Article 105 deals with the powers and privileges of the Houses of Parliament, their members, and committees.⁹ Article 194 is the corresponding provision for State legislatures and includes identical language. Clause (1) assures freedom of speech inside the legislature and Clause (2) explicitly protects the act of speaking and voting by members inside the legislature from judicial proceedings of any kind. Clause (2) further pre-empts liability for the publication of matters connected to legislative business, provided the same is done under the authority of the chamber.¹⁰ Much disputation has arisen from Clause (3), which empowers Parliament to define its ‘powers, privileges and immunities’ in other respects. For ascertaining the existence of privileges, the original language of Clause (3) stated that they ‘shall be the same as those of the House of Commons of the United Kingdom as on the coming into the force of the Constitution’. This clause was amended to its current form in 1978. Even though the explicit reference to the House of Commons was removed, judicial interpretation has favoured the view that legislative chambers

in India continue to enjoy the powers, privileges, and immunities that were available to the former on 26 January 1950 (ie, the date on which the Constitution of India came into force). This position enables the identification of implicit limits for their permissible use, subject to the inherent differences in the structure of government contemplated by the Indian Constitution.^{[11](#)} Consequently, the predominant strategy in litigation about their scope has been that of establishing or denying comparisons with British precedents.

III. CONTESTATIONS OVER THE SCOPE OF LEGISLATIVE PRIVILEGES

Lawmakers face pressures of different kinds during the discharge of their official functions. While the routine demands of constituents, lobbyists, and interest groups may play on their minds, they can hardly be described as impermissible influences. Given the largely unspecified nature of legislative privileges in India, the courts have been frequently called in to identify the kinds of pressures that can be properly resisted through this route and those which should not. Such judicial scrutiny has itself been contentious.

1. Relationship with Fundamental Rights

The first Supreme Court decision reported on this subject is *Gunupati Keshavram Reddy v Nafisul Hasan*.¹² It dealt with the arrest of Homi Dinshaw Mistri (a deputy editor of *Blitz* magazine at the time) in Bombay who was subsequently taken to Lucknow and detained at a hotel, ostensibly for production before the Speaker of the Uttar Pradesh Legislative Assembly to answer a charge of breach of privilege. There was no discussion on the scope of privileges because the question pertained to the validity of the detention, which was held to be improper since Mistri had not been produced before a magistrate within twenty-four hours of arrest, as required under Article 22(2) of the Constitution.¹³

The first substantive judgment was *MSM Sharma v Sri Krishna Sinha* (hereinafter *Search Light I*).¹⁴ A member of the Bihar Legislative Assembly had criticised the incumbent Chief Minister (respondent) during the budget discussions for 1957–58. The remarks made on 30 May 1957 suggested that the respondent had appointed ministers and improperly transferred civil servants on the advice of another politician who had previously served as Industry Minister but had lost the most recent elections. Allegations were also made about how this former minister had been appointed as the Chairperson of the Bihar State Khadi Board to make him eligible for accommodation in a large bungalow in Patna, the State's capital city. These attacks were objected to and the Speaker decided to expunge most of the references to the name of the former minister from the official records. On 31 May 1957, *The Search Light* newspaper carried a news item that reported the contents of the previous day's speech and published the name of the former minister. While there was no immediate response, on 18 August 1958 the assembly issued a notice of breach of privileges to the editor and publisher of *The Search Light* for reporting the redacted remarks. They were given until 8 September 1958 to appear before the assembly's privileges committee, which was headed by the respondent. Apprehending penal consequences, the editor initially approached the Patna High Court, but withdrew his petition to approach the Supreme Court under its writ jurisdiction.

The petitioner's argument was that the exercise of legislative privileges and a consequent punishment would violate his 'freedom of speech and expression' (Article 19(1)(a)) and deprive him of his 'personal liberty' (Article 21). The majority opinion by SR Das CJ, framed two legal questions, namely (i) whether the legislature could use its privileges to restrict reportage of openly conducted

proceedings; and (ii) whether these privileges would prevail over the freedom of speech and expression of the petitioner. The majority opinion upheld the exercise of privileges, largely by referring to English precedents where Parliament had proceeded against those who had reported proceedings in a manner that deviated from the official records. The reasoning was that while there was a public interest in being informed about legislative proceedings through the press, the legislature should retain control over such publication to prevent inaccurate reporting or commentary that might cause or contribute to hindrances in its functioning. The majority also favoured the respondents on the second question, by observing that the exercise of legislative privileges under Article 194(3) could trump the freedom of speech and expression under Article 19(1)(a), since the former was a special protection accorded to legislatures in contrast to the general applicability of the latter provision.¹⁵ There was a sharp dissent from K Subba Rao J, who argued that the protections accorded to legislators under Article 194(1) were constrained by other provisions in the Constitution, including the fundamental rights. Hence, Article 194(3) should also be construed in light of limitations placed by the freedom of speech and expression that is available to all citizens. The dissenting judge opined that Article 194(3) was better described as a transitory provision, which should not be preferred over a fundamental right.

If one considers the facts, the invocation of privileges appears to be a substitute for a defamation suit, since the presumptive legal injury was caused by the publication of the former minister's name. It is difficult to fathom how the reportage had threatened the exercise of legislative functions. The publication of the expunged remarks might have been a journalistic impropriety but it cannot be described as an act that was calculated to obstruct the legislative process. The Court did not look past the bar on scrutinising procedural matters inside the State legislature (Article 212) even though the substantive reasons for invoking privileges were doubtful.¹⁶ As the dissent points out, the records of the proceedings did not corroborate the Speaker's instructions to expunge some of the remarks made on the floor of the House. It was probable that the correspondent who reported the proceedings may not have understood or ascertained the Speaker's oral instructions.

Ordinarily, the fundamental rights are accorded primacy over other provisions in the constitutional text. However, in *Search Light I*, the majority engaged in a misconceived attempt at purposive interpretation. The unstated claim was that the importance of carrying out legislative functions without hindrances was at the same pedestal as that of the State's enumerated powers to regulate speech

and expression.¹⁷ The majority relied on an expansive reading of a liberty-limiting provision whereas the same is usually done for widening the ambit of liberty-enhancing provisions.¹⁸ Soon thereafter, the Bihar Assembly reconstituted a privileges committee for the matter. The petitioners initiated another round of litigation by submitting that since the incumbent Chief Minister was heading the privileges committee, there was a much higher likelihood of punitive action against them. The case was considered by an eight-judge bench, which refused to reopen the questions that had been answered earlier.¹⁹

The Supreme Court's vacuity on press freedoms *vis-à-vis* legislative privileges left the field open for the unpredictable use of the latter. On 29 August 1961, the Lok Sabha issued a reprimand to RK Karanjia, the editor of *Blitz* magazine at the time. This was in response to an article entitled 'The Kripaloony Impeachment' which had commented upon JB Kripalani's criticism of VK Krishna Menon, the Defence Minister at the time. The privileges committee of the House observed that this article 'in its tenor and contents libelled an honourable member of this House (JB Kripalani) and cast reflections on him on account of his speech and conduct in the House and referred to him in a contemptuous and insulting manner'. This development provoked considerable debate about the freedom of journalists to comment on the performance of individual legislators. Eventually the situation was diffused when the New Delhi correspondent of the magazine tendered an apology to the House on 23 March 1962.²⁰ A comparable instance took place in the Madras Legislature in March 1961. The assembly had proceeded against the editor of *The Mail*, a newspaper that had carried editorial comments on speeches given by two opposition legislators during the budget discussions. The privileges committee found fault with the editor for not having read the entire record of the proceedings. However, it did not take any punitive action after receiving an explanation.²¹

The next apex court ruling was *Dr Jatin Chandra Ghosh v Hari Sadhan Mukherjee*.²² The petitioner had served as a legislator in the West Bengal Legislative Assembly. In January 1954, he gave notice to ask some questions but they were not allowed under the assembly's rules for the conduct of business. On 28 February 1955 he published these questions in a local journal called *Janamat*. They related to the conduct of a sub-divisional magistrate, who subsequently filed a criminal complaint of defamation. The petitioner argued that he was immune from prosecution on account of his privileges as a legislator. This was not accepted in the trial court, nor in the Calcutta High Court, and neither in the Supreme Court. BP Sinha CJ explained that since the petitioner had acted in his private capacity to publish the disallowed questions, he could not invoke Article

194, which protected materials published under the legislature's authority.²³

Special Reference No 1 of 1964 (hereinafter *Keshav Singh*) dealt with some facts that illustrated the dangers of subordinating fundamental rights to legislative privileges.²⁴ On 14 March 1964 the Speaker of the Uttar Pradesh Legislative Assembly issued a notice for breach of privileges against one Keshav Singh who had circulated a pamphlet that criticised a serving legislator. Later that day, the Speaker issued an arrest warrant against Keshav Singh, citing the latter's disruptive behaviour on receiving the notice as well as a previous letter sent to the Speaker, which was described as disrespectful. Consequently, Keshav Singh was detained for seven days at the District Jail in Lucknow. On 19 March 1964 Keshav Singh's lawyer approached the Lucknow bench of the Allahabad High Court through a writ of habeas corpus. A two-judge bench (NU Beg and GD Sahgal JJ) heard the matter and directed the detainee's release on the next day. However, on 21 March 1964 the assembly responded aggressively by issuing a fresh notice of breach of privileges to the two judges, Keshav Singh, and his lawyer. They were found to be in contempt of the legislature and the notice required them to be produced in custody before the House. Keshav Singh was required to be presented afresh after completing the initial period of detention. The affected parties approached the Allahabad High Court to challenge the validity of the assembly's actions. The matter was considered by a full court meeting of twenty-eight judges, which issued an interim order restraining the assembly from acting on the notice until its validity was adjudicated upon. This unprecedented situation was diffused since the assembly eventually revoked the arrest warrants against the two judges and Keshav Singh's lawyer. It also issued a clarificatory resolution to explain that the intent was to give the affected parties a reasonable opportunity to explain their conduct before the House. Nevertheless, the situation was considered grave enough for the Union government to seek an advisory opinion from the Supreme Court under Article 143(1).

The legal questions pertained to the validity of invoking privileges against acts committed outside the House and the permissibility of judicial review over them.²⁵ HM Seervai argued that the legislature had broad powers to define the scope of its privileges through specific resolutions, while MC Setalvad appeared on behalf of the High Court judges to defend judicial scrutiny of such acts of the legislature. It was held that it was proper for the two High Court judges to have entertained Keshav Singh's petition and that the full bench of the High Court was also competent to consider the validity of the legislature's resolution. Gajendragadkar CJ opined that the assembly was not competent to direct the

production of the two judges and Keshav Singh's lawyer in custody. This was because their respective acts of adjudication and legal representation were not closely connected to the initial acts on the part of Keshav Singh, which were found to be contemptuous. The concurring opinion (AN Sarkar J) flagged the court's difficulty in scrutinising the exercise of privileges through warrants that did not disclose reasons.²⁶

Seervai sought a broader reading of the legislature's powers to punish for its contempt. He drew analogies with precedents from the British Parliament to show that it had consolidated its powers to include those of self-composition. The extension to this claim was that legislative bodies in India had inherited comparable powers and it would be wrong to endorse judicial scrutiny over them. However, the majority favoured Setalvad's argument that there were fundamental differences in the structure of government created by the Indian Constitution. Unlike the British Parliament, which addresses election disputes and matters related to the disqualification of members through specific resolutions, the composition of the Indian Parliament is controlled by constitutional provisions, which contemplate judicial involvement.²⁷ Furthermore, the House of Lords has historically acted in a judicial capacity while one cannot point to comparable functions in the Indian context. It was observed that the 'powers, privileges and immunities' available to legislative bodies in India were bounded by other parts of the written Constitution and since the judiciary performs the primary role in enforcing them, it should have the power to review a privileges motion. These views rest on the premise that the legislature's powers to punish for contempt are not absolute and are considerably narrower than the analogous power of the courts. The facts demonstrated how legislative privileges could be used without giving a fair hearing to those who face the prospect of detention, which is a direct curtailment of the liberty interest enumerated under Article 21.

The next Supreme Court decision was *Tej Kiran Jain v N Sanjeeva Reddy*,²⁸ where the followers of a religious leader had filed a defamation suit against some Members of Parliament. The defendants included a former Lok Sabha Speaker and the incumbent Union Home Minister. On 2 April 1969, the MPs had been informed about the religious leader's conduct at a religious conference. The seer had apparently stated that untouchability was compatible with Hinduism and had walked out of a gathering when the national anthem was played. This report had prompted some sharp and derisive comments by the parliamentarians. Both the High Court and the Supreme Court ruled that these remarks were immune from litigation, since they were made during

parliamentary proceedings.

Apart from the cases surveyed above, there are other notable instances of legislative privileges being invoked against non-members. In 1960, the appointment of a government pleader in Madras contributed to one such controversy. When the appointment was challenged by another lawyer, the High Court did not interfere with it, but one of the judges suggested that the State Law Minister had an excessive influence in such appointments. This minister was the leader of the Legislative Assembly at the time and consequently a privileges motion was initiated against the judge for the extraneous remarks. In turn, retaliatory proceedings for contempt of court were sought by the lawyer who had earlier approached the High Court. The issue was de-escalated when the Chief Justice explained that the judge's remarks related to an executive function of the minister and were hence unsuited for redress through legislative privileges.²⁹

In 1988, the Maharashtra Assembly issued several notices to publications that had covered its discussions on the report of a commission of inquiry headed by Bakhtawar Lentin J of the Bombay High Court. The commission had inquired into the deaths of fourteen patients at JJ Hospital in January 1986 and found that they had been caused by the administration of contaminated glycerol. This implicated several public officials for their complicity in the distribution of adulterated drugs. The media coverage suggested that the State government was reluctant to act on these findings. Interestingly, Lentin J and the lawyers who assisted him in the commission also received such notices, ostensibly for misrepresenting the assembly's discussions on their report. The matter snowballed further when the assembly initiated privileges motions against some prominent lawyers who had supported Justice Lentin. However, they were not acted upon owing to vehement protests by bar associations all over the State.³⁰

The Tamil Nadu Legislative Assembly passed a resolution on 7 November 2003 directing the arrest and imprisonment of six individuals working in different capacities with *The Hindu* and its sister publication *Murasoli* for a period of fifteen days. This resolution also prohibited the journalists belonging to these newspapers from reporting on the legislature's proceedings for fifteen days. This was in response to an editorial titled 'Rising Intolerance' which had been published on 25 April 2003. This editorial defended three previously published reports, which had criticised Chief Minister Ms J Jayalalithaa's use of strong language in her speeches. The assembly had constituted a privileges committee, which recommended the punitive steps. However, the assembly's directives met with stiff resistance and the Supreme Court intervened by issuing a stay order against them. The legislature's attempt to punish outsiders through

this method was certainly disproportionate, and more so if we keep in mind that the British Parliament last used it to order an imprisonment in 1880.^{[31](#)}

2. Legislative Privileges and Corruption

After *Keshav Singh*, the next major ruling came more than three decades later in *PV Narasimha Rao v State (CBI/SPE)* (hereinafter *PV Narasimha Rao*).³² The lead petitioner, PV Narasimha Rao was the Prime Minister of India between 1991 and 1996. He headed the Congress Party, which occupied the highest number of seats in the Lok Sabha at the time but did not enjoy a simple majority. The demolition of a mosque at a disputed site by Hindu right-wing extremists in Ayodhya, Uttar Pradesh (in December 1992) had provoked communal violence in several parts of the country. The Union government faced considerable criticism for its inability to prevent and control this violence. Consequently, it dismissed several State governments run by opposition parties, principally the Bharatiya Janata Party (BJP), whose leadership had catalysed the movement to build a temple at the disputed site. In this environment of distrust, a no-confidence motion was moved against the Union Government on 26 July 1993 and put to vote in the Lok Sabha on 28 July 1993. The government went on to complete its full term, since 265 MPs supported its continuance while 251 MPs voted against it. Subsequently, the Central Bureau of Investigation (CBI) uncovered evidence implicating the petitioner and some party colleagues for offering bribes to MPs from two smaller parties, namely the Jharkhand Mukti Morcha (JMM) and the Janata Dal Ajit Singh group (JDAS). This was allegedly done to procure their votes or to ensure abstentions during the no-confidence motion. Without their cooperation, the government could have lost the motion.

The CBI initiated proceedings and sought the requisite sanction to prosecute the legislators.³³ The accused legislators resisted this by arguing that the acts related to the no-confidence motion were immune from prosecution owing to their legislative privileges. This objection was refuted by a lower court, but the affected parties approached the higher courts through writ jurisdiction.³⁴ In a decision that is difficult to comprehend, the majority opinion (SP Bharucha J) concluded that most of the legislators could not be prosecuted since the alleged misconduct was closely connected to voting inside the legislature and was hence protected by Article 105(2). A distinction was drawn between ‘bribe givers’ and ‘bribe takers’ to hold that the former could be prosecuted but those who accepted bribes and voted in the no-confidence motion could not be proceeded against. The dissenting opinion (SC Agarwal J) explained that legislative privileges could not bar prosecution for accepting bribes, even if that was closely connected to legislative functions such as speaking and voting inside the

chamber. Understandably, this judgment attracted widespread criticism in the press and scholarly commentaries.³⁵ Even though the majority opinion surveyed a large number of foreign precedents, it ignored decisions that held privileges to be inapplicable when bribes are given to influence voting inside legislatures.³⁶ As a response to this judgment, the National Commission to Review the Working of the Constitution (NCRWC) had recommended an amendment to Article 105 to explicitly exclude corrupt acts from its ambit.³⁷

The use of legislative privileges in relation to corruption came to the foreground again in *Raja Ram Pal v Speaker, Lok Sabha* (hereinafter *Raja Ram Pal*).³⁸ In a television programme carried by a private news channel on 12 December 2005, a Rajya Sabha MP and ten Lok Sabha MPs were identified as accepting money or favours in lieu of asking questions during parliamentary proceedings. The 'cash for queries' scam received widespread attention in the press and the Lok Sabha Speaker promptly constituted a privileges committee to inquire into it. The privileges committee acted swiftly on the basis of videographic evidence and recommended the expulsion of the ten members, which was effected on 23 December 2005. The ethics committee of the Rajya Sabha initiated action against its member and recommended his expulsion. Another Rajya Sabha member was the subject of a programme telecast on 19 December 2005, wherein he was demanding money from an NGO to set up projects in his constituency and for the release of discretionary funds under the Member of Parliament Local Area Development Scheme (MPLADS). This was reported to the ethics committee of the Rajya Sabha and the concerned member was expelled on 21 March 2006. These twelve MPs then approached the Supreme Court to question their expulsions.

Their main contention was that Parliament was not competent to expel them in such a manner since the Constitution explicitly enumerates the conditions under which MPs can be disqualified. In particular, attention was drawn to Article 102(1)(e) read with Section 8(1)(m) of the Representation of the People Act 1951, which contemplates the removal of legislators convicted under the Prevention of Corruption Act 1988. The extension to this argument was that a privileges committee is far less likely to adhere to considerations of natural justice such as impartiality, reason giving and giving a fair hearing to those accused of wrongdoing. The implicit claim was that the legislature should not use unguided discretionary powers in matters where judicial involvement was explicitly contemplated. The majority (YK Sabharwal CJ and CK Thakker J) answered this question in favour of the legislative chambers. The gist was that in addition to the explicit conditions for disqualification, privileges can be used in a

discretionary manner to act against the misconduct of members which brings disrepute to the entire chamber and thereby obstructs the legislative process. A distinction was drawn between 'expulsion' through this route and 'disqualification' in terms of their consequences. It was observed that expulsion by way of privileges would not disentitle the affected individuals from seeking membership again, whereas disqualification would have a lasting effect.³⁹ The dissenting opinion (RV Raveendran J) maintained that the use of privileges to expel the MPs was improper, since the conditions for their disqualification were enumerated in the Constitution and formed a self-contained code.

The decision also built upon the position in *Keshav Singh* that courts could exercise a limited degree of scrutiny over privileges, owing to their primacy in interpreting the constitutional text. It explained that while Articles 122 and 212 prohibited judicial scrutiny of legislative proceedings on account of allegations of procedural impropriety, there remained scope for examining allegations of 'substantial illegality'. It was observed that 'there is no foundation to the plea that a legislative body cannot be attributed jurisdictional error'.⁴⁰ This reiteration of the permissibility of judicial review was a response to the unwillingness of the Speakers of the Lok Sabha and the Rajya Sabha to be impleaded as respondents in this case. They maintained that the expulsions concerned the legislature alone and could not be examined by the courts. Their position highlights a glaring conceptual inconsistency in *Raja Ram Pal*. The majority opinions liberally cited foreign decisions to support the use of legislative privileges for expelling errant members but ignored the comparatively restricted scope for judicial scrutiny, which is a concomitant of the same. A legislature's power to expel its members through an uncoded route flows from a broader view of its powers of self-composition. At the same time, the position refined from *Keshav Singh* was that judicial scrutiny of a 'substantial illegality' in legislative proceedings is proper, since the composition of Indian legislatures is controlled by a written constitution.⁴¹

The most recent constitutional bench ruling on this subject is *Amarinder Singh v Special Committee, Punjab Vidhan Sabha* (hereinafter *Amarinder Singh*).⁴² The petitioner belonged to the Indian National Congress (INC) party and was the Chief Minister of Punjab during the twelfth term of the Legislative Assembly between 2002 and 2007. During its thirteenth term, he became the Leader of the Opposition since the Shiromani Akali Dal (SAD) had formed the government after elections in February 2007. On 18 December 2007 a majority of the assembly's members resolved to constitute a special legislative committee to inquire into the improper exemption of a plot of land (that belonged to a private

developer) from an urban development scheme in Amritsar. The same had been allegedly done during the petitioner's rule. The special committee submitted its report on 3 September 2008 and recommended his expulsion for the remainder of the assembly's term. Meanwhile, criminal proceedings had also been initiated in respect of these allegations. On 10 September 2008 another resolution was passed to act on these recommendations and orders for expulsion were handed down to Amarinder Singh. He then approached the High Court of Punjab and Haryana to challenge his expulsion from the State legislature. The High Court issued an order that appeared to endorse the assembly's position but accepted that the matter involved a question of constitutional interpretation and transferred it to the Supreme Court.

Before the Supreme Court, the lawyers appearing for the Punjab Vidhan Sabha compared the facts to those in *Raja Ram Pal*. They urged that the use of legislative privileges was proper since Amarinder Singh's alleged complicity in the irregular exemption of land had brought disrepute to the Legislative Assembly as a whole. The Court unanimously favoured the petitioner and restored his membership to the State legislature. KG Balakrishnan CJ held that legislative privileges could not be used to tackle allegations of corruption related to purely executive functions.⁴³ It was also observed that the special committee had inquired into allegations connected to acts committed during the previous term of the Punjab Assembly. Therefore, it was misplaced to use privileges, since the past actions did not threaten the discharge of legislative functions during the current term.⁴⁴ It was further opined that since proceedings had been initiated before a criminal court, it was advisable to persist with them instead of using privileges as an instrument of political vendetta.

The situations examined above are not exhaustive of instances where legislatures have either tried or succeeded in removing members through this uncodified route. An early example is that of HG Mudgal's resignation from the Lok Sabha on 24 September 1951. He was accused of receiving monetary benefits from the Bombay Bullion Association in return for mobilising support for the latter and advancing its interests in Parliament. A privileges motion was moved by Prime Minister Nehru wherein his conduct was described as 'derogatory to the dignity of the House and inconsistent with the standards which Parliament was entitled to expect from its members'. Further discussions on this resolution prompted him to resign.⁴⁵

Another instance is that of Subramanian Swamy's expulsion from the Rajya Sabha in 1976. The House had constituted a committee on 2 September 1976 to investigate Swamy's conduct, which was described as 'alleged anti-India

propaganda calculated to bring into disrepute Parliament and other democratic institutions of the country and generally behaving in a manner unworthy of a member'. In its report submitted on 12 November 1976 the privileges committee recommended Swamy's expulsion, which was approved by the House three days later.⁴⁶ It must be highlighted that this was done during the imposition of the internal Emergency between June 1975 and March 1977. The Congress government led by Indira Gandhi at that time had detained thousands of political opponents and considerably muzzled civil liberties.

After the Congress Party's defeat in the 1977 elections, Indira Gandhi had entered the Lok Sabha by winning a by-election. On 18 November 1977 the House initiated a privileges motion against Indira Gandhi and two others. It cited obstructions in the collection of information by officials in the Industry Ministry, which was being done to answer some questions asked in the Lok Sabha. These questions related to her son Sanjay Gandhi's involvement in the establishment of a car-manufacturing plant. It was alleged that she had used her previous office to resort to intimidation, harassment, and institution of false cases against these officials, thereby obstructing legislative functioning. A privileges committee found her guilty but left the punitive action to the House, which adopted a motion on 19 December 1978 to expel Indira Gandhi and the other two members.⁴⁷ However, the resolution was withdrawn during the next term of the Lok Sabha in 1981, by which time the Congress Party had regained incumbency. There was a substantive debate on whether the House had the power to expel its members in such a fashion and concerns were expressed about the lack of jurisdiction and impartiality in this instance. Even though the parliamentary debates at the time did not favour expulsions through this route, the decision in *Raja Ram Pal* reflects an opposite view.

In 1978, the Haryana Legislative Assembly had expelled Hardwari Lal from its membership, without giving him an opportunity to explain his conduct before the privileges committee. He challenged his expulsion in the High Court, which ruled in his favour by holding that the legislature was not competent to enforce such expulsions.⁴⁸ Even though the expulsion in that particular case was highly questionable, the High Court's ruling on the broader issue now stands overturned by *Raja Ram Pal*. A similar question was considered by the Madras High Court in *K Anbazhagan v Secretary, Tamil Nadu Legislative Assembly*,⁴⁹ wherein ten legislators had been expelled on 22 December 1986 for burning copies of the Constitution during a protest. The Court recognised the legislature's powers to expel members by treating such conduct as a breach of its privileges, even though it could have been tried as an offence under the Prevention of Insults to

National Honour Act 1971. However, the High Court was unwilling to scrutinise the validity of the expulsions owing to the import of Article 212. As mentioned earlier, *Raja Ram Pal* took a different view on this issue as well.

IV. CONCLUSION

The constitutional bench decisions mentioned in the preceding sections can be roughly grouped into two clusters. While *Search Light I* and *Keshav Singh* dealt with the disproportionate use of legislative privileges against non-members, *PV Narasimha Rao*, *Raja Ram Pal*, and *Amarinder Singh* examined their applicability when members were accused of corruption.

The discussion on the first cluster has highlighted the court's ambiguous position on conflicts between the legislature's privileges and the fundamental rights of outsiders. While the majority in *Search Light I* had subordinated the freedom of speech and expression to the exercise of legislative privileges, the advisory opinions in *Keshav Singh* seemingly protected 'personal liberty' from their untrammelled use. Yet, there was no explicit overturning of the earlier decision. Instead, feeble attempts were made to differentiate between the liberties at stake in the two cases. An apparent textual difference is that while Article 19(2) explicitly enumerates the grounds for placing 'reasonable restrictions' on the freedom of speech and expression under Article 19(1)(a), there are no comparable restraints on 'personal liberty' under Article 21. By this logic, legislative privileges can prevail over press freedoms, which are subject to enumerated restraints but would have to yield to claims of 'personal liberty' since the countervailing State interests were not explicitly enumerated and left to judicial interpretation. This position has led to considerable confusion. Given that subsequent decisions have recognised the intersections between the fundamental rights (especially between Articles 14, 19, and 21), it has become difficult to prioritise one over another. Another dimension of the Court's inconsistency is that while *Search Light I* endorsed restrictions on the reporting of legislative proceedings, *Keshav Singh* favoured a liberty interest when the affected parties included fellow judges. This feeds the criticism of judicial behaviour that it is shaped by the social status and identity of litigants rather than the consistent application of principles.

In the second cluster, *PV Narasimha Rao* stands out as an egregious decision where the Supreme Court comes across as an apologist for corruption by lawmakers. In doing so, the majority in that case had overstressed the utility of

privileges for shielding legislators from bribery prosecutions by an ill-motivated executive branch. A close consideration of the facts shows that those concerns were misplaced. In *Raja Ram Pal*, legislative privileges were used as a ‘sword’ against corruption rather than as a ‘shield’. With respect to the facts, the majority opinions held that privileges had been collectively exercised by the legislative chambers against individual members to preserve the integrity of their functions. This begs the question as to why they did not explicitly overrule the erroneous decision in *Narasimha Rao*. The decisive use of privileges was probably chosen to avoid the implications of the previous ruling, which had made it virtually impossible to prosecute serving legislators for accepting bribes. Another notable point is that the time taken for effecting expulsions was much less than what might have been taken for disqualification after conviction. The legislature’s term would have probably ended by the time the matter would be adjudicated, thereby making the possibility of removal redundant. So in that sense, the use of privileges can be characterised as a form of summary justice against dishonest legislators. While such steps may attract public approval in the short run, they can easily sidestep the elements of natural justice. This concern was reinforced in *Amarinder Singh*, where the decision was largely an exercise in distinguishing the impugned facts from those in *Raja Ram Pal*. It tried to articulate a limiting principle for the use of privileges by emphasising that they should be used to respond to direct and proximate causes for the obstruction of legislative functions rather than those which may be vaguely construed as disrespectful.

If we examine the two clusters together, the umbrella question is whether trenchant criticism of legislators or any other act that contributes to a poor public estimation of their performance should be treated as obstructions to their official functions, thereby justifying the use of privileges. From the prism of speech guarantees, the answer for most of us would be in the negative. In modern democracies, lawmakers need to take on board a broad variety of opinions, including those that are deeply critical of their antecedents and abilities. If we turn to the familiar comparison between legislative privileges and the power of courts to punish for their contempt, the extrapolation is that legislators ought to be cautious in using this power in response to external criticism, while judges require stronger protections from external influences in order to function effectively. On this count, the Indian Supreme Court’s position exemplified in the first cluster is far from satisfactory. With respect to the second cluster, it has allowed room for improvisation in the legislature’s response to corrupt acts by its own members. Should privileges be construed narrowly so as to allow these acts to be prosecuted before the courts or should they be used proactively to tackle corruption from within? The decision in *Raja Ram Pal* veered towards the

view that self-dealing acts by individual members bring disrepute to the entire legislature and hence they can be redressed promptly through this route. On the other hand, there are serious anxieties about the structure and functioning of legislative committees when compared with that of the courts. Privileges committees constituted at the behest of incumbents have frequently turned into self-interested inquisitorial bodies that take disproportionate action against political opponents and other critics. On balance, it is hard to make a definitive case for their invocation as a method of disciplinary control.

¹ The Indian Press Commission made such a demand as early as 1954. For a sample of writings favouring codification of legislative privileges in India, see P Govinda Menon, 'Parliamentary Privileges and Their Codification' (1968) 2(3) *Journal of Constitutional and Parliamentary Studies* 1; LM Singhvi, 'The Question of Codification of Privileges in India' (1975) 9(3) *Journal of Constitutional and Parliamentary Studies* 295; SH Shakhder, 'The Codification of Legislative Privileges in India' in Alice Jacob (ed) *Constitutional Development since Independence* (NM Tripathi 1975); Akhtar Ali Khan, 'Powers, Privileges and Immunities: Need for Codification' (1980) 41(2) *Indian Journal of Political Science* 309; KN Goyal, 'Codification of Privileges—Search for an Alternative' (1985) 3 SCC J 21; Anirudh Prasad, 'Do the Indian Legislatures Enjoy a Privilege Not to Codify Their Privileges?' (1991) 29(2) *Civil and Military Law Journal* 81; K Madhusudana Rao, 'Codification of Parliamentary Privileges in India—Some Suggestions' (2001) 7 SCC J 21. There is an ongoing research project under the aegis of the Indian Law Institute, New Delhi, which seeks to generate a 'Restatement of the Law'. The subject of legislative privileges was among the first to be included. Even though some historically established privileges are usually enumerated in the rules for conduct of business for legislative bodies, there remains considerable anxiety about their invocation in unforeseen situations.

² These approaches can be flagged as the 'on-the-face' view, the 'existence' view, and the 'reviewability' view. See Shubhankar Dam, 'Parliamentary Privileges as a Façade: Political Reforms and Constitutional Adjudication' (2007) 49(1) *Singapore Journal of Legal Studies* 162, 164. See also Anirudh Prasad, 'Jurisprudential Study of Legislative Privileges in India' (1989) 16(3/4) *Indian Bar Review* 398; PK Balasubramanyan, 'Parliamentary Privilege: Complementary Role of the Institutions' (2006) 2 SCC J 1.

³ See eg, MN Kaul and SN Shakhder, *Practice and Procedure of Parliament*, ed PDT Achary (6th edn, Lok Sabha Secretariat 2009); Subhash C Kashyap, *Anti-Defection Law and Parliamentary Privileges* (3rd edn, Universal Law Publishing 2011); Subhash C Kashyap, *Parliamentary Procedure: The Law, Privileges, Practices and Precedents* (3rd edn, Universal Law Publishing 2014).

⁴ See eg, PS Pachauri, *The Law of Parliamentary Privileges in UK and in India* (NM Tripathi 1971); Hans Raj, *Privileges of Members of Parliament in India* (Surjeet Publications 1979); MP Jain, *Parliamentary Privileges and the Press* (NM Tripathi 1984); Ranjana Arora, *Parliamentary Privileges in India: Jawaharlal Nehru to Indira Gandhi* (Deep and Deep 1984); MA Qureshi, *Indian Parliament: Powers, Privileges and Immunities* (Deep and Deep 1994); Prititosh Roy, *Parliamentary Privileges in India* (Oxford University Press 1991); VR Krishna Iyer and Vinod Sethi, *Parliamentary Privileges: An Indian Odyssey* (Capital Foundation Society 1995).

⁵ Erskine May, *Parliamentary Practice*, ed Douglas Miller (24th edn, LexisNexis 2011) ch 3.

⁶ For a concise account of some important cases from this period, see Robert J Reinstein and Harvey A Silverglate, 'Legislative Privilege and the Separation of Powers' (1973) 86 *Harvard Law Review* 1113, 1120–35.

⁷ PN Malhan, 'Legislative Privileges in India' (1942) 3(3) *Indian Journal of Political Science* 337; LR

Sethi, 'Privileges of the Members of the Legislature in India in Matters of Freedom from Arrest' (1942) 3(4) Indian Journal of Political Science 515; Salil Kumar Nag, *Evolution of Parliamentary Privileges in India till 1947* (Sterling Publishers 1978).

⁸ Vinod Sethi, 'Press and the Parliament' (1980) 41(4) Indian Journal of Political Science 657, 663.

⁹ 105. Powers, privileges, etc. of the Houses of Parliament and of the members and committees thereof:

- (1) Subject to the provisions of this constitution and the rules and standing orders regulating the procedure of Parliament, there shall be freedom of speech in Parliament.
- (2) No member of Parliament shall be liable to any proceedings in any court in respect of anything said or any vote given by him in Parliament or any committee thereof, and no person shall be so liable in respect of the publication by or under the authority of either House of Parliament of any report, paper, votes or proceedings.
- (3) In other respects, the powers, privileges and immunities of each House of Parliament, and of the members and the committees of each House, shall be such as may from time to time be defined by Parliament by law, and, until so defined shall be those of that House and of its members and committees immediately before the coming into force of Section 15 of the Constitution (Forty-fourth Amendment) Act 1978.
- (4) The provisions of clauses (1), (2) and (3) shall apply in relation to persons who by virtue of this constitution have the right to speak in, and otherwise to take part in the proceedings of a House of Parliament or any committee thereof as they apply in relation to members of Parliament.

¹⁰ This is a clarificatory clause since the unauthorised publication of parliamentary proceedings had been a frequent source of litigation in the United Kingdom. The Parliamentary Proceedings (Protection of Publication) Act 1956 was enacted at the urging of Feroze Gandhi. It conferred a statutory protection for publishing substantially true reports of legislative discussions. This Act was repealed during the internal emergency of 1975–77 but reintroduced soon thereafter.

¹¹ *State of Karnataka v Union of India* (1977) 4 SCC 608 [57]; *Raja Ram Pal v Speaker, Lok Sabha* (2007) 3 SCC 184 [112], [123].

¹² AIR 1954 SC 636.

¹³ For a contemporaneous comment, see RC Ghosh, 'Parliamentary Privilege, Civil Liberty and Homi Dinshaw Mistri's Case' (1952) 13(3/4) Indian Journal of Political Science 38. Ghosh argued that the legislative privileges conferred by art 194 were coordinate to the protections contemplated by art 22(2), and that it was erroneous for the Court to have relied upon the latter provision to invalidate the detention.

¹⁴ AIR 1959 SC 395. In the intervening period, there were at least two cases where High Courts refused to scrutinise the exercise of privileges by Legislative Assemblies, in Orissa (*Godavaris Misra v Nandakisore Das* AIR 1953 Ori 111; the Speaker had disallowed questions asked by a member) and Uttar Pradesh (*Raj Narain Singh v Atmaram Govind* AIR 1954 All 319; disciplinary action had been taken against a member), respectively.

¹⁵ On the prospective violation of 'personal liberty' (art 21), the majority held that this question was redundant since the privileges committee was bound by the assembly rules for conduct of business which had been laid down in advance and therefore met the requisite standard of 'procedure established by law'.

¹⁶ Constitution of India 1950, art 212 reads:

- (1) The validity of any proceedings in the Legislature of a State shall not be called in question on the ground of any alleged irregularity of procedure; (2) No officer or member of the Legislature of a State in whom powers are vested by or under this Constitution for regulating procedure or the conduct of business, or for maintaining order, in the Legislature

shall be subject to the jurisdiction of any court in respect to the exercise by him of these powers.

Art 122 is the corresponding provision for the Union Parliament.

¹⁷ Constitution of India 1950, art 19(2) reads:

(2) Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.

¹⁸ A recent piece has argued that a search for reconciliation between seemingly conflicting provisions is only required when they have the same pedigree. Since the provisions dealing with legislative privileges have undergone amendments in 1976 and 1978, they now have a lower pedigree than the original text of the Constitution, which included the fundamental rights. Hence, press freedoms should be prioritised over legislative privileges. See Shivprasad Swaminathan, 'The Conflict between Freedom of the Press and Parliamentary Privileges: An Unfamiliar Twist in a Familiar Tale' (2010) 22(1) National Law School of India Review 123.

¹⁹ *Pandit MSM Sharma v Sri Krishna Sinha* AIR 1960 SC 1186 (hereinafter *Search Light II*).

²⁰ MV Pylee, 'Free Speech and Parliamentary Privileges in India' (1962) 35(1) Pacific Affairs 11, 22.

²¹ Pylee ([n 20](#)) 16–17.

²² AIR 1961 SC 613.

²³ This case is similar to an earlier decision of the Calcutta High Court where a legislator's speech had been published in 'Lok Sevak', a Bengali newspaper. The legislator was part of the editorial board for the newspaper and had published his own speech in that capacity. The Court had ruled that he could not avoid charges of criminal defamation by invoking legislative privileges. *Dr Suresh Chandra Banerji v Punit Goala* AIR 1951 Cal 176.

²⁴ AIR 1965 SC 745.

²⁵ *Special Reference No 1 of 1964* ([n 24](#)) [27].

²⁶ This case attracted substantial scholarly commentary. See eg, Duncan B Forrester, 'Parliamentary Privilege—An Indian Constitutional Crisis' (1964) 18(2) Parliamentary Affairs 196; Phiroze K Irani, 'The Courts and the Legislature in India' (1965) 14(3) International and Comparative Law Quarterly 950; Dalip Singh, 'Parliamentary Privileges in India' (1965) 26(1) Indian Journal of Political Science 75; NKP Sinha, 'The Nature of Parliamentary Privileges in the Indian Constitution' (1965) 26(3) Indian Journal of Political Science 58; DN Banerjee, *Supreme Court on the Conflict of Jurisdiction Between the Legislative Assembly and the High Court of Uttar Pradesh: An Evaluation* (World Press 1966); PK Tripathi, 'Mr. Justice Gajendragadkar and Constitutional Interpretation' (1966) 8(4) Journal of the Indian Law Institute 479 (1966); DC Jain, 'Judicial Review of Parliamentary Privileges: Functional Relationship of Courts and Legislatures in India' (1967) 9 Journal of the Indian Law Institute 205; M Hidayatullah, 'Parliamentary Privileges: The Press and the Judiciary' (1968) 2(2) Journal of Constitutional and Parliamentary Studies 1.

²⁷ In particular, arts 102(1)(e) and 191(1)(e), respectively, contemplate disqualification of legislators under laws made by Parliament and State legislatures. This includes disqualification on account of conviction for any of the offences enumerated in s 8 of the Representation of the People Act 1951. Art 329 empowers a High Court to directly entertain an election petition.

²⁸ (1970) 2 SCC 272.

²⁹ Pylee ([n 20](#)) 17–18.

³⁰ See PA Sebastian, 'Legislative Privileges: People Versus their Elected Representatives' (1988) 23(37)

Economic and Political Weekly 1878; M Rahman, 'Legislature Guns for Justice Bakhtawar Lentin' *India Today* (15 May 1988).

³¹ See TR Andhyarujina, 'Need for reformulating the law' *The Hindu* (Chennai, 14 November 2003) <<http://www.thehindu.com/2003/11/14/stories/2003111401331000.htm>>, accessed October 2015; VR Krishna Iyer, 'House privileges and the courts' *The Hindu* (Chennai, 27 November 2003) <<http://www.thehindu.com/2003/11/27/stories/2003112701961000.htm>>, accessed October 2015; AG Noorani, 'The enormity of the threat' 20(24) *Frontline* (22 November 2003); Anupam Gupta, 'Power and restraint' 20(24) *Frontline* (22 November 2003); Ajit Sharma, 'The Privileged Legislature' (2003) 38(48) *Economic and Political Weekly* 5018; NB Rakshit, 'Parliamentary Privileges and Fundamental Rights' (2004) 39(13) *Economic and Political Weekly* 1379.

³² (1998) 4 SCC 626.

³³ Prevention of Corruption Act 1988, s 19, lays down a requirement for obtaining a prior sanction from a superior authority to prosecute public officials. This requirement has been inherited from colonial era legislation owing to apprehensions about frivolous complaints against civil servants. In the post-Independence context, it has been a formidable obstacle in prosecuting corruption.

³⁴ The other legal question was whether MPs came within the definition of 'public servants' for the purpose of prosecution under the Prevention of Corruption Act 1988. On this point, both the majority and the dissenting opinions agreed that they would be so covered, but a sanction for prosecution was needed from the Speaker of the respective legislative chambers.

³⁵ See Balwant Singh Malik, 'PV Narasimha Rao v State: A Critique' (1998) 8 SCC J 1; Praveen Swami, 'The JMM case—the givers and the takers' 15(9) *Frontline* (25 April 1998); AG Noorani, 'Bribes in Parliament: A Shocking Ruling by the Supreme Court' in *Constitutional Questions in India* (Oxford University Press 2000) 222–25; Shobha Saxena, 'Parliamentary Privileges and the JMM Case' AIR 2000 Jour 26.

³⁶ For example, in *United States v Daniel Brewster* 408 US 501 (1972), the US Supreme Court refused to apply the 'speech and debate clause' to protect a Senator from prosecution for accepting bribes in relation to his official acts. Warren Burger CJ said that the clause was not meant 'to make Members of the Congress super-citizens, immune from criminal responsibility'.

³⁷ One of the bribe takers was subsequently tried for his involvement in the murder of an aide who had demanded a share in the amount after threatening public disclosure of the details. See TR Andhyarujina, 'Shibu Soren's unpunished act of bribery' *The Hindu* (Chennai, 16 December 2006) <<http://www.thehindu.com/todays-paper/tp-opinion/shibu-sorens-unpunished-crime-of-bribery/article3034198.ece>>, accessed October 2015.

³⁸ *Raja Ram Pal* (n 11).

³⁹ For a commentary on this point, see AG Noorani, 'Privilege to expel' 24(2) *Frontline* (27 January 2007). For an earlier discussion, see Anirudh Prasad, 'Do the Indian Legislatures Possess Power to Expel their Members?' (1990) 28(4) *Civil and Military Law Journal* 296.

⁴⁰ *Raja Ram Pal* (n 11) [431].

⁴¹ See Shubhankar Dam, 'Parliamentary Privileges as a Façade: Political Reforms and Constitutional Adjudication' (2007) 49(1) *Singapore Journal of Legal Studies* 162, 174–75.

⁴² (2010) 6 SCC 113.

⁴³ In *Raja Ram Pal*, one of the expelled MPs had accepted bribes in lieu of discretionary grants from the MPLADS, which resembles an executive function. Since the expulsion in that case was upheld, in *Amarinder Singh* the Court could have clarified that such supplementary functions performed by legislators are not protected by privileges. Given that the constitutionality of the MPLADS was later upheld in *Bhim Singh v Union of India* (2010) 5 SCC 538, future improprieties in these discretionary grants could be shielded by characterising them as core legislative functions.

⁴⁴ It is worth considering whether this observation has implicitly overruled the decision in *AM Paulraj v*

Speaker, Tamil Nadu Legislative Assembly AIR 1986 Mad 248. In that case, the Madras High Court had cited art 212 to defer to the assembly's decision to order the seven-day imprisonment of an editor for an act of contempt dating back to its previous term.

⁴⁵ Cited from MP Jain, *Indian Constitutional Law*, eds Justice Ruma Pal and Samaraditya Pal, vol 1 (updated 6th edn, LexisNexis 2013) 133.

⁴⁶ Jain ([n 45](#)) 133; these instances have also been cited in *Raja Ram Pal* ([n 11](#)) [301]–[307] and *Amarinder Singh* ([n 42](#)) [36].

⁴⁷ See S Sahay, 'A close look: Parliament privileges' *The Statesman* (New Delhi, 31 May 1979); Arun Shourie, 'Their privileges and our duty' *The Indian Express* (New Delhi, 18 August 1980).

⁴⁸ *Hardwari Lal v Election Commission of India* ILR (2) P&H 269. The petitioner went on to publish a book about the case: Hardwari Lal, *Myth and Law of Parliamentary Privileges* (Allied Publishers 1979).

⁴⁹ AIR 1988 Mad 277.

CHAPTER 18

EXECUTIVE

SHUBHANKAR DAM

I. INTRODUCTION

INDIA has a parliamentary system. The President is the head of the Union of India; the Prime Minister is the head of government.¹ Along with his or her cabinet, the Prime Minister is responsible to the Lower House of Parliament.² States have similar arrangements. They are formally headed by Governors. But chief ministers and their cabinets lead the governments. Executive power, ordinarily, is exercised by the Prime Minister, chief ministers, and their respective councils of ministers. However, in keeping with India's Westminster inheritance, such power often vests in the formal heads, and is exercised in their names. This chapter offers an overview of the principal offices that make up the executive in India, their appointments, powers, and functions, and importantly, the relationship between the formal and real heads of the executive. Section II introduces the office of the President and the Governor. Section III offers an overview of the council of ministers, the role of the Prime Minister and the chief ministers, and the terms that govern their offices. Ministerial responsibilities and interactions with the President are discussed in Section IV. Section V briefly introduces the powers and functions of the executive in India. Finally, Section VI examines the range of discretionary powers vested in the President and Governors, and their effect, if any, on India's parliamentary credentials.

II. THE HEAD OF THE STATE

There shall be a President of India: so says Article 52. Article 53 vests the executive power of the Union in him; he may exercise it 'directly or through officers subordinate to him in accordance with [the] Constitution'. Consistent with her republican character, India's Presidents do not inherit their offices; they are indirectly elected by the people. Rules regarding eligibility and electoral method are provided for in some detail in the Constitution.

Indian citizens who are 35 years of age or more are eligible to be elected President. They must satisfy all other conditions for membership to the Lower House of Parliament.³ In addition, such persons must not hold 'any office of profit under the Government of India or the Government of any State or under any local or other authority' under the control of such governments.⁴ In *Baburao Patel v Zakir Husain*,⁵ the petitioner challenged Husain's election as India's third President; a mandatory requirement, he claimed, was not complied with. Candidates for elections to both Houses of Parliament must subscribe an oath that they shall 'uphold the sovereignty and integrity of India'.⁶ Presidential candidates, the Constitution says, are bound by the same rules of eligibility. Therefore, Husain too should have subscribed an oath to this effect, Patel argued. The Supreme Court rejected the argument. Based on a combined reading of Articles 58, 60, and 84, the Court concluded that Parliament had no intention of extending that oath to Presidential aspirants.⁷ The Presidential oath remains unique as a result. While parliamentarians, legislators, ministers, judges, and other constitutional office-bearers swear to 'uphold the sovereignty and integrity of India', Presidents pledge to 'preserve, protect and defend the Constitution' to the best of their abilities.

Elected members of both Houses of Parliament and those of the State legislative assemblies form the Electoral College.⁸ Members of legislative assemblies vote in proportion to the population of their respective States. The share of parliamentarians' votes are obtained by dividing the total number of votes assigned to the elected members of all legislative assemblies by the total number of the elected members of both Houses of Parliament. These proportions ensure 'uniformity in the scale of representation of the different states'.⁹ As a result, parity between the State assemblies and the two Houses of Parliament is maintained.¹⁰ Presidential elections are held by secret ballots 'in accordance with the system of proportional representation by means of the single transferable vote'. Winners, therefore, are guaranteed at least 50.1 per cent of all votes cast. In this respect, Presidential elections differ from parliamentary ones. Because they rely on the first-past-the-post system, 'legislative' candidates are often elected on the basis of no more than 20 or 30 per cent of the total votes cast.¹¹

Article 71(1) grants the Supreme Court exclusive jurisdiction on 'all doubts and disputes' that arise out of or in connection with Presidential elections. When, how, and who should elect Presidents has been the subject of many controversies. In *Narayan Bhaskar Khare v Election Commission of India*,¹² the

petitioner challenged the notification for Presidential elections in 1957 on the ground that seats in some State legislative assemblies lay vacant. He argued that the Electoral College in Article 54 must be fully constituted for elections to be validly held. Otherwise, in closely fought contests, the timing may decide the outcome, especially if some of the assemblies or the Lower House stands dissolved. The Court declined the petition. Nonetheless, judges expressed doubts about the correctness of this reading.¹³ Parliament soon amended Article 71. To prevent the argument from gaining interpretive validity, a proviso was added: 'The election of a person as President or Vice-President shall not be called in question on the ground of the existence of any vacancy for whatever reason among the members of the electoral college electing him.'¹⁴ Article 54 must, therefore, be read as stating the maximum—or optimum—number of electors. There is no minimum floor; as few as one Legislative Assembly may validly elect a President in extreme cases. In *Re Presidential Poll*,¹⁵ the Supreme Court effectively upheld this view. But issues concerning improper dissolution of State assemblies or wilful delays in conducting State elections so as to affect the outcome of Presidential elections were left open; the Court did not offer an opinion.¹⁶ Finally, in *Shiv Kirpal v VV Giri*,¹⁷ relying on Section 3(58), General Clauses Act 1897, the petitioner argued that State legislative assemblies in Article 54 includes those in Union Territories. The Supreme Court rejected that claim. Union Territories do not have legislative assemblies. Article 239A merely authorises Parliament to create bodies that function *as* legislatures. But that, the Court clarified, does not make them legislative assemblies in the proper sense.¹⁸ Some Union Territories—notably the Delhi and Puducherry—have elected assemblies that are in no way different from those in other States. This created an anomaly; the verdict hindered their participation in the Electoral College. Parliament responded by amending Article 54.¹⁹ These territories were designated 'States' for the purposes of Presidential elections, thereby giving them a proportionate say in electing India's President.

Presidents enjoy a five-year term, but are eligible for re-election.²⁰ In practice, all occupants have served one term. Rajendra Prasad is the only exception; India's first President, he served two. Elections for incoming Presidents must be mandatorily completed before the expiration of the terms of their predecessors.²¹ Vacancies may also arise otherwise. Presidents may die in office, resign, or be 'impeached for violation of the Constitution'.²² The Vice-President temporarily takes over in such cases.²³

Impeachment is a serious matter; the mechanism is invoked only if Presidents

violate the Constitution. ‘Violation of the Constitution’ in Article 61 can bear several meanings. Narrowly read, it may mean a violation of the *provisions* of the Constitution. Or a wider view is possible—one that includes violations of conventions and settled practices that on no account may be regarded as part of the provisions of the Constitution. Impeachment proceedings may be initiated if one-quarter of the total members of either House agree to move a resolution. Once moved, it must be approved by two-thirds of the total membership of that House. The resolution is then sent to the other House; this latter body must ‘investigate the charges’ mentioned therein. If two-thirds of the total membership of the second House approves of the charges, the President stands impeached. Effectively, a President may be removed from office if two-thirds of the *total memberships* of both Houses agree to do so. This is admittedly a high bar. Except in limited cases, even constitutional amendments require no more than the support of a mere *majority* of the total memberships of both Houses.²⁴ It is easier to amend India’s Constitution than to impeach her President.²⁵

Presidents have near-complete immunity while in office. They are not ‘answerable to any court for the exercise and performance of the powers and duties of [their] office or for any act done or purporting to be done by [them] in the exercise and performance of those powers and duties’.²⁶ Notice that the immunity extends even to acts ‘purporting to be done’ under the Constitution. Article 361, therefore, shields Presidents so long as they *claim* to act in performance of their powers or duties.²⁷ They also enjoy immunity in their personal capacity, especially in criminal matters: ‘No criminal proceedings whatsoever shall be instituted or continued against the President ... in any court during his term of office.’ The bar is limited to their term in office. Therefore, wrongful acts committed before or during a Presidential term may bear prosecution after occupants vacate office. Immunity against civil proceedings is more restricted though. Subject to a two-month notice along with information about the party instituting the proceedings and the cause of action, suits may be instituted even while they are in office.²⁸

In *Common Cause, A Registered Society v Union of India*,²⁹ the Supreme Court distinguished the official immunity of the President from immunity for actions done *in the name of* the President. A minister in the Union government, Satish Sharma was found guilty of improperly allotting petrol pumps.³⁰ He argued that the allotments were in effect the decision of the President; it was issued in the latter’s name. The decision, therefore, was immune from judicial review. The Court rejected the argument. Though signed in the name of the President, the order remained ‘basically and essentially, the order of the Minister

on whose advice the President had acted'.³¹ That being so:

[T]he order [carried] with it no immunity. Being essentially an order of the Government of India, passed in exercise of its executive functions, it would be amenable to judicial scrutiny ... The immunity available to the President under Article 361 of the Constitution cannot be extended to the orders passed in the name of the President under ... the Constitution.³²

Presidents act in two capacities. In most cases, they act on the 'aid and advice' of the council of ministers; occasionally, they act at their discretion. After *Common Cause*, the council of ministers must defend Presidential actions in judicial forums. But *Rameshwar Prasad v Union of India* goes further.³³ Discretionary actions of Governors and Presidents may also invite judicial review, the Court held, especially if they are challenged as being *mala fide* or arbitrary. Such actions have no existence in the eyes of the law.³⁴ The bar is simply against personally hauling them up before courts and other forums. Presidential immunity in India, therefore, means *personal* immunity from forced appearances; Presidential actions, both aided and 'unaided', remain open to review.

Governors enjoy an analogous position at the State level. Every State must have a Governor, but two or more States may have the same Governor.³⁵ As formal heads of the executive, their terms, conditions, and immunities of office mirror those of the President, but with two critical differences. First, they are appointed. Governors do not enjoy any form of electoral legitimacy; they are appointees of the President. Secondly, Governors hold office at the pleasure of the President.³⁶ There is no security of tenure. They nominally enjoy five-year terms, but Presidents may remove, transfer, or reappoint them at any time.³⁷ Stripped of Presidential regalia in important respects, Governors are perhaps diminished heads of States.

Whether Governors should hold office by virtue of election or appointment was the subject of an animated debate in the Constituent Assembly. Constitutional advisor BN Rau set the ball rolling with his suggestion for indirect elections by a system of proportional representation. In effect, he proposed a State version of Presidential elections along with similar rules for impeachment. The Patel-led Provincial Constitution Committee disagreed; indirect elections, the members said, were insufficiently representative. They favoured direct elections. 'The dignity of the office' demanded nothing less, Patel argued.³⁸ In July 1947, the Committee's report on provincial constitutions was discussed in the Constituent Assembly. Members widely endorsed the idea

of directly elected Governors.³⁹

Two years later, the provision on electing Governors again came up before the assembly. The Ambedkar-led Drafting Committee had little faith in popular Governors. Wary of unintended consequences that such an arrangement may produce, it offered the Constituent Assembly two alternatives to square on: direct elections or ‘guided’ presidential appointments.⁴⁰ By then, many members too had had a change of heart. Overwhelmingly, they rejected elections, direct or otherwise—favouring to repose in the President the power to *appoint* Governors.

Broadly, four arguments were pressed to make the case for this revision. First, there was an argument about conflicting expectations. The office of the Governor, many members felt, was analogous to an impartial constitutional head and, therefore, standing above and beyond the everyday politics of a State. But direct elections would require that Governors be invested with real executive powers. A popularly elected but ceremonial head of a State made little sense. The method of attaining the office and the expectations of that office, in other words, were not in sync.⁴¹ Secondly, fear of gubernatorial intrusion agitated some members. Popularly elected Governors with authority to intervene in the everyday affairs of States may breed instability, they argued. Backed by popular mandate, a Governor could claim greater representative authority than the chief minister. That would not augur well for a parliamentary form of government. Democracy, as such, would be self-defeating.⁴² Thirdly, the fragility of the Union led many to vote against elected Governors. Their popularity may embolden fissiparous tendencies, some cautioned. Jawaharlal Nehru, in particular, was alarmed by this possibility.⁴³ Though heads of States, Governors in reality were to be seen as agents of national reconstruction, he implied. India, still fragile, needed strong regional hands. But gubernatorial elections were likely to promote provincial voices not all of which were fully reconciled to the idea of a united India. The laborious—and often unseemly—experience of stitching together India’s Union between 1947 and 1949 perhaps had a role here. Fourthly, there was an argument about unnecessary costs. Members who spoke against direct or indirect elections saw in the exercise a needless expense—one that impoverished India could hardly afford.⁴⁴ A ceremonial office, they argued, did not justify the trouble and expense associated with huge elections.

These arguments cumulatively won the day. A majority in the Constituent Assembly voted to strip Governors of their popular foundations. To a small and bitter minority, Nehru, Ambedkar, KM Munshi, and others offered a generous palliative: persons so appointed would be ‘above party politics’, detached outsiders, eminent in their achievements, and with no reason to meddle in the

everyday affairs of the States they formally head.⁴⁵ After more than sixty years, this assurance, it is safe to say, has been honoured more in the breach. The abuses are too many to list but the modus operandi has been remarkably uniform. Upon taking office, political parties at the Centre removed incumbents no matter how qualified, appointed loyal party men and women, and often encouraged them to foment trouble. The Congress Party established a troublesome legacy; its appointees often functioned as political lackeys rather than independent officers. After a Janata Party-led coalition was inaugurated at the Centre in 1977, the government repaid in kind disinfecting offices of ‘Congress Governors’. Since then, this fumigation has become a venerable practice, faithfully ritualised after every general election. The Sarkaria Commission on Centre–State Relations duly noted this recurring misuse, and there is a vast secondary literature that documents the abusive instances.⁴⁶

Oddly enough, the provision for removal—not appointment—of Governors has generously abetted this misuse. Governors are not impeached. Presidents may simply cashier them: they hold office ‘during the pleasure’ of the President.⁴⁷ This carelessly easy mechanism was challenged in *BP Singhal v Union of India*.⁴⁸ Presidents must have ‘good reasons’ to dismiss Governors, and such decisions should be subject to judicial review, Singhal argued. The Court fully accepted the first argument, and a modest version of the second. Without exhaustively listing them, the Court offered examples of what may qualify as valid reasons for dismissal: ‘Physical and mental incapacity, corruption, and behaviour unbecoming of a Governor’ would suffice.⁴⁹ ‘Loss of confidence in the Governor or the Governor being out of sync with the policies and ideologies of the Union government’, however, the Court categorically said, are not acceptable reasons.⁵⁰ With that, the most common reasons for sacking Governors were declared *ultra vires*. The rigour of this otherwise important decision was softened by two additional findings. First, the Court held that Presidential reasons for sacking Governors need not be shared with the latter; they have no recourse to rules of natural justice. Secondly, a strong prime facie case of arbitrariness or mala fides must be made out for a court to entertain a challenge.⁵¹ However, without access to the President’s reasons for acting in a certain way, it is unlikely that this bar of sufficiency can be meaningfully met.

At the national level, below the President stands the Vice-President.⁵² The Vice-President is also indirectly elected, but by a much smaller electorate; only members of both Houses of Parliament participate in this election.⁵³ The Vice-President is the ex-officio chairman of the Upper House, but steps in as an

interim President in case of temporary vacancy.⁵⁴ The office has a five-year term, and incumbents are eligible for re-election.⁵⁵ They may resign, or may also be impeached. A simple majority in both Houses is sufficient to impeach a Vice-President. Supermajorities of the kind associated with Presidential impeachments are not necessary.⁵⁶ States, however, do not have the equivalent of Vice-Presidents. In case of gubernatorial vacancies, the President is empowered to make provisions to deal with such contingencies.⁵⁷

Presidents and Governors are the formal heads; for the most part, they act on the advice of the heads of government. Section III deals with the offices of the heads of government who wield real executive power: the Prime Minister, Chief Minister, and their respective councils of ministers.

III. THE HEAD OF GOVERNMENT

Article 74 says that there ‘shall be a Council of Ministers with the Prime Minister at the head to aid and advise the President’.⁵⁸ Presidents appoint Prime Ministers. Other ministers are appointed on the latter’s advice.⁵⁹ The number of ministers cannot ‘exceed fifteen per cent of the total number of members of the House of the People’.⁶⁰ They hold office during the pleasure of the President and are collectively responsible to the Lower House of Parliament.⁶¹ Despite this, ministers may be members of either House of Parliament; membership of the Lower House is not a criterion for ministerial appointment. This applies even to Prime Ministers. However, they have mostly been from the Lower House. Indira Gandhi was an early exception. Appointed Prime Minister at a time she was in the Upper House, she promptly rectified her membership ‘anomaly’ by standing for and being elected to the Lower House. Manmohan Singh is the only real exception. India’s Prime Minister between 2004 and 2014, he never sought membership to the Lower House, choosing to remain with the elders for both his terms. Persons who are not members of either House are also eligible for ministerial appointments. But they must acquire membership within six months of taking office.⁶²

Presidents appoint Prime Ministers at their discretion. Governors do the same at the State level; they appoint Chief Ministers. Ordinarily, the leader of the party that commands a majority in the Lower House is invited to form the government. In *SP Anand v HD Deve Gowda*,⁶³ the petitioner challenged Deve Gowda’s appointment as Prime Minister on the ground that he was not a

member of either House of Parliament. The argument failed. ‘Minister’ in Article 75(5), the Court clarified, includes the Prime Minister: in this limited respect, ‘the Constitution does not draw any distinction between the Prime Minister and any other Minister’.⁶⁴ The Court, however, has read in several limitations to ensure that such non-member appointments do not militate against democracy, constitutionalism, or collective responsibility. In *Harsharan Verma v Union of India*,⁶⁵ the Court held that non-member ministers may participate in the proceedings of both Houses. But in keeping with Article 88, they are not entitled to vote in either House. In *SR Chaudhuri v State of Punjab*,⁶⁶ the Court barred ministerial reappointments through this procedure. TP Singh was appointed a minister in Punjab. He was not a member of the State Assembly; and he did not become one even after six months. He resigned. Later a new Chief Minister, Rajinder Kaur, was sworn in during the term of the same assembly. Once again, Singh was inducted as an unelected minister. The Supreme Court invalidated his second appointment. ‘Reappointments’, the Court warned, ‘would ... disrupt the sequence and scheme of Article 164 ... [and] defeat ... the basic principles of representative and responsible government.’⁶⁷ An additional limitation was read into this extraordinary method in *BR Kapoor v State of Tamil Nadu*.⁶⁸ J Jayalalithaa did not stand for elections to the State Assembly in 2001. Convicted of various offences, she stood disqualified from membership to that body.⁶⁹ Still her party projected her as the chief ministerial candidate. When it won, party members elected Jayalalithaa as their leader. The Governor swore her in as the Chief Minister. The appellant challenged this appointment: persons who are otherwise ineligible to become members of the legislature, he argued, cannot take recourse to the six-month route. The Court agreed: ‘It would be unreasonable and anomalous to conclude that a minister who is a member of the Legislature is required to meet the constitutional standards of qualification and disqualification but that a minister who is not a member of the Legislature need not.’⁷⁰ As a result, the extraordinary mechanism is available only to eligible persons; those already disqualified cannot invoke it.

Ministers take oath before assuming office.⁷¹ This is a constitutional requirement. But its legal effects, if any, are unclear. In *KC Chandy v R Balakrishna Pillai*,⁷² the Kerala High Court concluded that remedies for violations of ministerial oath lie in the political domain; the Governor, Chief Minister, and the legislature are appropriate authorities to deal with such infractions. A minister in the Kerala government made a speech allegedly inciting people to ‘resort to terrorism and wage war against the Union of

India'.⁷³ These words, the petitioner argued, rendered the minister ineligible to hold office; he was in breach of his oath to uphold 'the sovereignty and integrity of India'. The Court declined to intervene. Denying that an oath of office is an 'empty formality', the High Court held that a writ of *quo warranto* will lie against a person who assumes office without an oath.⁷⁴ Breach of oath, on the other hand, requires 'a termination of the tenure of office'—a power best exercised by the appointing authority.⁷⁵ With respect to ministers at the State level, that means the Governor and the Chief Minister. In other words, breach of ministerial oath is a valid reason for a Governor to dismiss a minister. Whether to exercise that power of dismissal, however, is a matter entirely within the former's discretion; the Court will stay out of it.⁷⁶ The Punjab and Haryana High Court reached a similar conclusion in *Hardwari Lal v Bhajan Lal*.⁷⁷ Refusing to prohibit the Chief Minister from continuing in office, the Court held that the grounds for—and the manner of—disqualification are comprehensively provided for in Articles 191 and 192.⁷⁸ Breach of oath is not one of the listed grounds; and the Court could not add to it. Remedy, if any, lies with the Governor.

Ministerial tenure is not directly provided for in the Constitution. Ministers hold office during the pleasure of the President. They are also 'collectively responsible to the Lower House of the People'. Ministers continue in office so long as they enjoy the confidence of the Lower House. 'During the pleasure of the President', therefore, ordinarily, refers to the period during which ministers collectively enjoy the confidence of the Lower House. Article 83 limits the duration of this body to five years, unless dissolved earlier. Read together, it implies that a council of ministers has a maximum tenure of five years.

Ministers must resign on losing a vote of confidence; it is an established convention. If a council of ministers refuses to vacate office after such loss, the President may dismiss it. The discretion to dismiss governments is a limited one. In keeping with British parliamentary conventions, it is invoked only in rare circumstances when a minority government stubbornly imposes itself in office against the will of the majority. Policy differences, for example, are not a valid ground on which to dismiss an otherwise stable government. Doing so will likely invite constitutional uncertainties of many kinds. For one, finding an alternative Prime Minister will prove difficult; the new appointee is unlikely to command a majority in the Lower House. The ensuing instability will breed executive and legislative paralysis, with a government unable to enact its policies into law. High-handed dismissals may also invite impeachments. Parties with sufficiently large majorities may make the case that such dismissal amounted to a 'violation of the Constitution'—that is, a violation of the conventions associated with the

Constitution. Apart from governments, the President may also dismiss individual ministers. Ordinarily, it is for the Prime Minister to recommend such dismissal. Whether a President may dismiss an individual minister at his discretion remains an open question.

Similar rules apply to the State executive, but with one notable exception. A government with a stable majority may be dismissed under Article 356, 'if the President ... is satisfied that a situation has arisen in which the Government of the State cannot be carried on in accordance with the provisions of [the] Constitution'. The provision has been invoked on more than a hundred occasions—many of them under questionable circumstances.⁷⁹ In such instances, Governors take over the administration of the States until a new government is appointed, or new elections are held. This is a critical difference. Contrary to the practice at the State level, a council of ministers always exists to aid and advise the President. The Constitution does not envisage any situation when a President may govern on his own. The Supreme Court arrived at this conclusion in *UNR Rao v Indira Gandhi*.⁸⁰ With the Lower House dissolved in December 1970, Indira Gandhi had lost her mandate as the Prime Minister, the appellant argued. Without a Lower House, there was nothing the council of ministers could be responsible to. The ministers should resign, or be dismissed. Thereafter, the President must carry on the government to the best of his ability until a new ministry is installed. The Court rejected this reading. Article 74(1) says that there 'shall be a Council of Ministers with the Prime Minister at the head to aid and advise the President'. The provision means what it says: there *shall* be a Council of Ministers.⁸¹ Even if the Lower House is dissolved prematurely, ministers remain in office until alternative arrangements are made. To hold otherwise and give effect to the appellant's contention would 'change the whole concept of the Executive', the Court reasoned. 'It would mean that the President need not have a Prime Minister and Ministers to aid and advise in the exercise of his functions.'⁸² Such a possibility is alien to the system of executive set up under the Constitution.

This mandatory requirement of a head of government means that there shall always be someone to aid and advise the Head of State. How, then, should the two interact? Section IV addresses this issue.

IV. PRESIDENT AND THE COUNCIL OF MINISTERS: CONSTITUTIONAL INTERACTIONS

Article 53 says that the executive power of the Union ‘shall be vested in the President and shall be exercised by him either directly or through officers subordinate to him in accordance with [the] Constitution’. Article 74 must be read alongside this provision to make sense of it. In its inaugurated form, Article 74(1) had a nebulous core: ‘There shall be a Council of Ministers with the Prime Minister at the head to aid and advise the President in the exercise of his functions.’ Notice that the provision demoted the Prime Minister and the council of ministers to an advisory capacity; nothing therein made ministerial advice binding on the President. In addition, Article 78 casts a duty on the Prime Minister to ‘communicate to the President all decisions of the Council of Ministers relating to the administration of the affairs of the Union and proposals for legislation’ and to furnish information on these matters, if sought. Taken together, these provisions lent credibility to the idea of a real—not formal—head of the Union.⁸³ With executive power vested in him, the President, it seemed, had discretion to exercise them directly or, in the interest of efficiency, delegate the same to subordinate officers. The council of ministers, subordinate to him in the constitutional scheme, performed an advisory role; he was free to accept or reject any advice tendered to him.⁸⁴

In *Ram Jawaya Kapur v State of Punjab*,⁸⁵ the Supreme Court read the provisions differently. Publishers of school textbooks challenged the State’s education policy. It violated their fundamental right to freedom of trade and profession, they claimed. The council of ministers, they argued, did not have the authority to formulate a restrictive policy. In rejecting the argument, the Court held that the President has been made a formal or constitutional head; ‘real executive powers are vested in the Ministers or the cabinet’.⁸⁶ With a majority in the legislature, the cabinet concentrates in itself ‘the virtual control of legislative and executive functions’, the Court said; and ‘the most important questions of policy are all formulated by them’.⁸⁷ In other words, executive powers inhere in those that are collectively responsible to the legislature. In India, that is the council of ministers. Articles 53 and 74, therefore, mean what Article 75 says.

This line of reasoning was developed in greater detail in *Samsher Singh v State of Punjab*.⁸⁸ Two members of the lower judiciary in Punjab were dismissed. The dismissal orders were signed in the name of the Governor, but in effect were ministerial decisions. The Governors should have exercised his discretion, the appellants contended. The Court rebuffed the claim: ‘Wherever the Constitution requires the satisfaction of the President or the Governor ... [it] is not ... [his] personal satisfaction ... [but the] satisfaction of his Council of Ministers on whose aid and advice the President or the Governor generally

exercises all his powers and functions.’⁸⁹ ‘It is a fundamental principle of English constitutional law that Ministers must accept responsibility for every executive act’, the Court said. The sovereign never acts alone, but through advisors who have the confidence of the House of Commons.⁹⁰ The rule is the same in India. Clearly, British parliamentary conventions strongly, perhaps exclusively, mediated the Court’s reading of the Indian provisions.

Samsher Singh was significant: leading up to it, the Court spoke about Presidential discretion in differing voices. Two decisions are especially worth noting. In *Moti Ram Deka v General Manager, NEF Railways*,⁹¹ a majority upheld a previously expressed view that the power to dismiss a public servant at pleasure was a discretionary one; a Governor could not delegate the same to a subordinate officer.⁹² Later, in *Jayantilal Amritlal Shodhan v FN Rana*,⁹³ the Court offered a long list of discretionary powers:

The power to promulgate Ordinances ... to suspend [provisions] ... during an emergency; to declare failure of the Constitutional machinery in States ... to declare a financial emergency ... to make rules regulating recruitment and conditions of service ... are not powers of the Union Government; *these are powers vested in the President* under the Constitution and are incapable of being delegated or entrusted to any other body.⁹⁴

These decisions offered a radically different view of the Presidency. With a wide range of discretionary powers, Presidents and Governors were far from irrelevant in the everyday exercise of executive power.⁹⁵ *Samsher Singh*, however, relegated them to a mostly ceremonial role; except on rare occasions, they do not enjoy personal discretion.

As if to obviate this controversy from rearing again, Parliament amended Article 74. Inspired by the reasoning in *Samsher Singh*, an elongated provision replaced the original: ‘There shall be a Council of Ministers with the Prime Minister at the head to aid and advise the President *who shall, in the exercise of his functions, act in accordance with such advice*.’⁹⁶ A polite practice till then, ministerial primacy now enjoyed textual pedigree. But even this, some felt, was insufficient. Two years later further elongation came in the form of a proviso: ‘Provided that the President may require the Council of Ministers to reconsider such advice, either generally or otherwise, and the President shall act in accordance with the advice tendered after such reconsideration.’⁹⁷ As it stands now, Article 74 recognises the possibility that the head of the Union may disagree with the head of government, but offers a straightforward template by which to resolve such disagreements. Notwithstanding these later developments, obligations under Article 78 remain: all decisions regarding the administration of

and proposals for legislation must be communicated to the President, and information sought for, if any, must be furnished.

Article 74(1) is cast in mandatory terms: the President *shall* act in accordance with ministerial advice. Yet violations of this mandatory requirement are unlikely to yield judicial remedies. Presidents are immune from legal actions for ‘the exercise and performance of the powers and duties of [their] office’. Also, Article 74(2) bars courts from intervening between the President and the council of ministers: ‘The question whether any, and if so what, advice was tendered by Ministers to the President shall not be inquired into in any court.’ Whether an advice was repeated or new advice tendered, in effect, remains occluded in judicial proceedings. Presidential intransigence must be resolved politically. The council of ministers may resign to register their protest. Or political parties with robust majorities may initiate impeachment proceedings against the President. In its original form, Article 74 offered similar possibilities. The elongated version clarified the mandatory nature of ministerial advice. Beyond that, the amendments, it seems, have achieved little.⁹⁸

Article 74(2) renders ministerial advice confidential. The early line of cases read this zone of confidentiality widely. Notes on files, cabinet notes, and the cornucopia of documents that form the *basis* for ministerial advice were protected from disclosure.⁹⁹ But *SR Bommai v Union of India* reversed much of this.¹⁰⁰ The new reading greatly narrowed the scope of secrecy, limiting its application to the actual advice tendered. *Bommai* distinguished ‘advice’ from the documents—notes, reports, file notes—on the basis of which such advice is offered. Article 74(2) only protects the former, the Court said; everything else may be judicially scrutinised.¹⁰¹ This reduced protection increases the volume of materials on which to judicially review executive actions.

Ministers exercise real executive power; they are both individually and collectively responsible for their actions in doing so. Collective responsibility, mentioned earlier, is provided for in Article 75(3). Incubated by British conventions over centuries, it stands for the idea that a council of ministers is jointly responsible for the affairs of the government.¹⁰² Collective responsibility has several facets. First, ministers act as a common unit; cabinet decisions are binding on all ministers. Disagreements, if any, may be aired in private. Ministers, however, speak in one voice and stand by one another in Parliament and in public.¹⁰³ Those that cannot reconcile themselves with particular government policies, or are unwilling to defend them in public, must resign. Conversely, decisions of particular ministers, unless overruled, are decisions of the government. However, Article 78 authorises the President to submit for the

consideration of the council of ministers any matter on which a decision has been taken by an individual minister. The Prime Minister, in such cases, must bring the matter before the council of ministers.¹⁰⁴

Clearly, joint responsibility has a political component; political parties in power invoke it to maintain party discipline. However, its legal standing, if any, remains unclear. In *Subramanian Swamy v Manmohan Singh*,¹⁰⁵ the Supreme Court did not enforce it. The origins of the controversy lay in the sale of telecom spectrum in 2008 that Union Minister A Raja oversaw. The sale was voided; the Court found that the policy underlying the sale and the procedure adopted were illegal and arbitrary.¹⁰⁶ A Raja designed some of the key rules regarding the sale. Documents revealed that the Prime Minister and his Empowered Group of Ministers were in the know of these irregularities. While A Raja was subsequently charged on several counts, the Prime Minister's omissions were neither challenged nor probed: the Court gave him a pass. Raja's decisions were discrete, judges implied; the council of ministers did not have to bear the cross of his alleged criminalities. Individual ministerial decisions, it therefore seems, do not always generate collective legal responsibilities. Occasionally, joint responsibility may only be politically enforced.¹⁰⁷

Secondly, a council of ministers stands or falls together. They collectively command a majority support in the legislative branch. As such, a no-confidence motion against the council of ministers is a motion against all ministers. Prime ministerial resignation automatically dissolves the council of ministers; separate resignations are unnecessary. Conversely, a vote of no confidence against a particular minister may be regarded as a vote against the entire council of ministers. This, however, depends on the circumstances of the motion. Occasionally, the legislative branch may target a minister individually, without reference to the council of ministers to which he or she belongs. In such instances, only the minister is expected to resign.¹⁰⁸ Ministers in their individual capacities may also be judicially hauled up for their arbitrary actions, provided they are motivated by animus. In *Common Cause*, the Supreme Court reversed an earlier decision to impose exemplary damages against a minister.¹⁰⁹ Bona fide exercise of power that produces an unintended injury, the Court said, does not justify punitive or exemplary damages. Malicious abuse of power or deliberate maladministration may, however, do so.¹¹⁰

Governing is a complex affair; hundreds of officials in dozens of departments make many decisions on a daily basis. Article 77(3) recognises this possibility: the provision authorises the President to 'make rules for the more convenient transaction of the business of the Government of India, and for the allocation

among Ministers of the said business'. These officials are also part of the executive, and ministers are responsible for those that serve in their departments.¹¹¹ This responsibility remains even in situations where ministers have no knowledge of the actions of their departmental subordinates. Ordinarily, ministers busy themselves with policy issues; matters of implementation are usually left to officials over whom ministers command little or no oversight. Yet, when they act, subordinates notionally do so on behalf of ministers. Ministers, therefore, cannot seek refuge in ignorance. Nor can they absolve themselves by pointing to their officers. Both inside and outside Parliament, *they* are accountable for their departmental shortcomings. This too is a facet of collective responsibility.

V. POWERS AND FUNCTIONS OF THE EXECUTIVE

The Prime Minister, council of ministers, and the civil service form the executive at the federal level in India. Different kinds of powers are vested in them. Naturally, the executive exercises executive power. What does that entail? Executive power, the Supreme Court has repeatedly said, defies definitional precision. It is not merely about executing laws that have been enacted. Rather, it 'connotes the residue of governmental functions that remain after legislative and judicial functions are taken away'.¹¹² Determining policies and executing them, initiating legislation, maintaining law and order, promoting social and economic welfare, directing foreign policy among other things involve the exercise of executive power.¹¹³

Two kinds of executive powers are found in India's Constitution: general and specific. The scope of general executive power is outlined in Article 73: it extends to matters 'with respect to which Parliament has power to make laws'. It also extends 'to the exercise of such rights, authority and jurisdiction as are exercisable by the Government of India by virtue of any treaty or agreement'. The executive power of the States is outlined in Article 162: subject to the provisions of the Constitution, it extends to 'matters with respect to which the Legislature of the State has power to make laws'. Notice that the scope of executive power is defined with reference to the scope of legislative power; generally speaking, both the Union and State executives may exercise executive power on matters over which their respective legislatures are authorised to enact legislation.

In *Ram Jawaya Kapur*, the education department of the State of Punjab

practically took over the task of printing and publishing school textbooks. Deprived of their business, publishers challenged the relevant notification. It was illegal, they argued; in creating a monopoly in the business of printing and publishing textbooks, the State acted without legislative sanction. The Supreme Court rejected this argument. The State's executive power is 'not confined to matters over which legislation has been passed already'; rather, it extends to all matters on which legislation *may be passed*.¹¹⁴ Prior legislative action in other words is not a prerequisite for the exercise of executive power.¹¹⁵

This, however, is not a blank cheque; the exercise of unsanctioned executive power is cabined by some exceptions. First, executive action cannot contravene the Constitution. In *Madhav Rao Jivaji Rao Scindia v Union of India*,¹¹⁶ privy purses promised to the rulers of the erstwhile Princely States were wrenched by executive action. Grandfathered into various provisions of the Constitution, these payments, the petitioners argued, were immune from executive imprudence. The Court agreed. 'The voice of the Constitution is paramount', and 'neither the legislature nor the executive can have a policy that runs counter to the policy laid down [therein].'¹¹⁷ 'If a Constitution or any part of it [becomes] out of tune [with society], appropriate steps may be taken to alter the Constitution', the Court reasoned.¹¹⁸ But the executive must 'uphold it even when it is inconvenient to do so'.¹¹⁹ Constitutional obsolescence or inconvenience does not justify executive illegality. Secondly, executive action cannot infringe fundamental rights. In *State of Madhya Pradesh v Thakur Bharat Singh*,¹²⁰ local authorities restricted the respondent's physical movements by executive order. It was done under the provisions of the Madhya Pradesh Public Security Act 1959. The Court struck down some provisions of the Act. With no statutory basis left on which to restrict the free movement of citizens, the State resorted to its general executive power to justify the restrictions. The Court disagreed. Actions that restrict the rights and freedoms of citizens must enjoy legislative backing, the Court held; executive power, by itself, cannot achieve these ends.¹²¹ Thirdly, executive action cannot contravene a statute or exceed powers conferred through it. In *KN Guruswamy v State of Mysore*,¹²² liquor rights were auctioned for the city of Bangalore under the Mysore Excise Act 1901. The highest bidder, Guruswamy, won the auction. But the deputy commissioner rescinded his rights on receiving a higher bid after the auction. He was at liberty to cancel the bid, the commissioner rationalised. The Court disagreed. 'Fetters imposed by legislation cannot be brushed aside at the pleasure of either the Government or its officers'; 'rules bind State and subject

alike'.¹²³ Executive power, in other words, is bound by—not beyond—statutory provisions and rules.¹²⁴ Fourthly, the executive can neither impose taxes nor spend money without legislative sanction.¹²⁵ This was explained in *Ram Jawaya Kapur*. Trade or business, such as printing and publishing school textbooks, that require funds must be legislatively authorised 'directly or under the provisions of a statute'. Ordinarily, estimates of expenditures 'are submitted in the form of demands for grants to the legislature'. These are often legislatively sanctioned in the form of appropriation laws.¹²⁶ Only in such circumstances are expenses deemed authorised; general executive power is insufficient for these purposes. Fifthly, executive action cannot contravene statutory rules. In *J&K Public Service Commission v Narinder Mohan*,¹²⁷ State colleges made ad hoc appointments. Later, they regularised them, and this was challenged. The relevant service rules neither made provision for ad hoc appointments nor any provision for relaxing the ordinary process of appointment to regularise the former. The State drew from the well of general executive power to justify these appointments. The Supreme Court shot down that claim. Having made the Rules, 'the executive cannot fall back on its general power', the Court rebuked.¹²⁸ To fill gaps, supplement rules, and address unforeseen exigencies is acceptable. But executive power, under no circumstances, may 'supplant the law'. The Constitution does not permit that. In short, the executive may exercise general executive power on an *unoccupied* field provided it does not violate the Constitution; in particular, it cannot restrict rights or impose taxes, offend statutes, or contravene statutory rules.

Specific executive powers are many. The power to make appointments and the power to pardon are especially worth noting. The Constitution creates a large number of institutions and vests in the executive the authority to appoint their functionaries. Some of these offices are political, others more independent. The Union executive appoints, for example, the Attorney General,¹²⁹ the Comptroller and Auditor General,¹³⁰ members of the Union Public Service Commission,¹³¹ and members of the Election Commission.¹³² The Constitution replicates some of these offices at the State level, and the State executive is authorised to make similar appointments.

The other specific executive power is the power to grant pardons.¹³³ The President may 'grant pardons, reprieves, respites or remissions of punishment' or 'suspend, remit or commute the sentence of any person convicted of any offence'. The power may be invoked in three contexts; first, in cases where punishment and sentence is by a court martial; secondly, in cases where the

punishment or sentence is for an offence against any law which Parliament is competent to enact; and, thirdly, in all cases where the sentence is a sentence of death.¹³⁴ The provision has attracted many controversies, and a large body of precedents must be mined to understand the nature, scope, and extent of this power. Pardon is not a private act of grace. The power to grant is constitutionally reposed in the head of the State and, therefore, constitutes a ‘responsibility of great significance’.¹³⁵ Historically exercised by most heads of states, the power rests on the rationale that the judicial process may occasionally go awry, the Supreme Court has said. As such, entrusting ‘some high authority to scrutinize the validity of the threatened denial of life ... or personal freedom’ is a worthy undertaking: Article 72 does that in India’s Constitution. Also, pardon is not an extension of—or an interference with—the judicial process; it stands on a ‘wholly different plane’.¹³⁶ Consequently, rules of natural justice do not apply. In making such decisions, the President enjoys discretion of the widest amplitude. He may re-examine the facts of the cases, reassess the evidence, take into account newly disclosed information if any, and fashion appropriate remedies keeping in mind the personal circumstances of those pleading for mercy.¹³⁷

This wide discretion has invited anguish on many occasions. In *G Krishna Goud v State of Andhra Pradesh*,¹³⁸ the Supreme Court, long before *Kehar Singh*, pondered over the nature of the power to pardon. It is a ‘public power’, the Court said—one that must be exercised with ‘intelligence ... informed care and [honesty]’.¹³⁹ This was reiterated in *Maru Ram v Union of India*.¹⁴⁰ Though wide, the power ‘cannot run riot’;¹⁴¹ religion, caste, colour, or political loyalties,¹⁴² for example, are irrelevant to the discretionary matrix of Article 72. The ‘widest amplitude’ in *Kehar Singh* notwithstanding,¹⁴³ the idea of reasoned discretion remains prominent in many decisions.¹⁴⁴ Public power in all forms has limits, the Court in *Epuru Sudhakar v Government of Andhra Pradesh* pointed out; and the right to equality is not irrelevant to Article 72.¹⁴⁵ As such, the law of pardon in India endures in flux: the extent and grounds of judicial review are still insufficiently clear.

India’s executive also enjoys legislative powers. Delegated legislative powers—rule-making powers—are provided for in a variety of provisions. The most important of these are provided for in Article 77(3): ‘The President shall make rules for the more convenient transaction of the business of the Government of India.’ Known as the Rules of Business, these instruments allocate and define the zone of authority for ministers and their subordinates. They have statutory

force and are binding. Actions consistent with these Rules become the actions of the government. Conversely, actions in contravention of these Rules are *ultra vires*.¹⁴⁶ Other specific rule-making powers include the power to make rules for the joint sittings of the two Houses of Parliament;¹⁴⁷ rules regarding the conditions of service of government employees¹⁴⁸ and rules regarding the appointment of officials of various constitutional bodies.¹⁴⁹

More strikingly, the Constitution authorises the executive to exercise *original* legislative power; Presidents may promulgate ‘ordinances’ under Article 123.¹⁵⁰ Ordinances are not by-laws, rules, orders, or delegated legislation of some other kind. They are the equivalent of parliamentary legislation.¹⁵¹ Two conditions must be met for the President to invoke Article 123. At least one House of Parliament must not be in session and he must be satisfied that ‘circumstances exist which render it necessary for him to take immediate action’. The satisfaction is of the council of ministers; that is how the provision has come to be understood and practised. Ministers decide whether an ordinance is necessary and draft it; the President formally promulgates it into law. In a series of cases, the Supreme Court has repeatedly held that Presidential satisfaction in Article 123 is not subject to judicial review; it is ‘purely subjective’.¹⁵² Parliament has complete discretion to decide whether or not to enact legislation. The executive too, the Court said, has complete discretion to decide whether or not to promulgate ordinances.¹⁵³ As a result, grounds of review ordinarily applicable to the exercise of executive power are inapplicable to ordinances. They are products of legislative power, vested in the executive.¹⁵⁴

Ordinances are temporary. They must be laid before both Houses once Parliament reconvenes. The duration of ordinances, however, is not directly provided for. Article 123(2) merely says that unless properly enacted within six weeks from the date of reassembly of Parliament, they ‘cease to operate’.¹⁵⁵ They may also cease to operate if both Houses of Parliament disapprove them by a resolution, or if the President withdraws the ordinances. In *State of Orissa v Bhupendra Kumar Bose*,¹⁵⁶ the Court struggled with the ‘cessation’ requirement. Election to a municipality was successfully challenged on the ground that the electoral rolls had been inadequately vetted. Worried about similar challenges against other elections, the Governor promulgated an ordinance validating all electoral rolls. The ordinance lapsed. Did the lapse revive the invalidity of the election? It did not, the Court determined. Even if an ordinance lapses, all actions completed during the period an ordinance is in force remain permanently valid; it only ceases to operate *prospectively*. This view has serious implications:

the executive can effectively generate permanent changes in the law even through failed ‘legislative’ action.¹⁵⁷

Ordinances may lapse. The possibility of repromulgating them, therefore, remains. In *DC Wadhwa v State of Bihar*,¹⁵⁸ the Supreme Court confronted questions about the constitutionality of repromulgating ordinances. The State of Bihar repeatedly promulgated some ordinances, thereby, keeping them ‘alive’ for periods ranging from three to fourteen years. The executive showed no interest in enacting them through the normal legislative procedure. Turning an ‘exceptional’ method of enacting legislation into a regular one amounts to a usurpation, the Court reasoned. It is contrary to India’s ‘constitutional scheme’ and, therefore, unconstitutional.¹⁵⁹ However, a small window of exception was left open. ‘If there is too much legislative business ... or the time at the disposal of the Legislature is short’, repromulgation may be justified, the Court added.¹⁶⁰ This exception is a convenient alibi for governments keen to repromulgate ordinances; many have taken refuge in it.¹⁶¹ Overall, the Court’s forgiving approach to ordinances has meant that they are persistently present in India’s legislative annals.¹⁶²

Finally, India’s executive also has modest judicial powers. Aspirants to both Houses of Parliament must meet certain eligibility criteria; they are provided for in Article 102. Article 103 empowers the President to adjudicate if persons who are already members have fallen foul of these criteria.¹⁶³ In making these decisions, the President relies on the opinion of the Election Commission.¹⁶⁴ The Election Commission acts in a quasi-judicial capacity and must, therefore, adhere to the principles of natural justice.¹⁶⁵

This panoply of powers demonstrates that India’s constitutional system does not have a watertight arrangement of separated functions. The executive exercises a range of powers and performs an array of functions, some of which are legislative and judicial. Conversely, the legislative and judicial branches do not limit themselves to legislative and judicial powers, respectively. They occasionally perform executive functions as well. Irrespective of the kind of power it exercises, the executive principally functions through the council of ministers and the officials responsible to it. However, Presidents and Governors enjoy some discretion—the precise boundaries of which remain disputed. The final section offers an overview of such discretionary powers.

VI. DISCRETIONARY POWERS OF PRESIDENTS AND

GOVERNORS

That Presidents and Governors enjoy discretionary powers in some situations was clarified in *Samsher Singh*. 'Without being dogmatic or exhaustive, these situations', Krishna Iyer J suggested, 'relate to (a) the choice of Prime Minister (Chief Minister) ... (b) the dismissal of a Government which has lost its majority in the House, but refuses to quit office; [and] (c) the dissolution of the House where an appeal to the country is necessitous'.¹⁶⁶ These are, it should be noted, among the most important discretionary powers. But they are by no means the only ones.¹⁶⁷ We may consider these situations briefly.

In a chronological sense, the 'first' exercise of discretionary power involves the appointment of Prime Ministers. The Constitution is economical on this; it only says that they 'shall be appointed by the President'. Yet, discretion may be a misnomer in most instances. In keeping with Westminster conventions, persons who command clear majorities in the Lower House are appointed Prime Ministers. Discretion is moot in such cases. Fractured electoral verdicts, however, add an important dimension to it. With no obvious prime ministerial candidate, Presidents must exercise discretion in a real sense; it is for them to assess the likelihood that a person may successfully command a majority in due course.¹⁶⁸ A practice now governs these uncertain circumstances as well. If no party secures a majority in the Lower House, Presidents look for the leader of a pre-poll alliance who may enjoy a majority. In 1999, Atal B Vajpayee led such an alliance. If such a leader does not exist, Presidents look for the leader of post-poll alliances. In 2004 and 2009, Manmohan Singh led such alliances. Post-poll alliances may also involve 'outside support'. Such alliances often require compromise, and the invited leader may not be from the largest party in the Lower House. Lacking majority, VP Singh, Chandra Shekhar, Inder Gujral, and HD Deve Gowda were all appointed Prime Ministers on the promise of outside support. If no such leader is available, the President may appoint the leader of the largest party as the Prime Minister in the hope that he or she will muster a working majority.

Ordinarily, ministries resign on losing trust votes. If they refuse, they may be dismissed. Can they, however, be dismissed under other circumstances? Presidents have not done so at the Centre for reasons mentioned earlier. But Governors have occasionally done so at the State level. Two options are available for this purpose. Pursuant to Article 356, Governors may write to the President suggesting that the administration of 'the State cannot be carried on in accordance with the provisions of the Constitution'. Governors are not bound by

ministerial advice in writing such reports; they make independent assessments. Otherwise, they may invoke the ‘pleasure’ rule in Article 164: ‘Ministers shall hold office during the pleasure of the Governor.’ In 1967, the Governor of West Bengal dismissed the United Front ministry on the *assumption* that it had lost the majority.¹⁶⁹ Similarly, in 1998, the Governor of Goa dismissed the ministry in office and installed a new one.¹⁷⁰ The same year, the Governor of Uttar Pradesh also dismissed his ministry and installed a new one, once again, on the assumption that the former had lost its majority.¹⁷¹ Except in this instance, courts have generally refused to intervene against Governors. As such, the legality of dismissing democratically elected ministries based on private assessments of the loss of majority support remains undecided.

Further, Lower Houses have a maximum tenure of five years. Presidents and Governors may also dissolve them earlier. In doing so, they generally act on the advice of the council of ministers. Whether Presidents and Governors are invariably bound by the advice of the cabinet remains unclear. Majority as well as minority cabinets may recommend premature dissolution. They may do so for a variety of reasons. A desire to seek electoral validation of specific policies may motivate majority cabinets to seek dissolution. They may also do so in order to time elections with particular political, economic, or military events—and benefit from them. Minority governments, on the other hand, may recommend dissolution to prevent competing coalitions from staking claim. Heads of State in India, generally speaking, have not bound themselves by the advice of minority cabinets in dissolution matters. They have frequently exercised discretion, looked for alternative ministries, and only then, in appropriate instances, proceeded with dissolution. Their discretionary quotient remains high, and a consistent practice is yet to develop.¹⁷²

The inaugurated provisions no longer govern the executive in India. Changes have been made. Parliamentary amendments and judicial interpretations have remade key aspects of the executive. New words have found their way in; some clarified existing meanings, others cautioned against new possibilities. Yet the nature and extent of Presidential discretion endure in uncertainty. Paradoxically, the system, the arrangement of the executive as a whole, remains remarkably stable; it has hardly wavered. The only exception—a modest one at best—is the early years of the republic. Confronted with a Constitution unburdened by usage, President Rajendra Prasad and Prime Minister Jawaharlal Nehru stood divided over meanings. Interpretive skirmishes broke out. To Prasad, ‘Presidential’ words had life; to Nehru, they were lifeless. Prasad saw *some* role for the President in the affairs of the State; Nehru did not. Prasad dilated on executive

matters, and occasionally delayed on legislative ones. He anguished over the proposed Hindu Code Bill and the law on Zamindari Abolition. Nehru, though, would have none of it. Determined to break Prasad's intransigence, he lined up a battery of lawyers. Those legal opinions coupled with Nehru's brutal parliamentary majority occluded Prasad's arguments of any staying power. He relented.¹⁷³ Nehru won against Prasad; then he won over the people. It heralded the Nehruvian Presidency. In handing Jawaharlal Nehru the prime ministerial baton in 1952 and 1957, India's electorate effectively interpreted the Presidency into ceremonial irrelevance. The President no longer mattered; only the Prime Minister did. While provisions of the executive, particularly those relating to the President, weathered occasional controversies and impelled debates, the basic consensus has since remained undisturbed.¹⁷⁴ *Samsher Singh* aided this.

The consensus notwithstanding, concerns remain. I shall briefly highlight two. First, Presidents have some measure of electoral legitimacy; Governors have none. And yet, gubernatorial discretion is potentially wider. Article 163 recognises that Governors have discretionary powers in the everyday administration of their States: 'There shall be a Council of Ministers ... to aid and advise the Governor in the exercise of his functions, except in so far as he is by or under this Constitution *required to exercise his functions ... in his discretion*.'¹⁷⁵ Interestingly, Governors self-police their discretionary boundaries: 'If any question arises whether any matter is or is not a matter as respects which the Governor is by or under this Constitution required to act in his discretion, *the decision of the Governor in his discretion shall be final*.'¹⁷⁶ And unlike Presidents, they are not bound by ministerial decisions. Article 74, we know, was elongated to limit Presidential discretion over ministerial decisions. No such proviso burdened Article 163; the original text remains. Beyond this general grant of discretion, the Constitution also confers specific legislative and executive powers. Governors may withhold assent to Bills,¹⁷⁷ reserve them for Presidential reconsideration,¹⁷⁸ recommend President's Rule in the States,¹⁷⁹ and are responsible for the administration of areas designated under the Fifth and Sixth Schedules of the Constitution.¹⁸⁰ These discretionary powers, widely formulated and often indiscreetly applied, continue to invite constitutional anxieties. That the powers vest in an unelected and, therefore, electorally unaccountable office amplifies the concerns. Governorships are an anomaly; they always have been. The Nehruvian consensus, for better or worse, never extended to them.

Secondly, the Nehruvian Presidency has struggled with possibilities that seemed distant in the 1950s. Article 74, in part, reads: 'There shall be a Council

of Ministers with the Prime Minister at the head to aid and advise the President.’ Many kinds of council of ministers exist. Some represent majority governments; others shepherd minority ones. Timing too is relevant. A council of ministers baptised by a confidence motion, presumably, is different from one that has yet to secure parliamentary benediction. Similarly, a council of ministers that has lost a confidence vote but retains office as a ‘caretaker government’ is of a different kind altogether. Many minority governments have populated India since the late 1980s; some also functioned as caretaker ones. PV Narasimha Rao deftly ran a single-party minority government between 1991 and 1996. VP Singh, Chandra Shekhar, HD Deve Gowda, and Inder Gujral fumbled with their minority coalitions for short durations. Later, AB Vajpayee and Manmohan Singh ran more competent coalition-minority governments. Charan Singh, India’s ninth Prime Minister, was the first to lead a caretaker ministry. Upended by political intrigue of the Congress Party, he resigned soon after taking oath. President Sanjiva Reddy, starved of alternatives, saddled him with a caretaker ministry; he was to remain Prime Minister for five weary months. The second Vajpayee cabinet added to this legacy in 1999. Despite resigning from office in April 1999, it held the executive reins for six more months.

To whom does Article 74 apply? Does it apply to all of them, or only to some? Recall the Nehruvian consensus on Article 74, endorsed by *Samsher Singh*: Presidential discretion is moot; what ministers say, goes. To indiscriminately apply this dictum to all councils of ministers is to bludgeon a system into feigned consistency. Parliamentary losers people caretaker ministries; their lost mandate makes them so. To bow before their dictates is to privilege the will of the defeated few over the will of the majority; Presidents have little reason to conspire in this constitutional travesty. In *Madan Murari Verma v Chaudhary Charan Singh*,¹⁸¹ the Calcutta High Court said as much. ‘In order to tender advice to the President which is binding on him by virtue of Article 74(1) ... the condition precedent is the responsibility of the executive to the legislative branch’, Mukharji J wrote. ‘The executive must act subject to the control of the legislature.’¹⁸² But with Parliament dissolved, and a caretaker council of ministers in office, the President, he added:

*[I]s ... not obliged to accept [any] advice ... [tendered] to him except for day-to-day administration ... This in effect means that any decision or policy decision or any matter which can await disposal by the Council of Ministers responsible to the House of People must not be tendered by the ... [Prime Minister] and his Council of Ministers. With this limitation ... [he] and the Council of Ministers can only function.*¹⁸³

Whether advice tendered is necessary to carry on the day-to-day administration

or beyond that, the President, Mukharji J pointed out, ‘is free to judge’.¹⁸⁴ The Nehruvian consensus had shown up. Constitutional possibilities, it turns out, are too complex to keep the President confined to irrelevance: circumstances may indeed compel the exercise of discretion. This concession, however, begs the larger question: was Rajendra Prasad right to romance discretionary powers in more ordinary situations? That there is a Presidency beyond the Nehruvian consensus is obvious, though its depth remains to be revealed. In 1969, parliamentarians urged the government to set up a committee; the constitutional position of the President must be studied and legislatively defined, they said.¹⁸⁵ More than four decades later, it may still be a worthy undertaking.

Written to serve generations, the provisions on the executive steadied the principal branch of government at the moment of founding, underwent amendments, witnessed controversies, and generated debates. That it has served well is a testament to the genius of those who penned it. The challenge, however, is to make the template—and its meanings—relevant to both stable and unstable times, politically. Whether those that work the Constitution and interpret it are up to this challenge remains to be seen.

¹ The distinction between the head of State and head of government is fundamental to parliamentary systems. See Douglas Verney, *The Analysis of Political Systems* (Routledge 1970) 17–38.

² This implies a fusion of the executive with the legislature. The executive ‘comes from’ the legislature and is in turn responsible to it. See Walter Bagehot, *The English Constitution* (Oxford University Press 1873) 42–60. See also Arend Lijphart, *Patterns of Democracy* (Yale University Press 1999) 116–42.

³² *Common Cause* ([n 29](#)) [26].

³ Constitution of India 1950, art 58(1).

⁴ Constitution of India 1950, art 58(2).

⁵ AIR 1968 SC 904.

⁶ Constitution of India 1950, art 84(a).

⁷ *Baburao Patel* ([n 5](#)) [12]–[16].

⁸ For an analysis of the method of election, see Balkrishna, ‘Election of the President of India’ (1973) 7(3) *Journal of Constitutional and Parliamentary Studies* 33.

⁹ Constitution of India 1950, art 55(2).

¹⁰ Constitution of India 1950, art 55(1).

¹¹ Whether India’s President should be directly or indirectly elected was debated in the Constituent Assembly. *Constituent Assembly Debates*, vol 7 (Lok Sabha Secretariat 1986) 987–99, 13 December 1948.

¹² AIR 1957 SC 694.

¹³ *Narayan Bhaskar Khare* ([n 12](#)) [7].

¹⁴ The Constitution (Eleventh Amendment) Act 1961, s 3.

¹⁵ (1974) 2 SCC 33.

¹⁶ *Re Presidential Poll* ([n 15](#)) [35].

¹⁷ (1970) 2 SCC 567.

- ¹⁸ Shiv Kirpal ([n 17](#)) [242].
- ¹⁹ Constitution (Seventieth Amendment) Act 1992, s 2.
- ²⁰ Constitution of India 1950, arts 56(1) and 57.
- ²¹ Constitution of India 1950, art 62(1).
- ²² Constitution of India 1950, art 61(1).
- ²³ For issues associated with Presidential vacancies, see KN Agarwal, 'The Problem of the Temporary Vacancy in the Office of the Indian President' (1965) 7(2) *Journal of the Indian Law Institute* 238.
- ²⁴ Constitution of India 1950, art 368(2).
- ²⁵ Madhukar Chaturvedi, 'The Impeachment under Indian Constitution' (1981) 14(3) *Journal of Constitutional and Parliamentary Studies* 179.
- ²⁶ Constitution of India 1950, art 361(1).
- ²⁷ See also *State v Kawas Manekshaw Nanavati* (1960) 62 Bom LR 383.
- ²⁸ Constitution of India 1950, art 361(4).
- ²⁹ (1999) 6 SCC 667.
- ³⁰ (1996) 6 SCC 530.
- ³¹ *Common Cause* ([n 29](#)) [26].
- ³³ (2006) 2 SCC 1.
- ³⁴ Rameshwar Prasad ([n 33](#)) [170].
- ³⁵ Constitution of India 1950, art 153. The literature on Governors under the Indian Constitution is vast; it is easily among the most commented upon aspects of India's Constitution. See eg, NS Gehlot, *The Office of the Governor, its Constitutional Image and Reality* (Chugh Publications 1977); Sibransan Chatterjee, *Governor's Role in the Indian Constitution* (Mittal Publications 1992); Chandrabhushana Pandeya, *Governor: Preserver, Protector, and Defender of the Constitution* (Vikas Publishing House 1999).
- ³⁶ Constitution of India 1950, art 156(1).
- ³⁷ Constitution of India 1950, art 156(3).
- ³⁸ *Constituent Assembly Debates*, vol 1 (Lok Sabha Secretariat 1986) 586, 15 July 1947.
- ³⁹ *Constituent Assembly Debates*, vol 1 (Lok Sabha Secretariat 1986) 602–17, 15 July 1947.
- ⁴⁰ B Shiva Rao, *The Framing of India's Constitution*, vol 3 (Universal Law Publishing 2006) 564.
- ⁴¹ *Constituent Assembly Debates*, vol 8 (Lok Sabha Secretariat 1986) 428–30, 433–34, 448–49, 30 May 1949.
- ⁴² *Constituent Assembly Debates*, vol 8 (Lok Sabha Secretariat 1986) 435, 444–46, 453, 30 May 1949.
- ⁴³ *Constituent Assembly Debates*, vol 8 (Lok Sabha Secretariat 1986) 426, 454–56, 30 May 1949.
- ⁴⁴ *Constituent Assembly Debates*, vol 8 (Lok Sabha Secretariat 1986) 433, 452, 468, 30 May 1949.
- ⁴⁵ *Constituent Assembly Debates*, vol 8 (Lok Sabha Secretariat 1986) 453–62, 30 May 1949. See KP Singh, 'The Governor in the Constituent Assembly' (1965) 26(4) *Indian Journal of Political Science* 37.
- ⁴⁶ See *Report of the Sarkaria Commission* (Government of India 1988) ch 4 <<http://interstatecouncil.nic.in/Sarkaria/CHAPTERIV.pdf>>, accessed October 2015.
- ⁴⁷ Constitution of India 1950, art 156(1).
- ⁴⁸ (2010) 6 SCC 331.
- ⁴⁹ *BP Singhal* ([n 48](#)) [69].
- ⁵⁰ *BP Singhal* ([n 48](#)) [69].
- ⁵¹ *BP Singhal* ([n 48](#)) [82]. See also *Ranji Thomas v Union of India* (2000) 2 SCC 81.
- ⁵² Constitution of India 1950, art 63. For a rare comment on the Vice-President, see JN Lal, 'The Vice-President of India' (1967) 28(3) *Indian Journal of Political Science* 104.
- ⁵³ Constitution of India 1950, art 66(1).

- ⁵⁴ Constitution of India 1950, art 65.
- ⁵⁵ Constitution of India 1950, art 67.
- ⁵⁶ Constitution of India 1950, art 67(b).
- ⁵⁷ Constitution of India 1950, art 160.
- ⁵⁸ For an assessment of ‘aid and advise’ in the Indian context, see Anirudh Prasad, ‘A Study of the Principle of “Aid and Advice” in Indian Constitutional Perspective’ (1976) 10(3) Journal of Constitutional and Parliamentary Studies 272.
- ⁵⁹ Constitution of India 1950, art 75(1).
- ⁶⁰ Constitution (Ninety-first Amendment) Act 2003, s 2.
- ⁶¹ Constitution of India 1950, art 75(3).
- ⁶² Constitution of India 1950, art 75(5).
- ⁶³ (1996) 6 SCC 734. See also *Har Sharan Verma v Tribhuvan Narain Singh* (1971) 1 SCC 616.
- ⁶⁴ *SP Anand* ([n 63](#)) [16].
- ⁶⁵ (1987) Supp SCC 310.
- ⁶⁶ (2001) 7 SCC 126.
- ⁶⁷ *SR Chaudhuri* ([n 66](#)) [35].
- ⁶⁸ (2001) 7 SCC 231.
- ⁶⁹ Constitution of India 1950, art 173.
- ⁷⁰ *BR Kapoor* ([n 68](#)) [23].
- ⁷¹ Constitution of India 1950, arts 75(4) and 164(3).
- ⁷² AIR 1986 Ker 116.
- ⁷³ *KC Chandy* ([n 72](#)) [1].
- ⁷⁴ *KC Chandy* ([n 72](#)) [6].
- ⁷⁵ *KC Chandy* ([n 72](#)) [9].
- ⁷⁶ *KC Chandy* ([n 72](#)) [10].
- ⁷⁷ AIR 1993 P&H 3.
- ⁷⁸ See also *Dhronamraju Satyanarayana v NT Rama Rao* AIR 1988 AP 62.
- ⁷⁹ K Suryaprasad, *Article 356 of the Constitution of India: Promise and Performance* (Synergy Books India 2012).
- ⁸⁰ (1971) 2 SCC 63.
- ⁸¹ *UNR Rao* ([n 80](#)) [8].
- ⁸² *UNR Rao* ([n 80](#)) [7].
- ⁹⁴ *Jayantilal Amritlal Shodhan v FN Rana* AIR 1964 SC 648 (emphasis added).
- ⁸³ Soon after the Constitution came into effect, debate erupted on the position of the President under the Indian Constitution. See eg, BM Sharma, ‘The President of the Indian Republic’ (1950) 11(4) Indian Journal of Political Science 1; Mrityonjoy Banerjee, ‘The President of the Indian Republic’ (1950) 11(4) Indian Journal of Political Science 10; DN Banerjee, ‘Position of the President of India’ (1951) 89(5) Modern Review 365.
- ⁸⁴ See KM Munshi, *The President under the Indian Constitution* (Bharatiya Vidya Bhawan 1963); MM Ismail, *The President and the Governors in the Indian Constitution* (Orient Longman 1972).
- ⁸⁵ AIR 1955 SC 549.
- ⁸⁶ *Ram Jawaya Kapur* ([n 85](#)) [14].
- ⁸⁷ *Ram Jawaya Kapur* ([n 85](#)) [14].
- ⁸⁸ (1974) 2 SCC 831. See also *A Sanjeevi Naidu v State of Madras* (1970) 1 SCC 443.
- ⁸⁹ *Samsher Singh* ([n 88](#)) [48].

⁹⁰ *Samsher Singh* ([n 88](#)) [32].

⁹¹ AIR 1964 SC 600.

⁹² *Moti Ram Deka* ([n 91](#)) [57].

⁹³ *Moti Ram Deka* ([n 91](#)). See also *Sardari Lal v Union of India* (1971) 1 SCC 411.

⁹⁵ For two comprehensive assessments on Presidential powers, see Henry Holmes, Jr, 'Power of President: Myth or Reality' (1970) 12(3) *Journal of the Indian Law Institute* 367; VS Deshpande, 'The President, His Powers and Their Exercise' (1971) 13(3) *Journal of the Indian Law Institute* 326.

⁹⁶ The Constitution (Forty-second Amendment) Act 1976, s 13.

⁹⁷ The Constitution (Forty-fourth Amendment) Act 1978, s 11.

⁹⁸ The debate on Presidential power lingers. See Anirudh Prasad, *Presidential Government or Parliamentary Democracy* (Deep and Deep Publications 1981); VR Krishna Iyer, *The Indian Presidency* (Deep and Deep Publications 1988).

⁹⁹ *State of Rajasthan v Union of India* (1977) 3 SCC 592; *State of Punjab v Sodhi Sukhdev Singh* AIR 1961 SC 493.

¹⁰⁰ (1994) 3 SCC 1.

¹⁰¹ See also *Rameshwar Prasad* ([n 33](#)).

¹⁰² See *A Sanjeevi Naidu* ([n 88](#)).

¹⁰³ *Common Cause* ([n 29](#)) [31].

¹⁰⁴ Constitution of India 1950, art 78(c).

¹⁰⁵ (2012) 3 SCC 64.

¹⁰⁶ *Centre for Public Interest Litigation v Union of India* (2012) 3 SCC 1.

¹⁰⁷ See Pratap Bhanu Mehta, 'The Indian Supreme Court and the Art of Democratic Positioning' in Mark Tushnet and Madhav Khosla (eds) *Unstable Constitutionalism: Law and Politics in South Asia* (Cambridge University Press 2015) 233.

¹⁰⁸ *State of Karnataka v Union of India* (1977) 4 SCC 608. See also *State of Jammu and Kashmir v Bakshi Gulam Mohammad* AIR 1967 SC 122.

¹⁰⁹ *Common Cause* (1996) ([n 30](#)).

¹¹⁰ *Lucknow Development Authority v MK Gupta* (1994) 1 SCC 243.

¹¹¹ *Common Cause* (1996) ([n 30](#)) [26].

¹¹² *Ram Jawaya Kapur* ([n 85](#)) [12].

¹¹³ *Ram Jawaya Kapur* ([n 85](#)) [13].

¹¹⁴ *Ram Jawaya Kapur* ([n 85](#)) [7].

¹¹⁵ See also *Maganbhai Ishwarbhai Patel v Union of India* (1970) 3 SCC 400.

¹¹⁶ (1971) 1 SCC 85.

¹¹⁷ *Madhav Rao Jivaji Rao Scindia* ([n 116](#)) [161].

¹¹⁸ *Madhav Rao Jivaji Rao Scindia* ([n 116](#)) [176].

¹¹⁹ *Madhav Rao Jivaji Rao Scindia* ([n 116](#)) [176].

¹²⁰ AIR 1967 SC 1170.

¹²¹ *Thakur Bharat Singh* ([n 120](#)) [8]. See also *Kharak Singh v State of Uttar Pradesh* AIR 1963 SC 1295.

¹²² AIR 1954 SC 592.

¹²³ *KN Guruswamy* ([n 122](#)) [7].

¹²⁴ *State of Uttar Pradesh v Johri Mal* (2004) 4 SCC 714.

¹²⁵ *State of Kerala v PJ Joseph* AIR 1958 SC 296.

- ¹²⁶ *Ram Jawaya Kapur* ([n 85](#)) [16]–[17].
- ¹²⁷ (1994) 2 SCC 630.
- ¹²⁸ *J&K Public Service Commission v Narinder Mohan* (1994) 2 SCC 630 [7].
- ¹²⁹ Constitution of India 1950, art 76.
- ¹³⁰ Constitution of India 1950, art 148.
- ¹³¹ Constitution of India 1950, art 315.
- ¹³² Constitution of India 1950, art 324.
- ¹³³ Constitution of India 1950, art 72.
- ¹³⁴ R Prakash, ‘Does the Pardoning Power of the President Under the Constitution Extend to Criminal Contempts of Court?’ (2000) 42(2–4) *Journal of the Indian Law Institute* 469.
- ¹³⁵ *Kehar Singh v Union of India* (1989) 1 SCC 204.
- ¹³⁶ *Kehar Singh* ([n 135](#)) [10].
- ¹³⁷ *Kehar Singh* ([n 135](#)) [10].
- ¹³⁸ (1976) 1 SCC 157.
- ¹³⁹ *G Krishna Goud* ([n 138](#)) [7].
- ¹⁴⁰ (1981) 1 SCC 107.
- ¹⁴¹ *Maru Ram* ([n 140](#)) [62].
- ¹⁴² *Maru Ram* ([n 140](#)) [65].
- ¹⁴³ *Kehar Singh* ([n 135](#)) [16].
- ¹⁴⁴ See *Ashok Kumar v Union of India* (1991) 3 SCC 498; *Dhananjay Chatterjee v State of West Bengal* (2004) 9 SCC 751; *Bikas Chatterjee v Union of India* (2004) 7 SCC 634.
- ¹⁴⁵ (2006) 8 SCC 161 [20].
- ¹⁴⁶ *A Sanjeevi Naidu* ([n 88](#)); *State of Rajasthan v AK Datta* (1980) 4 SCC 459.
- ¹⁴⁷ Constitution of India 1950, art 118(3).
- ¹⁴⁸ Constitution of India 1950, art 309.
- ¹⁴⁹ Constitution of India 1950, arts 148(5) and 146(1).
- ¹⁵⁰ Constitution of India 1950, art 213, provides for a similar arrangement at the State level; Governors too may promulgate ordinances.
- ¹⁵¹ Constitution of India 1950, art 123(2).
- ¹⁵² *Rustom Cavasjee Cooper v Union of India* (1970) 1 SCC 248; *SKG Sugar Ltd v State of Bihar* (1974) 4 SCC 827.
- ¹⁵³ *T Venkata Reddy v State of Andhra Pradesh* (1985) 3 SCC 198.
- ¹⁵⁴ *K Nagaraj v State of Andhra Pradesh* (1985) 1 SCC 523.
- ¹⁵⁵ Constitution of India 1950, art 123(2)(a).
- ¹⁵⁶ AIR 1962 SC 945.
- ¹⁵⁷ See also *T Venkata Reddy* ([n 153](#)); *Maitreyee Mahanta v State of Assam* AIR 1999 Gau 32.
- ¹⁵⁸ (1987) 1 SCC 378.
- ¹⁵⁹ *DC Wadhwa* ([n 158](#)) [6].
- ¹⁶⁰ *DC Wadhwa* ([n 158](#)) [6].
- ¹⁶¹ *Gyanendra Kumar v Union of India* AIR 1997 Del 58.
- ¹⁶² See Shubhankar Dam, *Presidential Legislation in India: The Law and Practice of Ordinance in India* (Cambridge University Press 2014).
- ¹⁶³ *Election Commission v Saka Venkata Subba Rao* AIR 1953 SC 210. See also *Consumer Education and Research Society v Union of India* (2009) 9 SCC 648.

- ¹⁶⁴ Constitution of India 1950, art 103(2).
- ¹⁶⁵ *Election Commission of India v Subramanian Swamy* (1996) 4 SCC 104.
- ¹⁸³ *Madan Murari Verma* ([n 181](#)) [26]–[27] (emphasis added).
- ¹⁶⁶ *Samsher Singh* ([n 88](#)) [154].
- ¹⁶⁷ KR Bombwall, ‘The President of India: Limits of Discretion’ (1966) 27(3) *Indian Journal of Political Science* 23.
- ¹⁶⁸ *Dinesh Chandra Pande v Chaudhary Charan Singh* AIR 1980 Del 114.
- ¹⁶⁹ *Mahabir Prasad Sharma v Prafulla Chandra Ghose* AIR 1969 Cal 198.
- ¹⁷⁰ *Pratapsingh Raojirao Rane v Governor of Goa* AIR 1999 Bom 53.
- ¹⁷¹ *Jagdambika Pal v Union of India* (1999) 9 SCC 95.
- ¹⁷² See Ravindra Mishra, ‘Governor and Dissolution of the Legislative Assembly’ (1967) 28(4) *Indian Journal of Political Science* 183.
- ¹⁷³ For a conventional, but misleading, account of the early controversies, see Harshan Kumarasingham, ‘The Indian Version of First Among Equals: Executive Power During the First Decade of Independence’ (2010) 44(4) *Modern Asian Studies* 709.
- ¹⁷⁴ Whether India should move to a Presidential form of government has been the subject of some academic debate. See Jashwant B Mehta, *Presidential System, A Better Alternative?* (NM Tripathi 1979); Vasant Sathe, *Two Swords in One Scabbard: A Case for Presidential Form of Parliamentary Democracy* (New India Books 1989).
- ¹⁷⁵ Constitution of India 1950, art 163(1) (emphasis added).
- ¹⁷⁶ Constitution of India 1950, art 163(2) (emphasis added).
- ¹⁷⁷ Constitution of India 1950, art 200.
- ¹⁷⁸ Constitution of India 1950, art 201.
- ¹⁷⁹ Constitution of India 1950, art 356.
- ¹⁸⁰ Constitution of India 1950, arts 244 and 244A.
- ¹⁸¹ AIR 1980 Cal 95.
- ¹⁸² *Madan Murari Verma* ([n 181](#)) [26].
- ¹⁸⁴ *Madan Murari Verma* ([n 181](#)) [27].
- ¹⁸⁵ *The Hindustan Times*, 9 August 1969.

CHAPTER 19

JUDICIAL ARCHITECTURE AND CAPACITY

NICK ROBINSON*

I. INTRODUCTION

THE power and functioning of different branches of government is intertwined with their structure. A bicameral legislature functions differently from a unicameral one. The powers of an executive headed by a President differ from that headed by a Prime Minister. The judiciary is no different.

This chapter describes the architecture of the Indian judiciary—in other words, the different types of courts and judges in the Indian judicial system and the hierarchies and relations between them. In particular, it focuses on how the Indian judiciary coordinates its behaviour through appeal and *stare decisis* and through a system of internal administrative control. Although the Indian judicial system, particularly the upper judiciary (ie, the Supreme Court and High Courts), plays a central role in Indian political life and is widely covered in the media, there has been limited academic literature on the impact of the judiciary's structure. The functioning of the Indian Supreme Court has only begun to be explored,¹ and even less attention has been given to India's High Courts and subordinate judiciary.²

The top-heaviness of the Indian judiciary is striking, both in terms of the relative power of the upper judiciary and the number of cases these courts hear in relation to the subordinate. The origins of this top-heaviness are partly historical. When writing the Indian Constitution the drafters emphasised that the upper judiciary should be accessible to ordinary Indians, especially to enforce constitutional claims. They also wrote in safeguards to protect the judiciary's independence, giving Supreme Court and High Court judges a prominent role in court administration and the appointment of judges. After independence, both the accessibility and self-management of the upper judiciary have been further reinforced and strengthened through legislative action and judicial interpretation. Today, a broad distrust of the subordinate judiciary, both by litigants and judges of the upper judiciary, has led litigants to appeal from, or attempt to bypass, the

subordinate judiciary in large numbers. As the Supreme Court in particular has become an omnivorous arbiter of last, and sometimes seemingly first, resort, it has seen an ever-mounting number of cases, which has caused a multiplication of judges and benches. These different benches of the Supreme Court give slightly—and sometimes markedly—different interpretations of the Constitution and law more generally, generating confusion over precedent, creating even more incentive for litigants to appeal to the Supreme Court.

This top-heavy system has arguably helped the upper judiciary become more actively involved in large swathes of Indian political and social life. However, India's disproportionate reliance on the upper judiciary has also slowed and added uncertainty to decision making, contributing to the Indian judicial system's well-known underperformance on a range of measures from enforcing contracts to the duration of pre-trial detention.

II. HIERARCHY OF COURTS

On the face of it, the Indian Constitution organises the country's judicial system with a striking unity. Appeals progress up a set of hierarchically organised courts, whose judges interpret law under a single national constitution. Although States may pass their own laws, there are no separate State constitutions, and the same set of courts interprets both State and national law. At the top of the judicial system, there is a single Supreme Court. Upon closer scrutiny of this seeming cohesiveness, however, two types of clear divisions quickly become evident—that between the judiciary's federal units and its different levels.

Each State in India has its own judicial service for the subordinate judiciary, and judges of the High Court in a State are overwhelmingly selected from the State's judicial service and the State High Court's practising bar. At the same time, each State provides funds for the operation of its judiciary. Since States in India are so socio-economically diverse, levels of funding for the judiciary can vary considerably,³ as can the legal cultures, litigant profile, and governance capability of different States. As a result, State judiciaries can perform strikingly differently in terms of professionalism, backlog, and other measures of functioning and quality.

In India, the upper judiciary is traditionally viewed not so much as an extension of the subordinate judiciary, but as categorically distinct—more capable, less corrupt, and with a more central role in enforcing constitutional rights. The judges in the upper judiciary tend to be from more high-status

families and often have already had distinguished professional careers before joining the bench, unlike members of the subordinate judiciary, who often join the judiciary directly from law school, making them less assertive and more likely to simply follow the arguments of more seasoned lawyers or the government.⁴ Although court proceedings are mostly in English in the upper judiciary, and the judgments always are, in the subordinate judiciary proceedings are often in the local vernacular, while decisions are in English (although they are frequently not reported).

Even at the nation's framing, members of the Constituent Assembly, many of whom were lawyers in the High Courts, seemed distrustful of the quality and integrity of the district courts. The Constitution allows for litigants to directly petition the High Courts in constitutional matters,⁵ and the Supreme Court if their fundamental rights are at stake,⁶ although in recent years the Supreme Court has encouraged litigants to first approach the High Courts to remedy fundamental rights violations, except for cases of national importance.⁷ Article 228 of the Constitution allows for a High Court to withdraw any matter involving a substantial question of constitutional law from a subordinate court to itself. MP Singh has argued that Article 228 should not prohibit the subordinate courts from hearing certain limited types of constitutional matters, but in practice the High Courts and Supreme Court are the de facto constitutional courts of the country with the subordinate courts hearing few such cases.⁸ Given the Constitution's length and detail, along with the judiciary's broad interpretation of it, many administrative law and other types of cases are considered constitutional matters and brought directly to the High Courts, further increasing the workload of the upper judiciary and further sidelining the subordinate courts.

1. Description of the Courts

The Supreme Court sits in New Delhi.⁹ The Chief Justice may also direct that judges of the Court sit in other parts of the country with the approval of the President. There are longstanding demands from elsewhere in India, particularly the south, for judges to sit in multiple locations as the Court disproportionately hears cases originating from Delhi and nearby States.¹⁰ However, the judges of the Supreme Court have traditionally resisted attempts to have benches outside the capital, fearing that such a practice would further weaken the Court's sense of institutional integrity.

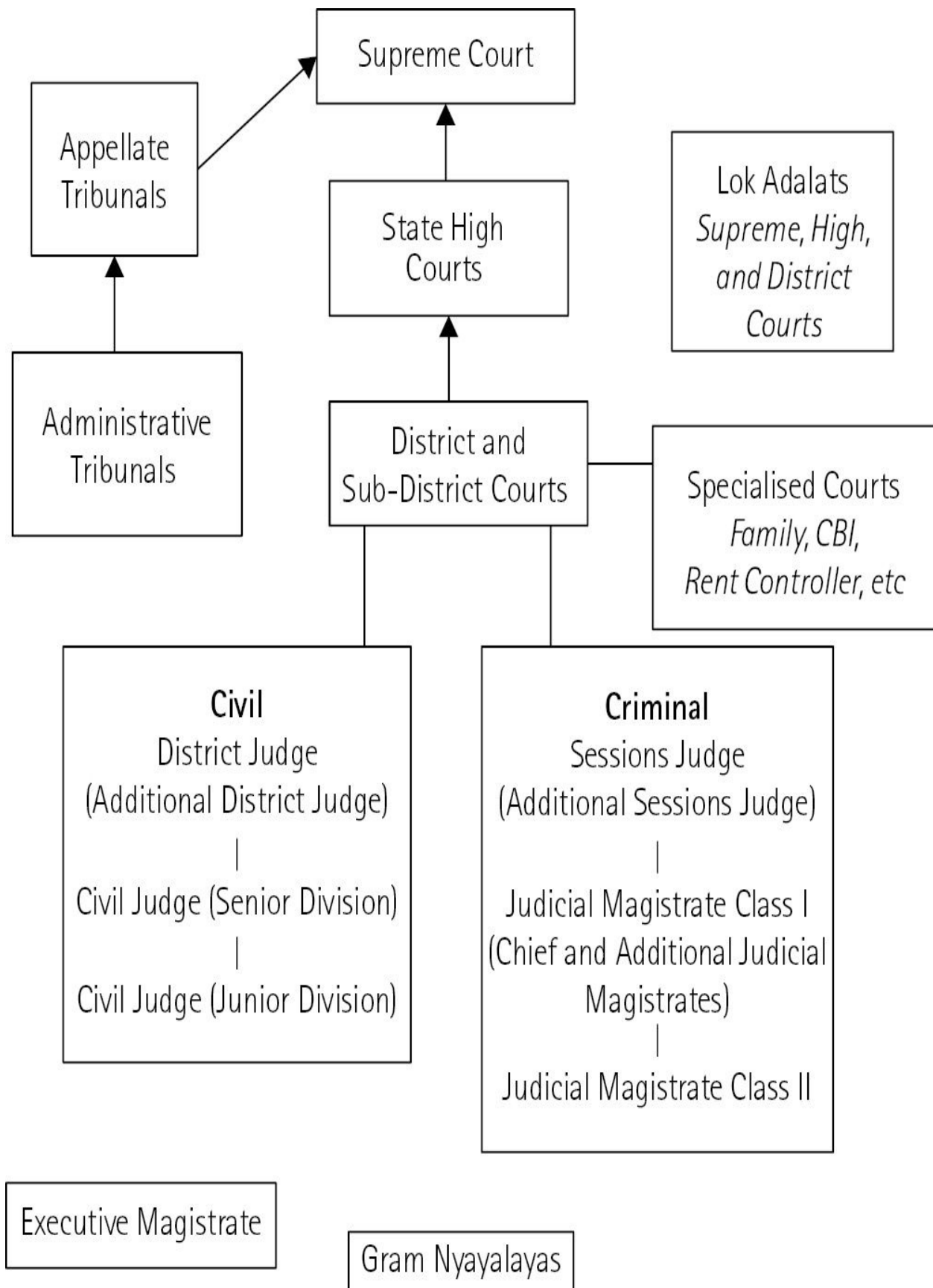


FIGURE 19.1 Hierarchy of Courts and Judges

In 2014, there were twenty-four High Courts in India, which ranged in size from 160 sanctioned judges in Allahabad to 3 in Sikkim. No State has more than one High Court,¹¹ but some High Courts have jurisdiction over multiple States¹² and over Union Territories.¹³ For example, the Bombay High Court is the High Court for the States of Maharashtra and Goa and the Union Territories of Daman & Diu and Dadra & Nagar Haveli (two island groups off the western coast of India). Although the High Court's principal seat is in Bombay, it also has benches that permanently sit in the State of Goa, as well as two other large cities—Nagpur and Aurangabad—in Maharashtra.

There are 640 districts in India, each with its own district court.¹⁴ Additional sub-district courts may operate at the block level.¹⁵ Some details that are not obvious from [Figure 19.1](#) are important to note. First, the diagram makes a clear distinction between judges on the civil and criminal side at the district level. In reality, a single judge will often wear both hats. For example, the top judge in the administrative hierarchy in a district court is called a District and Sessions Court Judge, as she will hear both civil and criminal matters. Similarly, Civil Judges of the Senior or Junior Division are also often Chief Judicial Magistrates or Judicial Magistrates, respectively. Although the District and Sessions Court Judge is the administrative head of the district, she is otherwise a first amongst equals with Additional District and Sessions Court Judges in the same district. That is to say, the word 'additional' in the title given to judges does not connote a lower rank.

[Figure 19.1](#) is only designed to give a general overview of the structure of the Indian judiciary. Historically, there has been significant variation in the names used by different States to refer to types of judges and their grades and some of this nomenclature is still prevalent in parts of India, even if the overall judicial structure across the country is relatively similar. For instance, Junior Civil Judges are sometimes called *Munsifs* and Senior Civil Judges are sometimes referred to as Subordinate Civil Judges.¹⁶

There are also noteworthy differences between [Figure 19.1](#) and the court structure in metropolitan areas.¹⁷ In metropolitan areas the distinction between Judicial Magistrates of the first or second class is absent and they are collectively referred to as Metropolitan Magistrates. Further, Chief and Additional Chief Judicial Magistrates are referred to as Chief and Additional Chief Metropolitan Magistrates, respectively.¹⁸

The judicial service in the subordinate judiciary in a State will generally be broken up between the regular judicial service and the higher judicial service. District and Sessions Court Judges will be in the more senior cadre, while civil judges and magistrates will be in the lower cadre. This distinction proves pertinent not just because it demarcates seniority, but because members of the bar can be recruited directly into the senior cadre if they have practised as advocates for seven years or more.¹⁹

In most States, original jurisdiction for both civil and criminal matters begins in the subordinate courts. Under the Code of Criminal Procedure, which applies across India, a magistrate of the second class may pass a sentence of imprisonment not exceeding a year, while a Chief Judicial Magistrate can pass a sentence not exceeding seven years.²⁰ On the civil side, there is more State variation. Each State has a civil courts act under which a judge will have jurisdiction to hear a case depending on the monetary amount at stake in the suit. In the States that were Presidency towns (Bombay, Calcutta, and Madras) and in New Delhi the High Court maintains original jurisdiction in civil matters above a certain amount or that originate in the old Presidency town itself. In the three Presidency towns, civil matters below such an amount are heard by the 'City Civil Courts'. Original jurisdiction civil matters in the Bombay, Calcutta, Madras, and New Delhi High Courts are heard in different courtrooms to appellate matters, with High Court judges rotating between these courtrooms and respective jurisdictions. All High Courts may also exercise extraordinary civil or criminal original jurisdiction at their discretion.²¹

District courts also frequently house family courts, juvenile courts, Central Bureau of Investigation (CBI) courts, rent control courts, and other specialised courts created under specific legislation. Judges from the regular judicial service cadre will be appointed to these postings. For example, an Additional District Court Judge may be appointed as a principal judge in a family court. For some particular local areas, State governments may, after consultation with the High Court of that State, establish a special court staffed by judicial magistrates of the first or second class to try particular cases or classes of offences (for example, only murder or rape cases).²² Judges from the regular judicial cadre are also appointed to administrative posts (ie, as court registrars and other key administrative staff in the judiciary).

Meanwhile, there are a number of tribunals, commissions, and courts whose judges are generally not drawn directly from the State judicial service, and instead have members that may be retired judges, former bureaucrats, social workers, or members of civil society. These non-cadre postings include

consumer commissions, tax tribunals, administrative tribunals, labour courts, competition commissions, and environmental tribunals. Some of these tribunals are appealed to the High Court, while others have specialised appellate bodies that may then be directly appealed to the Supreme Court. Litigants frequently attempt to bypass some of these tribunals (or the subordinate courts) by making a constitutional claim and bringing their matter directly to a High Court under its original jurisdiction for violations of fundamental rights.

Before Independence, district magistrates, then appointed by the executive, could both prosecute and judge criminal matters in their district. One of the longstanding demands of the Indian Independence movement was for the separation of these executive and judicial functions.²³ In the Constituent Assembly debates Jawaharlal Nehru reassured the delegates that the newly independent government would quickly secure the independence of the judiciary.²⁴ Embodying this promise, Article 50 of the Directive Principles of State Policy states that ‘The State shall take steps to separate the judiciary from the executive in the public services of the State.’ However, it was not until the 1973 Code of Criminal Procedure that this commitment was brought about by creating separate judicial magistrates.²⁵ Notably, even after 1973 there still are ‘executive magistrates’, who are drawn from the administrative, not the judicial, service whose functions are administrative or executive in nature, such as the granting, suspension, or cancellation of a licence, the hearing of a tax dispute, or the sanctioning of a prosecution.²⁶ For instance, *tehsildars*, who are revenue administrative officers, collect taxes and set land boundaries at the local level, as well as hear disputes related to these functions.

Finally, there has been a push over many decades to create a more informal justice system through *Lok Adalats*²⁷ and alternative dispute resolution, as well as more local justice through *Gram Nyayalayas*.²⁸ These alternative dispute forums loosen procedural standards in order to hasten the hearing of more minor matters, and draw on historical ideals of village justice, even if the actual forums have become relatively formalised by the State. Some critics contend that poorer litigants’ rights are more vulnerable in these forums, which lack as many procedural safeguards and the rigour of the regular courts.²⁹

2. Backlog and Top-heaviness in the Judicial System

The Indian courts are notoriously backlogged, with cases often taking years and

sometimes decades to resolve. Common explanations of backlog include a shortage of judges, poor judicial management of cases, procedural complexity, a promiscuous system of appeal, and, on the criminal side, the relatively rare use of plea-bargaining. While India's courts are certainly clogged, India itself has a relatively low per capita litigation rate. This is not surprising as more developed economies typically have higher civil litigation rates and, indeed, within India more economically and socially prosperous States have higher civil litigation rates than other States.³⁰ This low per capita litigation rate does mean though that as India further develops economically it can expect to have even more cases enter its courts.

The upper judiciary hears a relatively large number of cases in the Indian court system. For example, in 2012 the subordinate courts disposed of 4.3 million civil matters and 13.9 million criminal matters, while the High Courts disposed of approximately 1.16 million civil matters and 625,000 criminal matters.³¹ In other words, the High Courts were hearing 27 per cent as many civil matters as the subordinate judiciary. Meanwhile, in 2012 the Supreme Court disposed of about 51,000 civil matters and 13,600 criminal matters.³²

This top-heaviness has seemingly increased in recent years. Between 2005 and 2011, the number of cases disposed of by all the High Courts increased by about 33.4 per cent. During the same period, the number of cases that were appealed to the Supreme Court increased by 44.8 per cent and the number of cases the Court accepted for regular hearing increased by 74.5 per cent. Meanwhile, the number of cases disposed of by the subordinate courts grew by only about 7.8 per cent.³³ In other words, litigants seem to be bypassing the subordinate judiciary where possible, appealing to the Supreme Court in greater numbers, and increasingly having those appeals accepted. This pattern seems to indicate either a breakdown in precedent giving by judges in the Supreme Court or precedent following by judges in lower courts.

The overall result is a judiciary whose caseload often looks more like an isosceles trapezoid than a pyramid. The wealthy and the government are in a better position to push their cases to the upper judiciary at the top of this isosceles trapezoid. In particular, they can hire prestigious, and expensive, lawyers who are well known for their ability to ensure that judges in the upper judiciary accept matters for hearing and secure interim orders, which are particularly important in a system where cases routinely take many years to be resolved.³⁴ While it is unlikely that the growth of matters in the upper judiciary will continue to outpace the growth of matters in the subordinate judiciary at such a striking rate, the large number of cases that the upper judiciary, and

particularly the Supreme Court, hears has important consequences for the functioning of the overall judicial system, as Section III explains.

III. *STARE DECISIS* AND POLYVOCALITY

Since opening its doors, the Supreme Court has witnessed an ever-ballooning increase in its workload. Today, panels of two judges typically hear whether the Court should admit a case. This practice occurs during admission hearings, which currently occur on Monday and Friday, during which a single bench will commonly hear seventy or eighty matters. If a case is accepted for admission, it is then heard during what is called a regular hearing. Regular hearing days are currently Tuesday, Wednesday, and Thursday, and a panel of generally two judges will hear anywhere from one to several regular hearing matters in a single day. In its first year of operation in 1950 over 1,000 admission matters were filed with the Supreme Court. By 1970, over 4,000 were filed, and by 1980 this had jumped to over 20,000. The number of regular hearing matters it disposed of tracked a similar curve, rising from 227 in 1951 to 2,433 in 1980. In 2010, almost 70,000 admission matters were filed with the Court, while it disposed of 7,642 regular hearing matters.³⁵ The Supreme Court now hears cases almost year round. Even when most of the Justices are in recess for much of May and all of June, a vacation bench sits to hear pressing matters. To accommodate the increasing number of cases, Parliament increased the maximum size of the Court from its original eight judges to eleven in 1956, fourteen in 1960, seventeen in 1977, twenty-six in 1986, and finally to thirty-one judges in 2008.³⁶

The value of prioritising wide access to the Court, which has led to this multiplication of benches and judges, has roots that are both idealistic and pragmatic. The Indian Constitution, and by extension the judiciary, was charged with changing a country rooted in hierarchy into one that internalised the liberal values of equality and due process for all its citizens. Arguably, a Supreme Court active in many cases has more opportunities to act as this sort of democratic schoolmaster, working to instil these values in a society still frequently resistant. The idea that anyone whose constitutional right has been violated can appear before a panel of the Supreme Court to have their case heard has deep democratic resonance. It is a populist ideal that carries added weight in a country wracked by sharp class, religious, caste, and ethnic divisions.

Wide access also has clear practical benefits. Accepting more cases for regular hearing allows the Indian Supreme Court to actively police the High Courts, the

subordinate judiciary, and the assorted tribunals that have arisen since Independence. Both the Supreme Court and many members of the public seem to distrust these courts, fearing that they might be incompetent, corrupt, or that local parochial interests such as caste biases or State politics unduly influence their decisions. Meanwhile, the somewhat peculiar, and time-consuming, practice of hearings for admission matters in the Supreme Court is a product of a system where written submissions are often underdeveloped and heavy reliance is placed on oral argument.

While Article 141 of the Constitution binds the rest of the judiciary to the Supreme Court's decisions, given its many benches speaking of *the* Indian Supreme Court is in many ways a misnomer. Instead, the many benches that make up the Court are perhaps better thought of as constituting a 'polyvocal court' or 'an assembly of empanelled judges'.³⁷ Any given bench may have a slightly different interpretation of the law from that of another bench, and sometimes a starkly different one.³⁸

The Indian Supreme Court itself is not bound by its past precedent, but may overrule decisions that are 'plainly erroneous' based on 'changing times',³⁹ although in *Keshav Mills Co Ltd v Commissioner of Income Tax*,⁴⁰ the Court warned that when deciding to overturn its decisions the Supreme Court should be cautious and that it should endeavour to create continuity and certainty in the law.⁴¹ Statements that are not part of the *ratio decidendi*, or the principle upon which the case was decided, are considered *obiter dicta* and are not authoritative or binding precedent. Similarly, a judgment is not binding if it is made *per incuriam* (based on ignorance of the terms of a statute or related rules), *sub-silentio* (made without any argument or reference to the critical point of law), or if the judgment is based on the consent of the opposing parties and they agree the judgment will not be binding.⁴²

A Supreme Court bench's precedent is binding not just on the rest of the judiciary, but also on smaller or equal-sized benches of the Court, making much of the typical work of a Supreme Court judge resemble that of a High Court judge, unable to overrule previous Supreme Court decisions.⁴³ In *Union of India v Raghubir Singh*, the Court found that 'the ideal condition would be that the entire Court should sit in all cases to decide questions of law ... But having regard to the volume of work demanding the attention of the Court, it has been found necessary in India as a general rule of practice and convenience that the Court should sit in Divisions.'⁴⁴ Affirming a longstanding rule to promote consistency, in *Central Board of Dawoodi Bohra Community v State of Maharashtra*, a five-judge bench held that 'The law laid down by this Court in a

decision delivered by a Bench of larger strength is binding on any subsequent Bench of lesser or coequal strength.’⁴⁵ The Court further found that a smaller bench should not publicly express doubt of the opinion of a larger bench, but may place it before the Chief Justice to be referred to a bench of coequal strength, which if it also doubts the judgment, may place it before a bench of a larger strength.⁴⁶ The Chief Justice may independently place any matter before a bench of any strength.⁴⁷

Since overruling, or partially overruling, previous decisions requires ever more populated benches, large bench decisions become increasingly entrenched. For example, *Kesavananda Bharati v State of Kerala* (hereinafter *Kesavananda Bharati*) is a seminal decision that laid down the basic structure doctrine, which allows the Court to strike down constitutional amendments if they violate a certain judicially interpreted ‘Basic Structure’ of the Indian Constitution.⁴⁸ Thirteen judges decided the case, in part because the bench needed to overrule an earlier bench of eleven judges. If *Kesavananda Bharati* is to be reconsidered, either in full or in part, a bench of fifteen judges is required or a smaller bench must carefully reinterpret parts of *Kesavananda Bharati* while claiming to be in compliance with the judgment.⁴⁹

Rules over the precedent-setting ability of different bench sizes take on added relevance today, as the Court mostly sits in benches of the minimum required two judges.⁵⁰ In its early days, the Supreme Court generally sat in benches of three, five, or more judges. As more matters have come to the Court and backlog has increased, it has adopted smaller two-judge benches to cope, even though historically a two-judge bench was considered a ‘weak bench’.⁵¹ Traditionally, on a two-judge bench the opinion of the more senior judge prevails, although if the junior judge does disagree with their fellow judge they can dissent, and the matter will be heard by a larger bench. This practice of hearing so many cases with two judges has not been without controversy. In *Union of India v Raghubir Singh*, Pathak CJ wrote that ‘We would ... like to think that for the purpose of imparting certainty and endowing due authority decisions of this Court in the future should be rendered by Division Benches of at least three Judges unless, for compelling reasons, that is not conveniently possible.’⁵² These words though have not been followed, and the widespread use of two-judge benches to hear both important (and relatively unimportant) matters has become the norm.

While smaller benches are supposed to follow the decisions of larger ones, the plethora of benches has led to doctrine from different benches that often seems contradictory or at odds with itself. Overworked judges that are strained to capacity exacerbate this challenge. Rajeev Dhavan has described Indian

Supreme Court judges as lacking ‘precedent consciousness’,⁵³ while Upendra Baxi has noted Supreme Court judges will misapply or simply overlook previous holdings,⁵⁴ and that ‘neither the value of certainty nor that of finality has a very strong appeal to justices of the Supreme Court of India’.⁵⁵ Although these statements were made some thirty years ago, they could be equally applicable today. The ambiguity that develops from this system in predicting the Court’s future orders adds uncertainty to a wide range of social, political, and economic relations and arguably motivates more cases to be brought to the Supreme Court.⁵⁶ Litigants realise even if their case is not strong that with a sympathetic bench they could get a better ruling, so it may be worth the time and money to appeal. This uncertainty in the law also discourages private settlement, as parties are less certain of how a court would ultimately rule in their case.

In theory, larger benches are supposed to clarify conflicts between smaller benches, and under the Indian Constitution five or more judges must hear any ‘substantial question of law as to the interpretation of the Constitution’,⁵⁷ but there has been a decline in such larger benches. In the 1960s, on average about a hundred cases a year were heard by these ‘constitutional benches’ of five or more judges. After the Emergency, this dipped to about ten a year as the Supreme Court was overwhelmed with other more ordinary matters.⁵⁸ Determining the *ratio decidendi* of these judgments can also be difficult, as they have on average got longer and more fractured after the Emergency, frequently making the holding of the majority difficult to discern.⁵⁹

The Indian Supreme Court has given little guidance to what constitutes a ‘substantial question of Constitutional law’, which is required to be heard by five judges as required by Article 145(3) of the Constitution.⁶⁰ However, the exact same language is used in two other places in the Constitution allowing for intratextual comparison. According to the Constitution, a ‘substantial question of law as to the interpretation of the Constitution’ also can be certified by a High Court to be heard by the Supreme Court (under Article 132 of the Constitution), or can be withdrawn from a subordinate court to be decided by a High Court (under Article 228 of the Constitution). Despite using identical language, Articles 145(3), 132, and 228 have in practice been interpreted markedly differently. In recent years, under Article 145(3), five or more judges of the Supreme Court seem to generally only hear constitutional matters of very high jurisprudential or national importance, and do so rarely. Meanwhile, the High Courts seem to have adopted more of a middle path in the interpretation of the same language in Article 132, with High Courts certifying many, but certainly not all, constitutional matters to be appealed to the Supreme Court. Meanwhile,

under Article 228 almost all matters in the subordinate judiciary that involve constitutional interpretation are withdrawn to a High Court.

For the drafters of the Constitution a ‘substantial question of law as to the interpretation of the Constitution’ seems to have meant any case where the substantial issue at stake was constitutional interpretation (in other words, the case could not be decided without deciding a constitutional question).⁶¹ This is similar to how Article 228 is interpreted today, but not Articles 132 or Article 145(3).

Those who advocate for more five-judge benches by the Supreme Court argue that having such benches would reduce confusion over precedent, increase the quality of decisions, is supported by an intratextual reading of the Constitution, and is in line with the founders’ vision. Yet, having significantly more five-judge or larger benches would entail costs. The Court would need to either add more judges, thereby creating even more possibility for contradictory precedent, or hear fewer matters, which some fear would leave the Supreme Court less opportunity to correct erring decisions of lower courts.

1. Judicial and Litigation Entrepreneurs and Chief Justice Dominance

The distinctive structure of the Supreme Court allows for different types of relations between judges, as well as the Court and litigants, impacting the Court’s jurisprudence as a result. For example, the development of public interest litigation would have been far less likely without the Court’s panel structure. Judicial entrepreneurs such as Bhagwati, Iyer, and Verma JJ played a leading role in developing public interest litigation in the 1980s and 1990s, frequently issuing decisions from smaller benches on which they were the senior judges. Litigation entrepreneurs from civil society who bring public interest litigation are also able to use the Court’s structure to attempt to shop for benches, using procedural techniques to try (not always successfully) to have their case heard by judges that may be more sympathetic to their arguments. The detailed orders and long hearings in public interest litigation cases were made possible on a widespread basis at the Supreme Court level by having a large number of smaller benches with the capacity to commit the time necessary to hear these cases. For instance, in the ‘right to food’ case, which has gone on for over ten years, the Supreme Court has issued over forty orders, managing many of the country’s primary social welfare programmes on the basis of pleadings

from the parties and recommendations by right to food commissioners who were appointed by the Court to help oversee its orders.⁶²

When judges on smaller benches create innovations like certain types of public interest litigation, it enters a feedback loop. The press, public, and bar react with favourable or unfavourable views. If there is a largely favourable reception an expectation is created that other judges should follow a similar line of reasoning. Letting smaller benches first experiment with new paths in jurisprudence allows other benches of the Court to better understand the feasibility and real-world implications of its judgments.

Having precedent more regularly reinterpreted through different Supreme Court benches may also be a strength in a country where there is little national consensus on many political issues from caste-based reservations to environmental policy. The judges can use their discretion to navigate the particularities of a specific case rather than try to impose a more cohesive jurisprudence. In this way, the Court's pluralistic polyvocality can be seen as a tool, conscious or not, to keep the law and the Court as an open arbitrator between different social and political forces with divergent views.⁶³

While the Indian Supreme Court's polyvocality can seem almost anarchic, there are also forces that help foster more cohesiveness.⁶⁴ As has already been mentioned, there are theoretically strong precedent rules that oblige judges to at least be perceived as following the Court's precedent. The Chief Justice of India also plays an important role in unifying and policing the system. The Chief Justice (who so far has only been male) selects which judges will sit together on panels, meaning he can place outlier judges on panels with more senior judges, making their voice less likely to be heard. The Chief Justice may also direct important cases to his own bench or other benches. Finally, he chooses when to constitute five-judge or larger benches and who will be on them. As a result, he can influence the outcome of matters by simply choosing judges that he thinks will lean towards a certain outcome. For example, since Independence the Chief Justice has been 6.5 times less likely to be in dissent than another judge on constitutional benches, perhaps indicating that the Chief Justice is arranging benches that are less likely to disagree with him.⁶⁵

While Supreme Court judges, and in particular the Chief Justice, may seem to have considerable discretionary power, this power is checked by the relatively short time they have on the Court. Between 1985 and 2010 the average Indian Supreme Court judge was appointed to a High Court at the age of 45 and to the Supreme Court at the age of 59, which means on average they served six years on the Supreme Court.⁶⁶ The Chief Justice of India is appointed by the

President,⁶⁷ but by tradition is the seniormost judge on the Supreme Court, meaning that a typical Chief Justice is Chief Justice for just over a year. Since judges' terms on either the Supreme Court or High Court are comparatively brief this limits the power of any given individual judge. At the same time, it may help empower prominent lawyers, who will often be well-respected fixtures at the Supreme Court and in the High Courts for much longer periods than the judges, giving these lawyers both potential reputational and institutional knowledge advantages over the judges.⁶⁸

IV. MANAGEMENT OF THE COURTS

Besides hearing a disproportionate number of cases, the upper judiciary in India is also centrally involved in governing the judicial system. This is in part by constitutional design and in part by the upper judiciary, and in particular the Supreme Court, claiming more authority over the years.

1. Subordinate Courts

To staff the subordinate courts, each State has its own judicial service that is chosen through competitive examination. The High Court, through a committee of judges, sets and administers the exam, although in some States this is done with the involvement of the State public service commission. The Governor of a State appoints the judges of the subordinate judiciary, but must do so by consulting the High Court, and jurisprudence (see eg, *MM Gupta v State of Jammu and Kashmir*⁶⁹) has made clear that the Governor must as a rule follow the High Court's directions.⁷⁰

Article 227 gives the High Court superintendence over all courts and tribunals in its jurisdiction (except military tribunals), allowing them to make rules for these courts and call for returns. The High Courts control the posting, transfer, and promotion of judges in the subordinate judiciary in their jurisdiction.⁷¹ A High Court can delegate some of these powers to an administrative committee of judges, but decisions of appointment, promotion, and disciplining are done during sittings of the entire High Court. The Chief Justice of the High Court is in charge of administering the bureaucracy of the High Court,⁷² although in practice many of these duties are often delegated amongst the Court's most senior judges.

Interactions between subordinate court judges and High Court judges are frequent and often demanding. For example, subordinate court judges are typically assigned to a committee of High Court judges, which in turn monitors and reports on their work. These reports are included in the subordinate court judge's file and form an important part of the information that informs decisions over the judge's promotion, which is done on the basis of seniority-cum-merit. This internal promotion of subordinate court judges ensures independence from the executive, but creates a high degree of norm following within the system as judges try to ensure they please—or at least do not upset—superiors within the judiciary.

There has been a longstanding call for the creation of an All-India Judicial Service to staff the subordinate judiciary. It has been argued that such a pan-Indian judicial service, modelled on the vaunted All India Administrative Service, would be more prestigious and so attract higher-quality and more professional judges to the subordinate judiciary, who would be less likely to entertain parochial interests since they would generally not be posted to the State of their origin. In 1976, Article 312 of the Constitution, dealing with the All-

India Services, was amended to explicitly allow for the creation of an All-India Judicial Service for the upper tier of the subordinate judiciary.⁷³ The Supreme Court ordered the creation of an All-India Judicial Service in 1992,⁷⁴ but despite declared support from the Supreme Court and multiple Prime Ministers this order has yet to be fulfilled, in part because of resistance by State governments as well as State bar councils and members of the subordinate judiciary.

The State government also plays an important role in administering the courts in the State. The law minister of the State approves funding of the State judiciary, including for new posts and infrastructure improvements. Although there are few open conflicts between the judiciary and the government over the budget, the judiciary has long complained that it does not receive enough money from the State governments, which judges claim leads to under-resourced and backlogged courts.⁷⁵

Traditionally, High Courts were at the centre of judicial power in India and at Independence they were given a dominant role in administering the subordinate courts in each State, while the Supreme Court was not provided with extensive powers to manage either the High Courts or the judiciary more broadly. However, the Supreme Court through its own, often wide, interpretation of the Constitution has subsequently provided for itself a pivotal, and frequently trumping, role in governing the rest of the judiciary.

Besides directing the creation of an All-India Judicial Service, in *All-India Judges Association v Union of India*,⁷⁶ the Supreme Court ordered that infrastructure and amenities for the subordinate judiciary be improved, found that recruits to the judicial service should have at least three years' experience at the bar, and ordered the retirement age of the subordinate judiciary to be raised to 60. In *All-India Judges Association v Union Of India*,⁷⁷ the Court partially reversed its earlier decision and found that recruits to the judicial service did not require previous experience at the bar, as this had led to difficulty in recruiting qualified lawyers. The Court also called on the government to increase the strength of the subordinate judiciary from 'the existing ratio of 10.5 or 13 per 10 lakhs people to 50 Judges for 10 lakh people', as well as to increase the judiciary's pay scale.⁷⁸ The decision also laid out guidelines for recruitment into the higher judicial service. In *Brij Mohan Lal v Union of India*,⁷⁹ the Supreme Court directed that fast-track judges, who had been funded by the Union government, be regularised into the State judicial services. The Supreme Court has also quashed disciplinary and other actions against subordinate judges by High Courts (see eg, *RC Sood v High Court of Rajasthan*⁸⁰).

The Supreme Court has indirect influence over the subordinate judiciary

through its interaction with High Court judges, particularly High Court Chief Justices, who often are eager to be appointed to the Supreme Court. The Conference of State Chief Justices is led by the Chief Justice of India and will frequently issue multiple resolutions impacting the administration and staffing of the subordinate judiciary.⁸¹ Supreme Court judges will also interact with High Court judges at the National Judicial Academy in Bhopal and through other more informal meetings, giving them opportunities to influence how High Court judges manage both the High Courts and the subordinate judiciary.

Finally, the Supreme Court performs a coordinating and information role. It tracks the number of instituted, disposed, and backlogged cases throughout the judicial system, the number of judicial officers and vacant positions, and has been working to create a National Court Management System to improve these information gathering and dissemination processes.⁸²

2. The Upper Judiciary

Under the Constitution, to be appointed a Supreme Court judge one must be a High Court judge for at least five years, an advocate at a High Court for at least ten years, or a distinguished jurist.⁸³ High Court judges must be High Court advocates with ten or more years of experience or judicial officers of the subordinate judiciary with ten or more years of experience.⁸⁴ Currently, about one-third of High Court judges are promoted from the judicial service and two-thirds are selected from the bar directly.⁸⁵ High Court judges are traditionally selected from the State or States over which the High Court has jurisdiction. However, since 1983 there has been a policy of having the Chief Justice of each High Court be a senior High Court judge transferred from another State to ensure greater independence from local considerations. The Law Commission recommended in the late 1970s that one-third of High Court judges should come from outside the State, but this proposal has never been implemented.⁸⁶

While in the original constitutional text, it was the President who appointed Supreme Court and High Court judges in consultation with the judiciary,⁸⁷ starting in the 1980s the Supreme Court began to have a controlling hand in appointments. Through its orders in what is collectively known as the *Three Judges Cases* the Court evolved new rules for the appointment and transfer of judges in the upper judiciary in order to guard against what it perceived as undue influence from the executive both during and before the Emergency.⁸⁸ Under this jurisprudence a collegium of the Chief Justice of India and the four most senior other judges recommend appointments to the Supreme Court. High Court judges are appointed on the recommendation of the Chief Justice of India, the two most senior judges of the Supreme Court, and the Chief Justice of the concerned High Court. These recommendations are almost always followed, and the judiciary cannot be bypassed in the appointment process. Similarly, the Supreme Court requires that all transfers be initiated by the Chief Justice with the consultation of the four most senior Supreme Court judges as well as any Supreme Court judges familiar with the concerned High Court.⁸⁹

Responding to complaints of incestuousness and sycophancy surrounding the appointment and transfer of High Court and Supreme Court judges through the collegium system, in 2014 Parliament passed the Constitution (One-hundred-and-twenty-first Amendment) Bill, which was to establish a National Judicial Appointments Commission (NJAC).⁹⁰ The NJAC was to replace the collegium

and would appoint and transfer High Court and Supreme Court judges. The Commission was to comprise the Chief Justice of India, the two other seniormost judges of the Supreme Court, the Union Minister for Law and Justice, and two eminent persons to be nominated by the Prime Minister, the Chief Justice of India, and the Leader of the Opposition of the Lok Sabha. However, in 2015 a five-judge bench of the Supreme Court struck down the amendment that established the NJAC as violating judicial independence and so the Basic Structure doctrine of the Indian Constitution.⁹¹ The majority argued that by not giving the judges control over the appointment process the amendment undercut the independence of the judiciary and ordered that the previous collegium system be restored. It remains to be seen if further reform efforts, either instituted by the Court or outsiders, might change the collegium process, but for now the judiciary clearly remains central to its own self-governance.

Although appointments to the Supreme Court and transfers to be made Chief Justice of a High Court are based on merit and the discretion of the collegium, seniority has traditionally played a central role in these appointments, with more senior High Court judges being more likely to be elevated to the Supreme Court. Seniority also plays an important role on the Court itself. In recent years, the Chief Justice of India has always been the judge who has served the longest on the Indian Supreme Court. This practice makes it possible to predict who will become the Chief Justice years in advance with a great deal of accuracy.

Besides its judges controlling role in judicial appointments and transfers, the Supreme Court also creates its own rules as to who may practice before it, how proceedings are governed, what fees it may charge, and how it hears cases.⁹² The administration of the Court, including the appointment and management of its staff, is directed by the Chief Justice and paid for out of a common fund.⁹³

While the salary of judges is fixed by statute and cannot be reduced during their tenure,⁹⁴ some have claimed that judges become more sensitive to the concerns of the executive and corporate interests as they near retirement, as after retirement they may wish to be appointed to either positions on public tribunals or commissions (a decision made by the executive) or to arbitration panels (whose members are chosen by the—usually corporate—parties of the dispute). The base salary of a Supreme Court judge is currently Rs 90,000 a month and their pension is similarly modest.⁹⁵ Meanwhile, an elite, well-paid advocate can make Rs 400,000 for just one appearance before the Supreme Court.⁹⁶ During their tenure, judges do have housing provided for them by the State, often in desirable locations, as well as a government car, driver, and other perks. These

perks though may further incentivise some judges to find work after retirement that will allow them to maintain a comparable standard of living.

Adding to their post-retirement financial predicament, former Supreme Court judges may not practice again before any court in India,⁹⁷ while High Court judges cannot practice again before any subordinate court and by tradition do not argue in the High Courts.⁹⁸ Many former High Court judges are appointed as senior advocates at the Supreme Court once they retire, but it is usually difficult to start a robust Supreme Court practice so late in one's career.

While the design of the Indian judiciary has historically insulated judges from the demands of the executive, it also makes them much more susceptible to the demands of judges further up the judicial hierarchy who may control their prospects for promotion or transfer. This power is accentuated by the tiered retirement age of judges. Subordinate court judges retire at 60 and so are eager to be appointed to the High Court if possible where retirement is at 62,⁹⁹ while High Court judges desire to be appointed to the Supreme Court where retirement is set at 65.¹⁰⁰ In other words, promotion not only carries prestige benefits, but failure to be promoted can lead to an earlier end to one's judicial career.

There have been calls to reform how to handle complaints against judges, particularly in relation to corruption. Currently, complaints are dealt with at the discretion of the Chief Justice, and in the extreme, a Supreme Court or High Court judge may be removed by a two-thirds majority of both Houses of Parliament for proved misbehaviour or incapacity, although such action is rare. The proposed Judicial Standards and Accountability Bill 2010 would require judges to declare their assets and would create a national oversight committee to hear complaints. The commission would comprise a former Chief Justice of India, a current Supreme Court judge, a current High Court Chief Justice, the Attorney General, and an eminent person nominated by the President.

V. CONCLUSION

The Indian judiciary is a polycephalic creature—whose largest heads can snarl and sometimes bite—but which for much of its history has had an emaciated body. By centralising power in the upper judiciary, and particularly the Supreme Court, the judiciary has helped protect and consolidate its independence, as well as corrected some of the worst errors of the rest of the judiciary. However, this top-heavy system has also led to promiscuous appeal, destabilising *stare decisis*

and creating more delay in the resolution of disputes. The interpretation of the Constitution, and law in general, frequently becomes polyvocal and in flux.

Today, India is investing more resources in its courts, including the subordinate judiciary. Nothing should be taken away from the critical role the High Courts and Supreme Court have played in checking some of the worst abuses or omissions of the State, but if the Indian judiciary is to truly be democratised it will be in the subordinate courts. It is only judges at a more local level that can systematically ensure that a citizen unfairly imprisoned by the police or a shopkeeper attempting to enforce a contract receives justice.

Empowering the subordinate courts will require reforming the top-heavy nature of the Indian judiciary. For instance, the Supreme Court could hear fewer regular hearing matters and have more large benches in order to provide clearer precedent for the entire judiciary, helping discourage appeal and encourage settlement. Subordinate courts could be allowed to hear at least some constitutional matters, while efforts could also be made to dismantle the rigid social hierarchy that creates undue servility in the subordinate judiciary in relation to the High Courts and Supreme Court (equalising the retirement age for all judges would be one concrete place to begin).

Judges do not make judicial decisions in isolation. Instead, they sit within courts and professional hierarchies that shape and constrain their role in the adjudicatory process. Mapping the structure of this larger architecture helps us understand how both judges and litigants navigate this system and the context in which the law and the Constitution are ultimately interpreted.

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¹ Rajeev Dhavan, *The Supreme Court Under Strain: The Challenge of Arrears* (NM Tripathi 1978); Nick Robinson, 'A Quantitative Analysis of the Indian Supreme Court's Workload' (2013) 10(3) *Journal of Empirical Legal Studies* 570.

² Rajeev Dhavan, *Litigation Explosion in India* (NM Tripathi 1986); Robert Moog, 'The Significance of Lower Courts in the Judicial Process' in Veena Das (ed) *The Oxford India Companion to Sociology and Anthropology* (Oxford University Press 2003) 1390; Jayanth Krishnan and others, 'Grappling at the Grassroots: Access to Justice in India's Lower Tier' (2014) 27 *Harvard Human Rights Journal* 151, 153. This chapter uses the term 'subordinate' in referring to district courts and other affiliated courts and tribunals because the Indian Constitution uses this term (see Constitution of India 1950, ch VI). 'Subordinate' is not meant to imply that these courts are in any way less important than the Supreme Court or High Courts. Indeed, a key thesis of this chapter is that the Indian judiciary has suffered due to misplaced faith in the powers and abilities of the upper judiciary at the expense of the subordinate.

³ Supreme Court of India, 'National Court Management System Policy & Action Plan' (2012) 26–32 <<http://supremecourtindia.nic.in/ncms27092012.pdf>>, accessed October 2015, showing the allocation and variation of different states' budgets to the judiciary. For example, in Maharashtra over 2% of the budget was devoted to judicial expenditures in 2011, while in Chhattisgarh it was about 0.25%.

⁴ Marc Galanter, *Competing Equalities: Law and the Backward Classes in India* 481 (Oxford University Press 1984); Krishnan ([n 2](#)) 168.

⁵ Constitution of India 1950, art 226.

⁶ Constitution of India 1950, art 32.

⁷ See eg, *PN Kumar v Municipal Corporation of Delhi* (1987) 4 SCC 609, detailing ten reasons litigants should generally approach High Courts before the Supreme Court for fundamental rights violations.

⁸ MP Singh, 'Situating the Constitution in the District Courts' (2012) 8 Delhi Judicial Academy Journal 47. Constitution of India 1950, art 32(3), though does enable Parliament to pass legislation that would extend the Supreme Court's fundamental rights jurisdiction to other courts, including seemingly the subordinate judiciary.

⁹ Constitution of India 1950, art 130.

¹⁰ Robinson ([n 1](#)) 587.

¹¹ Constitution of India 1950, art 214.

¹² Constitution of India 1950, art 231.

¹³ Constitution of India 1950, art 230.

¹⁴ The district (which on average contains about 1.9 million people) is the chief unit of administrative coordination below the State level.

¹⁵ Each district in India is composed of a number of blocks ranging from three to thirty, depending on the geography of the district.

¹⁶ Law Commission of India, *Reform of Judicial Administration* (Law Com No 14, vol 1, 1958) 264 <<http://lawcommissionofindia.nic.in/1-50/Report14Vol1.pdf>>, accessed October 2015. After the First National Judicial Pay Commission Report 1999 and the Supreme Court's subsequent intervention there has been substantial progress made in harmonising these variations.

¹⁷ These are areas having a population exceeding 1 million, which are designated as metropolitan areas under the Code of Criminal Procedure 1973, s 8.

¹⁸ Code of Criminal Procedure 1973, ss 3(a) and (b) and 12(2).

¹⁹ Constitution of India 1950, art 233(2).

²⁰ Code of Criminal Procedure 1973, s 29.

²¹ Constitution of India 1950, art 226.

²² Code of Criminal Procedure 1973, s 11(1).

²³ *Constituent Assembly Debates*, vol 7 (Lok Sabha Secretariat 1986) 590, 25 November 1948 (Bakshi Tek Chand).

²⁴ *Constituent Assembly Debates*, vol 7 (Lok Sabha Secretariat 1986) 589, 25 November 1948 (Jawaharlal Nehru).

²⁵ First National Judicial Pay Commission Report (1999) ch 6.11 <<http://www.kar.nic.in/fnjpc/firstpage.htm>>, accessed October 2015: 'In order to bring about complete separation of judiciary from the executive, the Code of Criminal Procedure 1973 was enacted.'

²⁶ Code of Criminal Procedure 1973, s 6.

²⁷ Lok Adalats first found statutory backing in the Legal Services Authorities Act 1987, ch VI.

²⁸ Gram Nyayalayas were formalised in the Gram Nyayalayas Act 2008.

²⁹ Marc Galanter and Jayanth Krishnan, 'Bread for the Poor: Access to Justice and Rights of the Needy in India' (2004) 55 Hastings Law Journal 789; Menaka Guruswamy and Aditya Singh, 'Village Courts in India: Unconstitutional Forums with Unjust Outcomes' (2010) 3(3) Journal of Asian Public Policy 281.

³⁰ Theodore Eisenberg, Sital Kalantry, and Nick Robinson, 'Litigation as a Measure of Well Being' (2013) 62(2) DePaul Law Review 247.

³¹ In fact, these statistics give the impression that more full cases are being heard in the subordinate judiciary than actually are, since they include routine, and often uncontested, cases. For example, almost 40% of matters in the subordinate courts in 2010–12 involved traffic tickets. Law Commission of India,

Arrears and Backlog: Creating Additional Judicial (wo)manpower (Law Com No 245, 2014) 78 <<http://lawcommissionofindia.nic.in/reports/Report245.pdf>>, accessed October 2015.

³² These statistics are compiled from Issues of Court News available on the Indian Supreme Court's website, <<http://supremecourtindia.nic.in/courtnews.htm>>, accessed October 2015.

³³ Robinson ([n 1](#)) 581.

³⁴ Marc Galanter and Nick Robinson, 'India's Grand Advocates: A Legal Elite Flourishing in the Age of Globalization' (2014) 20(3) *International Journal of the Legal Profession* 241.

³⁵ Nick Robinson, 'Structure Matters: The Impact of Court Structure on the Indian and U.S. Supreme Courts' (2013) 61(1) *American Journal of Comparative Law* 173, 180–81.

³⁶ Robinson ([n 35](#)) 182.

³⁷ Robinson ([n 35](#)) 184; Upendra Baxi, 'Preface' in Mayur Suresh and Siddharth Narrain (eds) *The Shifting Scales of Justice: The Supreme Court in Neo-Liberal India* (Orient Blackswan 2014) vii.

³⁸ Robinson ([n 35](#)) 185; Chintan Chandrachud, '[Constitutional Interpretation](#)' (chapter 5, this volume).

³⁹ *Bengal Immunity Company Limited v The State of Bihar* AIR 1955 SC 661.

⁴⁰ AIR 1965 SC 1636.

⁴¹ Reaffirmed in *Jindal Stainless Ltd v State of Haryana* (2010) 4 SCC 595.

⁴² *State of Uttar Pradesh v Synthetics and Chemicals Ltd* (1991) 4 SCC 139; *Municipal Corporation of Delhi v Gurnam Kaur* (1989) 1 SCC 101.

⁴³ Dhavan ([n 1](#)) 36.

⁴⁴ (1989) 2 SCC 754 [27].

⁴⁵ (2005) 2 SCC 673 [12].

⁴⁶ *Central Board of Dawoodi Bohra Community* ([n 45](#)) [12].

⁴⁷ In *Pradip Chandra Parija v Pramod Chandra Patnaik* (2002) 1 SCC 1, the Court found that if a case involves a substantial question of the interpretation of the constitution and so implicates art 145(3), then two judges may refer a matter directly to a constitutional bench.

⁴⁸ (1973) 4 SCC 225.

⁴⁹ This system of ever-increasing bench sizes did not have to be adopted and it is unclear why it was. The Court could instead have a rule that a bench of a certain size—perhaps seven or nine judges—could overturn a bench of any other size, even if smaller benches had to conform with the decisions of these larger benches.

⁵⁰ The Supreme Court Rules 1966, Order VII.

⁵¹ Robinson ([n 35](#)) 180.

⁵² *Raghubir Singh* ([n 44](#)) [28].

⁵³ Dhavan ([n 1](#)) 450.

⁵⁴ Upendra Baxi, 'The Travails of Stare Decisis in India' in AR Blackshield (ed) *Legal Change: Essays in Honour of Julius Stone* (Butterworths 1983) 38.

⁵⁵ Baxi ([n 54](#)) 45.

⁵⁶ If a High Court bench finds two Supreme Court judgments conflicting it should follow the one that it views as more accurate. *Amar Singh Yadav v Shanti Devi* AIR 1987 Pat 191.

⁵⁷ Constitution of India 1950, art 145(3).

⁵⁸ Nick Robinson and others, 'Interpreting the Constitution: Indian Supreme Court Benches since Independence' (26 February 2011) 46(9) *Economic and Political Weekly* 27, 28.

⁵⁹ Robinson ([n 58](#)) 30.

⁶⁰ Chintan Chandrachud, '[Constitutional Interpretation](#)' (Chapter 5, this volume).

⁶¹ *Constituent Assembly Debates*, vol 8 (Lok Sabha Secretariat 1986) 613, 3 June 1949 (BR Ambedkar), noting that all appeals to the Supreme Court involving constitutional questions should be heard by five judges.

⁶² Robinson (n 35) 190.

⁶³ Robinson (n 35) 190.

⁶⁴ In order to help reduce backlog and resolve conflicts in the High Courts, in 1976 the Forty-second Amendment (further amended by the Forty-fourth in 1978) gave the Supreme Court power to transfer a case to itself if two High Courts were hearing substantially the same questions of law that are of general importance (art 139A(1)). The Supreme Court may also transfer cases if it deems it expedient to do so for the ends of justice (art 139A(2)). This gives the Supreme Court pre-emptive power to clear up conflicts between High Courts. However, in reality since the multiple benches of the Supreme Court often have a somewhat contradictory doctrine this frequently does not more generally help clarify precedent except in the particular case or cases being heard.

⁶⁵ Robinson (n 58) 31.

⁶⁶ Abhinav Chandrachud, 'An Empirical Study of the Supreme Court's Composition' (1 January 2011) 46(1) Economic and Political Weekly 71, 72.

⁶⁷ Constitution of India 1950, art 126.

⁶⁸ Galanter and Robinson (n 34).

⁶⁹ (1982) 3 SCC 412.

⁷⁰ Constitution of India 1950, art 233.

⁷¹ Constitution of India 1950, art 235.

⁷² Constitution of India 1950, art 229.

⁷³ The Constitution (Forty-second Amendment) Act 1976.

⁷⁴ *All India Judges Association v Union of India* (1992) 1 SCC 119.

⁷⁵ Supreme Court of India, 'Notes on Agenda Items, Chief Justices Conference (August 14–15, 2009)' 48–50 <<http://supremecourtfindia.nic.in/cjiconference/agenda2009.pdf>>, accessed October 2015.

⁷⁶ (1992) 1 SCC 119.

⁷⁷ (2002) 4 SCC 247.

⁷⁸ *All India Judges Association* (n 77) [25].

⁷⁹ (2012) 6 SCC 502.

⁸⁰ (1994) Supp (3) SCC 711.

⁸¹ Supreme Court of India, 'Conference Resolutions, Chief Justices Conference (August 5–6, 2013)' <http://supremecourtfindia.nic.in/outtoday/resolution_cjc2013.pdf>, accessed October 2015.

⁸² See eg, Supreme Court of India, 'National Court Management Systems Action Plan' (2012) <supremecourtfindia.nic.in/ncms27092012.pdf>, accessed October 2015.

⁸³ Constitution of India 1950, art 124(3).

⁸⁴ Constitution of India 1950, art 217(2).

⁸⁵ Supreme Court of India, 'Notes on Agenda Items, Chief Justices Conference (August 14–15, 2009)' <<http://supremecourtfindia.nic.in/cjiconference/agenda2009.pdf>>, accessed October 2015.

⁸⁶ Law Commission of India, *The Method of Appointment of Judges* (Law Com No 80, 1979) 33 <<http://lawcommissionofindia.nic.in/51-100/report80.pdf>>, accessed October 2015.

⁸⁷ See Constitution of India Art 1950, arts 124(2) and 217.

⁸⁸ *SP Gupta v Union of India* (1981) Supp SCC 87; *Supreme Court Advocates-on-Record Association v Union of India* (1993) 4 SCC 441; *Re Special Reference No 1 of 1998* (1998) 7 SCC 739.

⁸⁹ See *Supreme Court Advocates-on-Record v Union of India* (1993) 4 SCC 441.

⁹⁰ See Constitution of India 1950, art 124(A–C).

⁹¹ *Supreme Court Advocates-on-Record Association v Union of India* 2015 SCC OnLine SC 964.

⁹² Constitution of India 1950, art 145.

⁹³ Constitution of India 1950, art 146.

⁹⁴ Constitution of India 1950, arts 125 and 221.

⁹⁵ Supreme Court Judges (Salaries and Conditions of Service) Act 1958, s 12A.

⁹⁶ Galanter and Robinson ([n 34](#)).

⁹⁷ Constitution of India 1950, art 124(7).

⁹⁸ Constitution of India 1950, art 220.

⁹⁹ Constitution of India 1950, art 217.

¹⁰⁰ Constitution of India 1950, art 124(2).

CHAPTER 20

JUDICIAL INDEPENDENCE

JUSTICE (RETD) BN SRIKRISHNA

I. INTRODUCTION

IN a democratic polity wedded to rule of law an independent judiciary is a sine qua non. In a democratic State governed by a written constitution, the task of interpreting the constitution and being the sole arbiter in constitutional disputes is assigned to the judiciary and it is here that it is required to be totally free of any direct or covert influence by the legislative or the executive. It is in this role that the judiciary has to enjoy complete freedom. If the judiciary were to be controlled by the legislature and/or the executive, the rule of law would become chimerical for absence of an external audit machinery of the constitutional validity of any legislative or executive action. For this reason also, the judiciary needs to be fully independent so that it can test the acts of the legislature or executive on the anvil of the constitution. That is the true *raison d'être* for judicial independence. In the felicitous parlance of Krishna Iyer J,

[I]n a dynamic democracy, with goals of transformation set by the Constitution, the Judge, committed to uphold the founding faiths and fighting creeds of the nation so set forth, has to act heedless of executive hubris, socioeconomic pressure, and die-hard obscurantism. This occupational heroism, professionally essential, demands the inviolable independence woven around the judiciary by our Constitution.¹

This powerful exhortation extolling the virtue of judicial independence, delivered in the *Sankalchand* case, which will be subsequently examined, was supported by highlighting a host of constitutional provisions that recognise this virtue and give it legal shape. These range from the security of the salary of judges to prohibitions on legislatures discussing the official conduct of judges to the immunity that judges receive for the performance of their duties. The form of the oath prescribed in the Third Schedule to the Constitution demands that judges perform their duties 'without fear or favour, affection or ill-will'.² In a normative sense, judicial independence would be independence from any factor influencing the judge to deviate from the oath of office, namely to uphold the Constitution and the laws, and to act without fear or favour, affection or ill will.

Anything short of these desiderata would spell the absence of independence. The factors that might influence a judge to deviate from the oath of office could be pressure from the legislature, executive, or any other public authority; it could be close affinity with a litigant or, at the worst, corrupt motives. Any of these factors would erode the independence of the judge to abide by the requirements of his oath of office and induce him to decide for reasons other than the merits of the issue for resolution. ‘The muniments’, as the Supreme Court noted, ‘highlight the concern of founding fathers for judicial insulation, a sort of Monroe doctrine.’³

The aforementioned protections, which constitute the *muniments* that induced the strong observations about the independent status of the judiciary under the Indian Constitution, leave no doubt that the founders were conscious of the pivotal role of the judiciary and ensured that no manner of interference with the independence of the judiciary was brooked. To give but one example, while under the Government of India Act 1935 the judges of the High Court held office during the pleasure of the Crown, Article 217(1) of the Constitution of India substituted a fixed tenure of office during good behaviour for the tenure at pleasure. A judge of the High Court or Supreme Court is thus not removable from office except for proved misbehaviour or incapacity during his tenure of office. The very obviolation of the pleasure doctrine as controlling the tenure of office of a judge of the High Court or the Supreme Court is explicit of the intention of the founding fathers to insulate the judges of the superior courts from the pleasure of the executive. The several Articles embedded in the Constitution ensure that a judge is fully independent and capable of rendering justice not only between citizens and citizens but also between citizens and the State, without let, hindrance, or interference by anyone in the State polity. This kind of insulation or immunity from the pleasure of the executive is essential in view of the fact that the Constitution has guaranteed several fundamental rights to the citizens and persons and also empowered the High Courts and Supreme Court under Article 226 and 32 to render justice against acts of the State.

Apart from yielding to someone’s pressure or acting on account of ill will or affection or corrupt motives, often the judge may act from benign motives but because of deep-seated prejudices. As Cardozo once said, ‘the great tides and currents which engulf the rest of men do not turn aside in their course and pass the judges by’.⁴ This perceptive observation of Cardozo stems from his belief that subconscious imprints of the socioeconomic background and upbringing of a person appointed as judge could influence the discharge of his functions, but bias due to the political view held by a judge would have been far from his mind.

In *SP Gupta*, during the days of the dominant discourse of committed judiciary, while advocating an active role for a judge and ‘value packing’, a learned judge of the Supreme Court delivered a homily worth quoting for the stark contrast between precept and practice, and also as instructive of how political bias is destructive of the true independence of the judiciary:

It is not unlikely that the total insulation may breed ivory tower attitude, a bishop delivering sermon from the pulpit and therefore no claim to be imperium in imperio can be extended to the judiciary or for that matter to any other instrumentality under the Constitution. It is not as if judicial independence is an absolute thing like a brooding omnipresence ... Nor should judges be independent of the broad accountability to the nation and its indigent and injustice ridden millions. Therefore, consequently one need not too much idolise this independence of judiciary so as to become counterproductive ... [The] judiciary cannot stand aloof and apart from the mainstream of society.⁵

Conveniently, the observations of Cardozo were pressed into service to support the pernicious theory of committed judges afloat during the heyday of Indira Gandhi’s government. Learned judges, calling themselves ‘forward looking’, but pejoratively referred to as ‘looking forward’ judges, vied with each other in giving speeches propounding their perceived socio-political approach to constitutional questions. Forgotten, or perhaps conveniently ignored, were the observations of Benjamin Cardozo that emphasised judicial integrity as part and parcel of the principle of judicial independence:

Judges have, of course, the power, though not the right, to ignore the mandate of a statute, and render judgment in despite of it. They have the power, though not the right, to travel beyond the walls of the interstices, the bounds set to judicial innovation by precedent and custom. Nonetheless, by that abuse of power, they violate the law. If they violate it wilfully, ie, with guilty and evil mind, they commit a legal wrong, and may be removed or punished even though the judgments which they have rendered stand.

. . . The recognition of this power and duty to shape the law in conformity with the customary morality is something far removed from the destruction of all rules and the substitution in every instance of the individual sense of justice, the *arbitrium boni viri*. That might result in a benevolent despotism if the judges were benevolent men. It would put an end to the reign of law.⁶

Cardozo may be right in stating that *the great tides and currents which engulf the rest of men do not turn aside in their course and pass the judges by*, but the mettle of a judge is tested by his ability to stand firm like the Rock of Gibraltar in the face of tides and currents. That would be the hallmark of true judicial independence.

This chapter focuses on the place that judicial independence occupies within Indian constitutionalism. Under the Indian Constitution the judiciary is divided into superior judiciary—that is, judges of the Supreme Court and High Courts—and subordinate judiciary—that is, the judges under the control of the State High

Courts. The judges of the subordinate judiciary also enjoy independence in their judicial acts, albeit that their decisions may be subject to scrutiny by the High Court and they are subject to the administrative control of the High Court. In matters regarding their appointment, pay, and allowances, they are governed by the rules made by the Governor of the State but in matters of performance appraisal, promotions, disciplinary measures, and removal they are subject to the control of the High Court. It would therefore be sufficient to explore the contours of judicial independence in India by focusing the discussion on the judges of the superior courts.

The goal of judicial independence must be considered alongside the goal of judicial accountability. The challenge in any modern constitutional democracy is to design a system that institutionally secures the independence of the judiciary as well as produces a degree of accountability. The goals of judicial independence and judicial accountability are not necessarily at odds. On one account, a legal system in which judges have a greater degree of autonomy will itself produce a greater degree of accountability. This idea of accountability will be based on self-regulation. A second equilibrium is one in which judicial independence is still regarded as a desired goal, but it must be achieved against the backdrop of a perceived failure of accountability through self-regulation. Under this account, accountability comes to be achieved through external checks. This chapter pays special attention to how the balance between independence and accountability has been struck. Different historical periods have witnessed an emphasis on different concerns and goals, thereby shaping constitutional doctrine in this area. It is important to note that while the question of judicial independence has played out most notably in the context of appointments to the higher judiciary, matters relating to salaries, tenure, transfers, removal, administrative staff, and so forth are all integral to this question.

II. APPOINTMENTS

In the matter of choosing judges, the Constituent Assembly sought hard to ensure that the executive does not have unfettered discretion and complete control over the appointments process. The assembly's concern was to create a judiciary that was independent and efficient.⁷ The Constitution provides for appointment of Supreme Court judges by Article 124(2), which only requires appointment by the President by a warrant under his hand and seal 'after

consultation with such of the Judges of the Supreme Court and of the High Courts in the States as the President may deem for the purpose'.⁸ Article 217 provides that every judge of the High Court shall be appointed by the President by a warrant under his hand and seal 'after consultation with the Chief Justice of India, the Governor of the State, and, in the case of the appointment of a Judge other than the Chief Justice, the Chief Justice of the High Court'.⁹ The interpretation of these provisions has been the primary issue on which the debate over judicial independence has played in India.

The first case to consider the import of Articles 124 and 217 was *Union of India v Sankalchand Himmatlal Sheth*.¹⁰ While technically dealing with transfer under Article 222, the Court considered the meaning of the word 'consultation' with regard to Articles 124 and 217 as well. Chandrachud J's opinion cited *Chandramouleshwar Prasad v Patna High Court*¹¹ and *R Pushpam v State of Madras*¹² to hold that 'consult' meant 'a conference of two or more persons ... in order to enable them to evolve a correct, or at least, a satisfactory solution'.¹³ Thus, 'what the Constitution requires is consultation with the Chief Justice, not his concurrence with the proposed transfer'.¹⁴ However, presaging future decisions, Chandrachud J also warned that 'in all conceivable cases, consultation with the Chief Justice of India should be accepted by the Government of India' and that 'the Court will have an opportunity to examine if any other extraneous circumstances have entered into the verdict of the executive if it departs from the counsel given by the Chief Justice of India'.¹⁵

In *Subhash Sharma*,¹⁶ a bench of three judges considered writ petitions filed under Article 32. The petitioners prayed for a writ of mandamus to fill up judicial vacancies in the Supreme Court and in several High Courts. While considering the import of Articles 124 and 217 of the Constitution, the Court was of the opinion that *consultation* with the Chief Justice of India was of vital importance and his views must play a decisive role in the appointment of Judges. The Court held that the constitutional phraseology needs to be read in light of the principle of separation of powers, and the goal of judicial independence. Against this background, it took the view that the role of the Chief Justice of India should be recognised as of crucial importance in the matter of appointments to the Supreme Court and High Courts of the State. The Court deprecated the practice of governments of States sending the proposals directly to the Union government without reference to the Chief Justice of State and the Chief Justice of India.

Importantly, the bench also doubted the correctness of the majority opinion in *SP Gupta*, and suggested that *SP Gupta* needed reconsideration by a larger

bench.¹⁷ In *SP Gupta*, a seven-judge bench of the Court considered whether a circular issued by the Union Law Minister, which recommended the redistribution and transfer of High Court judges, violated judicial independence. By a majority of four to three, with each judge authoring a separate opinion, the Court dismissed the petitions.

Specifically, the bench in *Subhash Sharma* took issue with two issues dealt with by the majority in *SP Gupta*: the meaning of ‘consultation’ and the primacy of the position of the Chief Justice of India. First, referring to Articles 124 and 217, Bhagwati J had held that ‘on a plain reading of these two articles ... the Chief Justice of India, the Chief Justice of the High Court and such other judges ... are merely constitutional functionaries having a consultative role and the power of appointment resides solely and exclusively in the Union government’.¹⁸ Secondly, on the issue of the primacy of the Chief Justice of India, Bhagwati J had held that ‘where there is a difference of opinion amongst the constitutional functionaries ... the opinion of none of the constitutional functionaries is entitled to primacy’, and that the ‘Central Government is entitled to come to its own decision as to which opinion it should accept ...’¹⁹

The issue of the opinion of the Chief Justice was considered by the Supreme Court in the *Second Judges’ case*.²⁰ *SP Gupta* was reversed and the majority held that primacy in the matter of appointment of judges to the superior Courts must vest with the judiciary. It is the Chief Justice of India and his consultees in the superior judiciary who are to select, in consultation with the executive, the next Chief Justice of India. The Court did away with the ‘seniority alone rule’ by holding that selection of the Chief Justice of India must be made on the basis only of merit. It proceeded to note that the opinion and the recommendation of the Chief Justice of India in the matter of appointment of judges is binding on the executive and this has to be read into the word *consult* used in Articles 124(2) and 217(1) of the Constitution of India. The majority also took the view that in matters relating to appointments in the Supreme Court, the opinion given by the Chief Justice in the consultative process has to be formed taking into account the views of the two most senior judges of the Supreme Court. The Chief Justice is also expected to ascertain the views of the most senior judge, whose view is likely to be significant in adjudging the suitability of the candidate by reason of coming from the same High Court as the candidate. This judgment was of the view that the opinion of the Chief Justice is not merely his individual opinion but ‘an opinion formed collectively by a body of men at the apex level in the judiciary’.²¹ With regard to appointment of judges of the High Courts, the Chief Justice of India is expected to take into account the views of

his colleagues in the Supreme Court who are likely to be conversant with the affairs of the High Court, and may also take into account the views of one or more senior judges of that High Court whose opinion may be significant. The opinion of the Chief Justice of the High Court must be formed after ascertaining the views of at least two seniormost judges of the High Court. The bench provided a detailed working methodology of the process of appointment, but the importance of this judgment lies in the fact that it overruled *SP Gupta* and held that the Chief Justice of India's opinion had primacy in the matter of appointment of judges to the Supreme Court and the High Courts. This judgment therefore led to the collegium system in both the High Courts and the Supreme Court, which is supposed to collectively represent the views of the respective courts.

Article 217 came to be reconsidered in the *Special Reference No 1 of 1998* made by the President of India to the Supreme Court under Article 143.²² The Supreme Court was called upon to express its opinion with regard to Articles 217(1) and 222(1) of the Constitution. Interpreting the expression 'consultation with the Chief Justice of India' in these Articles, the Court held that it meant consultation with a plurality of judges in the formation of the opinion of the Chief Justice of India, which would comprise the four most senior judges for appointment to the Supreme Court and two most senior judges for appointment to the High Court. The appointment of judges to the Supreme Court and High Courts was regarded as a 'participatory consultative process' for selecting the best and most suitable persons.²³ For the Court, the task imposed by the Constitution was one to be performed collectively. The sole individual opinion of the Chief Justice of India with regard to a person to be recommended for appointment to a High Court does not constitute 'consultation' within the meaning of the said Articles. The Chief Justice of India should form his opinion in the same manner as he forms it in regard to a recommendation for appointment to the Supreme Court; that is, in consultation with his most senior judges as well as after consultation with the Chief Justice and judges of the High Court from which a judge for appointment to the Supreme Court was being considered. Importantly, the collegium system was affirmed.

Significantly, the judgment also carved out specific exceptions when the decision of the collegium would not be binding on the Government and would be subject to judicial review. The first was in the case of a transfer of a High Court judge under Article 222, and only if the recommendation made by the Chief Justice of India had 'not been made in consultation with the four seniormost puisne Judges of the Supreme Court ...' or if the views of the Chief

Justices of both affected High Courts were not obtained.²⁴ Secondly, recommendations for appointment made by the Chief Justice of India ‘without complying with the norms and requirements of the consultation process ... are not binding upon the Government of India’.²⁵ This would include cases where the Chief Justice fails to consult his seniormost colleagues, or the seniormost Supreme Court Judge from the same High Court as the proposed appointee, or if the appointee lacks eligibility. Finally, the Government could convey reasons to the Chief Justice of India for the ‘non-appointment’ of a judge recommended by the collegium.²⁶ The Chief Justice, along with other members of the collegium, would be bound to reconsider the recommendation; the Chief Justice was also given the discretion to seek a response from the proposed appointee after conveying to him the Government’s reasons for non-appointment.

The Court’s opinion did not, however, engage with the larger issues at stake in the case: judicial independence and separation of powers. It merely cited Verma J’s opinion in the *Second Judges’* case, holding that the constitutional requirement for consultation was introduced because the Chief Justice was ‘best equipped to know and assess the worth of the candidate ... [and] to eliminate political influence even at the stage of the initial appointment of a Judge, since the provisions for securing his independence after appointment were alone not sufficient for an independent judiciary’.²⁷ The Court in the *Special Reference* simply stated that ‘The principal objective of the Collegium is to ensure that the best available talent is brought to the Supreme Court Bench’ and that the ‘Chief Justice of India and the seniormost puisne judges, by reason of their long tenures on the Supreme Court, are best fitted to achieve this objective’.²⁸

As a result of the judgment of the Supreme Court in *Special Reference No 1 of 1998*, the appointment of Judges to the superior judiciary became the exclusive privilege of the collegium of the Supreme Court.

The Three Judges cases led to intense political debate over the judicial control of the appointments process. The decisions, it was suggested, gave the judiciary complete and unchecked power over its own functioning. Numerous constitutional amendment proposals were formally and informally proposed to undo these decisions. The most recent development in this regard was the Constitution (One-hundred-and-twenty-first Amendment) Bill 2014, which became the Ninety-ninth Amendment to the Constitution. This was enacted alongside the National Judicial Appointments Commission Act 2014. The Statement of Objects and Reasons of the Constitution (One-hundred-and-twenty-first Amendment) Bill noted the following:

The Constitution (One Hundred and Twenty-first Amendment) Bill, 2014 is an enabling

constitutional amendment for amending relevant provisions of the Constitution and for setting up a National Judicial Appointments Commission. The proposed Bill seeks to insert new articles 124A, 124B and 124C after article 124 of the Constitution. The said Bill also provides for the composition and the functions of the proposed National Judicial Appointments Commission. Further, it provides that Parliament may, by law, regulate the procedure for appointment of Judges and empower the National Judicial Appointments Commission to lay down procedure by regulation for the discharge of its functions, manner of selection of persons for appointment and such other matters as may be considered necessary. The proposed Bill seeks to broaden the method of appointment of Judges in the Supreme Court and High Courts, enables participation of judiciary, executive and eminent persons and ensures greater transparency, accountability and objectivity in the appointment of the Judges in the Supreme Court and High Courts.²⁹

The Amendment, alongside the National Judicial Appointments Commission Act, put in place a framework that gives the executive considerable power over the appointments process. Article 124A established a six-member National Judicial Appointments Commission (NJAC) of which only half the members were to be judges. Three members were to consist of the Union Minister for Law and Justice and two ‘eminent persons’ nominated by the Prime Minister, Chief Justice of India, and the Leader of the Opposition in the Lok Sabha. Thus, as per the provision, judges were not to have a majority say in the appointments process. Further, Article 124C gave Parliament the power to enact legislation to regulate the appointments process and related matters. This signalled a major departure from India’s constitutional framework, where matters like judicial appointments, and related means to secure judicial independence, are guaranteed in the constitutional text and cannot be altered by mere ordinary legislation. As the Supreme Court noted in *L Chandra Kumar*:

While the Constitution confers the power to strike down laws upon the High Courts and the Supreme Court, it also contains elaborate provisions dealing with the tenure, salaries, allowances, retirement age of Judges as well as the mechanism for selecting Judges to the superior courts. The inclusion of such elaborate provisions appears to have been occasioned by the belief that, armed with such provisions, the superior courts would be insulated from any executive or legislative attempts to interfere with the making of their decisions.³⁰

Immediately following their enactment, the Ninety-ninth Amendment and the National Judicial Appointments Commission Act were challenged as violating the Constitution’s basic structure. On 16 October 2015, the Supreme Court delivered its verdict, and by a 4:1 majority struck down the Amendment as violating the basic structure doctrine.³¹ The key question before the Supreme Court was whether judicial independence required the judiciary to have primacy in the appointments process.

Kehar J, whose opinion contains a detailed history of the development of judicial independence in India and of debates surrounding the appointments

process, answered this question in the affirmative and made three particular points. First, he highlighted how it was a mistake to characterise the collegium system as giving exclusive power to judges. Rather, the system established a participatory process. He drew attention to memoranda for the appointments procedure drawn by the Ministry of Law, Justice, and Company Affairs in 1999, following the Three Judges cases, which clearly revealed that the political-executive did play a part in determining how judges were appointed.³² Secondly, Kehar J suggested that a careful reading of constitutional history showed that BR Ambedkar's principal concern, with regard to judicial appointments, was that the judiciary must have independence from the executive. Thus, the word 'consultation' in Articles 124 and 217, Kehar J argued, aimed at ensuring that appointments were not the free will of the executive. Thirdly, Kehar J held that judicial primacy was done away with by the composition and structure of the NJAC. Even if the Chief Justice and the two other seniormost judges of the Supreme Court made a nomination, it could be blocked by the Commission. In fact, Kehar emphasised, the two 'eminent persons' could reject a unanimous view of the three judicial members. Even the role of the Union Minister for Law and Justice was problematic. The constitutional requirement of judicial independence only permitted him to play a consultative role. By giving him a specific position in the final determination of who might be appointed, the impugned measure undermined the independence of the judiciary.

Lokur J's opinion made similar points. He highlighted Ambedkar's concern with executive primacy over the appointments process, and held that the principal fear of the Constituent Assembly was that a single person (say the Chief Justice of India or the President) would control the process. There was no objection to a consultative, participatory mechanism. The process prior to the Ninety-ninth Amendment was participatory, Lokur J noted, in two ways. At the pre-recommendation stage, it consisted of the Chief Justice and certain other members of the Supreme Court. In the post-recommendation stage, it was participatory because the executive could offer its objections to a particular recommendation. Furthermore, Lokur J pointed out that the judicial primacy in appointments was a constitutional convention that had existed in India since at least the Government of India Act 1935. The NJAC, with its composition, flew in the face of both the constitutional text and history. Like Kehar J, Lokur J offered a scathing criticism of the NJAC's make-up. The two 'eminent members', whose role was nowhere imagined by the Constituent Assembly, had an effective veto over the entire judiciary. Under the Amendment, these two persons who had previously played no role could now 'paralyze the appointment process, reducing the President and the Chief Justice of India to ciphers for

reasons that might have nothing to do with the judicial potential or fitness and suitability of a person considered for appointment as a judge’.³³ The Chief Justice was not merely reduced ‘to a number’ in the NJAC; more seriously, the measure converted ‘the mandatory consultation between the President and the Chief Justice of India to a dumb charade with the NJAC acting as an intermediary’.³⁴

Goel J likewise noted that the primacy of the judiciary in the appointments process was a part of the basic structure of the Constitution. Without this, the executive or legislature could effectively control the process. Joseph J, who also struck down the measure, placed special emphasis on the separation of powers and the structural consequences of the impugned Amendment. The measure, he suggested, would engender bargaining between different branches of government and thereby seriously impair the structural separation that the Constitution enshrines.

It is important to note that Chelameswar J, who delivered the sole dissenting opinion, did not deny the importance of judicial independence or challenge its place in India’s constitutional framework. Instead, he suggested that the primacy of the judiciary in the matter of appointments could not be considered the exclusive route towards the creation of an independent judiciary. According to Chelameswar J, *Kesavananda Bharati* and the cases that followed drew an important distinction between the *basic features* and the *basic structure* of the Constitution. The basic structure of the Constitution was composed of basic features; a change to a single basic feature may not necessarily destroy the basic structure of the Constitution. For instance, Chelameswar J suggested that while democracy was a basic feature of the Constitution, a minor change in the voting age would likely be constitutional. With regard to judicial appointments, the basic feature of the Constitution was not the primacy of the view of the Chief Justice of India or the collegium but, Chelameswar J argued, it was in the executive lacking the exclusive and absolute power to appoint judges. This fact remained unchanged by the impugned Amendment, and it was thereby constitutional.

With the striking down of the Ninety-ninth Amendment, the Supreme Court held that the earlier method of appointment, that is, the collegium system, would revive. Finally, while the majority revived the collegium system it did accept that the system could be improved. It listed, for a further hearing, a consideration of the ways in which the imperfections of the system could be remedied. While there is no doubt that the collegium system could be improved—and the Supreme Court has accepted as much—it must be remembered that this system

was a reaction to the political dominance over the appointments process of Supreme Court judges that came about during Indira Gandhi's term as Prime Minister. Judges who upheld views inconvenient to the Government of India had to suffer supersession to the high office of Chief Justice of India on two occasions during the heyday of Prime Minister Indira Gandhi, and some had to suffer unilateral transfers.³⁵ What the collegium system managed to do was entirely eliminate this kind of political interference. The Ninety-ninth Amendment and the NJAC posed a major risk in this regard, and the Supreme Court's decision to strike them down is an important affirmation of the place that judicial independence occupies in India's constitutional scheme. In appreciating the Court's concerns about the NJAC and the bargaining that its composition would have engendered, it is worth remembering Dieter Grimm's observation that:

Judicial independence must be guaranteed, not only against any attempt to directly influence the outcome of litigation, but also against more subtle ways of putting pressure on the judiciary. This is why constitutions usually guarantee the impossibility of removal of judges and often a sufficient salary, to mention only a few devices.³⁶

III. CONDITIONS OF SERVICE AND APPOINTMENT OF OFFICERS AND SERVANTS

The appointment and conditions of service of officers and servants of the High Courts and the Supreme Court are governed by Articles 229 and 146, respectively. These are interesting sister provisions because all three branches of government are involved to varying degrees in the procedure they prescribe. The case law on these two Articles illustrates how the Supreme Court changed its characterisation of judicial independence after *Sankalchand Himmatlal Sheth*. In a series of decisions from the 1970s, the Court dealt with differences of opinion between High Courts and State Governments on the balance of power under Article 229. The Court did not characterise all cases as being symptomatic of executive encroachment into judicial independence and did not hesitate to rule against the High Courts involved when they were themselves guilty of overreaching. However, two later decisions in *Supreme Court Employees' Welfare Association* and *All India Judges' Association* showed a distinctive shift in the tone of the Court.³⁷ Both decisions came down heavily in favour of the judiciary's power to prescribe conditions of service, with the latter decision upholding the judiciary's power to involve itself with prescribing conditions of

service of subordinate judges under Article 309.

In *M Gurumoorthy v Accountant-General, Assam and Nagaland*,³⁸ a constitutional bench of the Supreme Court addressed the scope of Article 229, which relates to the appointment of officers and servants of the High Courts. The Chief Justice of the High Court of Assam and Nagaland (as it was then) merged the post of Secretary (held by the appellant) to the Chief Justice into the post of a Selection Grade Stenographer, in the exercise of his power under Article 229. The State Government, however, raised objections about the merging of two separate posts, which were accepted by the new Chief Justice, who vacated the order of his predecessor. Eventually, however, the next Chief Justice decided to restore the original order merging the two posts. In response, the State Government 'took the extraordinary and somewhat unusual step ...' of directing the Accountant-General not to pay the appellant until the Government had issued final orders.³⁹

Regarding the scope of Article 229, the Court held that it made the Chief Justice 'the supreme authority ...' and allowed 'no interference by the executive except to the limited extent that is provided in the article'.⁴⁰ This was done to 'secure and maintain the independence of the High Courts'.⁴¹ The Court made several arguments to support this contention. First, it pointed to the fact that the administrative expenses of the High Court were treated on a par with the salaries of High Court judges themselves and could not be varied by the State Legislature. Secondly, the Governor's approval for the conditions of service under Article 229(2) was confined only to specific areas. This was in contrast to the Government of India Act 1935.⁴² Thirdly, it noted the contrasting treatment in the Constitution of the power to prescribe conditions of service for the Comptroller and Auditor-General under Article 148 and the State Legislatures under Article 187. The relevant authorities in these cases were the President and the Governor, respectively. The Court thus directed the Government to give effect to the original order of the Chief Justice of the High Court.

Interestingly, this same emphasis on judicial independence was not seen in two subsequent cases that came before the Supreme Court just a few years after *M Gurumoorthy*, which involved the Supreme Court reining in overzealous High Courts from exercising their power under Article 229. In *State of Assam v Bhubhan Chandra Dutta*,⁴³ the Court ruled that the Assam High Court was wrong in issuing a writ of mandamus directing the State Government to pay the respondent a special allowance that had been fixed by the Chief Justice of the High Court under Article 229 without consulting the Governor. In *State of Andhra Pradesh v T Gopalakrishnan Murthi*,⁴⁴ a Pay Commission appointed by

the Government recommended that some, but not all, of the Andhra Pradesh High Court's staff be given the pay scales of their counterparts in the Secretariat. The High Court, through the Registrar, tried to persuade the Government to equate the pay scales of its entire staff. On its failure to do so, the respondents, who were part of the High Court staff, succeeded in getting the High Court to issue a writ of mandamus directing the Government to give effect to the Chief Justice's recommendations. The Supreme Court, somewhat reluctantly, held that the Governor's approval under Article 229(2) was not simply an empty formality:

One should expect in the fitness of things and in the view of the spirit of Article 229 that ordinarily and generally the approval should be accorded. But surely it is wrong to say that the approval is a mere formality and in no case it is open to the Government to refuse to accord their approval.⁴⁵

The Court noted the decisions in both *M Gurumoorthy* and *Bhubhan Chandra Dutta*, but chose to apply the latter as being the 'more apposite and direct case on the point ...'⁴⁶ Thus, while the Supreme Court '... share[d] the sentiment expressed by the High Court ...', it found it 'difficult to allow our sentiment to cross the boundary of law engrafted in the proviso to clause (2) of Article 229'.⁴⁷ The High Court's writ was set aside.

In *Supreme Court Employees' Welfare Association v Union of India*,⁴⁸ the Supreme Court had the opportunity to examine the scope of Article 146, which is the companion provision to Article 229, and applies to the Supreme Court. The Court had noted that its own staff did not have a distinct designation and were instead paid salaries that corresponded to the pay scales fixed by the Central Pay Commissions for other government employees. A five-judge committee of the Court had submitted a report to the Chief Justice recommending that he refer the case of the Supreme Court staff to the Fourth Central Pay Commission. In the meanwhile, the Delhi High Court had allowed a writ petition by its own employees and had revised and enhanced their pay scales. The Supreme Court employees filed a writ petition in the Supreme Court for a similar relief. The Court granted them interim relief, which prompted the Government to refer their case to the Pay Commission. The Pay Commission's Report revised the pay scales of Supreme Court employees, but some were reduced when compared to the Court's interim orders.

In its final judgment, the Court considered the scope of Article 146 and its applicability. Citing its previous decisions in *M Gurumoorthy* and *T Gopalakrishnan Murthi*, the Court held that the President '[could] not be compelled to grant approval to the rules framed by the Chief Justice ...' but

when the rules '[had] been framed by a very high dignitary of the State, it should be looked upon with respect and unless there is very good reason not to grant approval, the approval should always be granted'.⁴⁹ Further, if the President decided to refuse approval, he had to first ensure the 'exchange of thoughts between the President of India and the Chief Justice of India'.⁵⁰ In this specific instance, however, the Court ruled that Article 146(2) would not apply, since the Chief Justice had yet to formally frame rules.

In *All-India Judges' Association v Union of India*,⁵¹ the Court heard a review petition against its earlier judgment,⁵² which had mandated the creation of an All-India Judicial Service and gave specific directions regarding the conditions of service of the subordinate judiciary. The review petition argued, chiefly, that the Court had encroached into the domain exclusively reserved by the Constitution under Article 309 for the executive and the legislature. Rebuffing the argument, the Court declared that the 'mere fact that Article 309 gives power to the executive and the legislature to prescribe the service conditions of the judiciary, does not mean that the judiciary should have no say in the matter'.⁵³ In a revealing sentence that exposed its preoccupation with executive misuse, the Court warned that 'theoretically it would not be impossible for the executive or the legislature to turn and twist the tail of the judiciary by using the said power'.⁵⁴ Such an event would be 'against one of the seminal mandates of the Constitution, namely, to maintain the independence of the judiciary'.⁵⁵

One decision, which appears at first glance to be an exception to the Supreme Court's reluctance to formally regulate judicial misconduct, was *HC Puttaswamy v The Hon'ble Chief Justice of Karnataka High Court*.⁵⁶ The Chief Justice had chosen to disregard the established procedure for appointing clerks for subordinate courts and instead personally appointed 398 candidates when only 40 posts had been originally advertised. The High Court had allowed writ petitions filed by the unsuccessful applicants to the original advertisement and quashed all of the Chief Justice's appointments. Agreeing with the High Court's course of action, the Supreme Court noted that while the objective of Article 229 was 'to secure the independence of the High Court ...', it also placed on the Chief Justice 'a duty to ensure that in carrying out the administrative functions, he is actuated by the same principles and values as those of the court he is serving'.⁵⁷ What must be noted about this decision, however, is that it dealt with a case of rather egregious misconduct by the Chief Justice: in the Court's words, 'without parallel ...' and 'manifestly wrong ...'.⁵⁸ Secondly, since the High Court had already admitted the writ petition against its own Chief Justice, it was

not a case with any significant involvement of the State executive or legislature. Rather, it involved a dispute within the judicial family, which was internally resolved.

IV. DISCIPLINARY ACTION

The approach towards disciplinary action against judges, including their impeachment, has major implications for judicial independence. On the one hand, we find that the judiciary has vested considerable faith and power in self-regulation, a fact that has often invited criticism and concern from other branches of government. On the other hand, the legitimacy and nature of judicial power, both in India and elsewhere, makes it extremely hard to allow for external regulation without seriously threatening the autonomy that adjudication demands.

In *Sub-Committee of Judicial Accountability v Union of India*,⁵⁹ the Supreme Court, for the first time, was confronted with a motion for impeachment of one of its judges.⁶⁰ Allegations of financial impropriety had been made against Justice V Ramaswami, which finally prompted a motion by members of the Lok Sabha to the Speaker of the House for an Address to the President for the judge's removal, under Article 124(4) and the Judges (Inquiry) Act 1968. While this particular decision primarily dealt with the consequences of the dissolution of the Lok Sabha on the pending motion, it also gave the Court the opportunity to examine the scope and nature of the provisions for judicial impeachment in the Constitution. It also revealed much about the Court's interpretation of judicial independence and accountability.

To begin with, the majority opinion decided to 'take a conspectus of the constitutional provisions concerning the judiciary and its independence', in order to 'adopt a construction which strengthens the foundational features and the basic structure of the Constitution'.⁶¹ According to the Court, 'Independence of the judiciary [was] ... an essential attribute of rule of law', which in turn was a basic feature of the Constitution.⁶² The provisions the Court flagged as being relevant were Articles 121, 124, and 217. The Court then examined the procedure for removal of judges in other jurisdictions, in order to obtain 'a proper perspective for the understanding and interpretation of the Constitutional Scheme'.⁶³ It pointed to Canada, Australia, and the United States as examples of a general trend that favoured 'investigation and inquiry into the allegations of

misconduct ... against a judge by a judicial agency before the institution of the formal process of removal in the legislature'.⁶⁴ This would bolster its own interpretation of the Indian constitutional scheme.

Coming to Articles 124(4) and (5), the Court framed three possible interpretations: two of which would effectively vest the entire power of removal with Parliament, and one which would first require an investigation by an outside forum in order to ensure that the allegations against the Judge were 'proved'. The Court came down heavily in favour of the latter, pointing out that the other two interpretations would put the procedure 'entirely beyond judicial review' and the possibility of 'inconvenient judicial pronouncements thus endangering judicial independence'.⁶⁵ In other words, the law enacted under clause (5) of Article 124 constituted a limitation on Parliament's power of removal under clause (4), since it would determine whether the allegations were 'proved' as required by clause (4). This interpretation, the Court argued, would also cohere with Article 121, since it would effectively bar an investigation of the conduct of a judge within Parliament. Thus, the Court divided the process of impeachment into two parts: the first would cover the investigation according to the law enacted under clause (5) and the second would cover the parliamentary process under clause (4) after a finding of proof. The practical consequence of this interpretation was that 'the validity of [the enacted law] ... and the process thereunder ...' would be 'subject to judicial review independent of any political colour ...'.⁶⁶

An interesting argument that the Court had to address was that in addition to the constitutional remedy under Article 124, the fundamental right to move the Supreme Court included the right to an impartial judiciary. This would cast on the Court the duty 'to ensure the integrity and impartiality of the members composing it and restrain any member who is found to lack in those essential qualities ...'.⁶⁷ The Court rejected the idea of such a jurisdiction as 'unacceptable' and 'productive of more problems than it can hope to solve', and pointed to the constitutional scheme as being exhaustive.⁶⁸ Interestingly, the Court then added that 'The question of propriety [was] ... different from that of legality'.⁶⁹ Coming back to the central figure of the Chief Justice, the Court suggested that it 'should be expected that the learned Judge would be guided in such a situation by the advice of the Chief Justice of India ...'.⁷⁰ Alternatively, it was left to the individual Judge in question: '... unless he himself decides as an act of propriety to abstain from discharging judicial functions during the interregnum'.⁷¹ The Court derived support for this idea from the fact that there was no provision in the Constitution to suspend 'higher constitutional

functionaries' like the President and Supreme Court judges, unlike, for example, a member of a Public Service Commission in Article 317(2).

In *K Veeraswami v Union of India*,⁷² the appellant was a former Chief Justice of the Madras High Court, against whom the Central Bureau of Investigation had registered a case of disproportionate assets under the Prevention of Corruption Act 1947. The appellant's chief contention was that judges of the High Courts and the Supreme Court were not within the purview of the Prevention of Corruption Act. The constitutional bench of five judges delivered four separate opinions, with Verma J dissenting, and Ray J and Sharma J delivering concurring opinions to Shetty and Venkatachaliah JJ's opinion. With the exception of Verma J, all the other opinions ultimately found that the expression 'public servant' in the Prevention of Corruption Act was wide enough to include judges of the High Courts and Supreme Court, and the trial court was directed to proceed with the case.

In the process of reaching this decision, however, the opinions had an opportunity to discuss judicial independence, and also inserted an important qualification in the process of prosecution of a judge under the Act. The first question that they confronted was the 'authority competent to remove' an errant judge from his office under Section 6(1)(c) of the Act. This posed an interpretive problem, since Parliament would then have to be the authority, given the terms of Article 124. However, this was rejected as 'impracticable', since Parliament was 'unsuitable to the task', especially given the prohibition on discussion by Article 121.⁷³ The puzzle was resolved by reading 'authority competent to remove' as 'authority without whose order or affirmation the public servant cannot be removed': this would make the President the competent authority, 'since the order of the President for the removal of a Judge is mandatory'.⁷⁴

This, however, led to a second concern. The President does not act independently, but only on the advice of his Council of Ministers. Fully cognisant of this possibility, the Court decided to 'avoid [an] interpretation which is likely to impair the independence of the judiciary'.⁷⁵ Therefore, the Court, as 'the ultimate guardian of rights of people and independence of the judiciary' decided to 'lay down certain guidelines lest the Act may be misused'.⁷⁶ These guidelines centred on the person of the Chief Justice of India, who, being 'primarily concerned with the integrity and impartiality of the judiciary', was not to be 'kept out of the picture of any criminal case contemplated against a Judge'.⁷⁷ Somewhat cryptically, the Chief Justice was said to 'be of immense assistance to the government in coming to the right conclusion'.⁷⁸ Thus, no criminal case was to be registered under Section 154 of

the Code of Criminal Procedure unless the Chief Justice of India was consulted. Importantly, the Court was explicit that if the Chief Justice was of the opinion that it was ‘not a fit case for proceeding under the Act’, the case was not to be registered.⁷⁹ There would then be a second consultation with the Chief Justice before granting sanction for prosecution.

In *C Ravichandran Iyer v Justice AM Bhattacharjee*,⁸⁰ the Court was confronted with the resignation of a High Court judge. The Bar Council of Maharashtra and the Bombay Bar Association, among others, had forced the resignation of the respondent, who was the Chief Justice of the Bombay High Court, after allegations of impropriety against him. Since the respondent had already resigned, the question before the Court was whether Bar Associations were entitled to pass resolutions demanding the resignation of a judge and what the effect of such resolutions would be on judicial independence.

The Court, taking a cue from the judgment in *Sub-Committee of Judicial Accountability*, reiterated that decision’s interpretation of the impeachment process as something that Parliament would ‘sparingly’ resort to as an ‘extreme measure’, which ‘implies that [the] impeachment process is not available for minor abrasive behaviour of a Judge’.⁸¹ The process was supposed to strengthen, and not undermine, judicial independence: ‘It reinforces that independence to the Judge is of paramount importance to sustain, strengthen and elongate rule of law.’⁸² In a nod to the distinction made in *Sub-Committee of Judicial Accountability* between the legality and propriety of an individual judge’s conduct, the Court emphasised the (non-enforceable) expectation from a judge to ‘voluntarily set forth wholesome standards of conduct reaffirming fitness to higher responsibilities’.⁸³ In the absence of self-enforced probity, dealing with the ‘Bad conduct or bad behaviour of a Judge ... [who] needs correction ... ’ would involve a ‘delicate but pragmatic approach to the questions of constitutional law’.⁸⁴ The answer, for the Court, lay in the person of the Chief Justice. It held that when there was a complaint against a High Court judge, the Chief Justice of that High Court ‘should satisfy himself about the truth of the imputation made by the Bar Association ... and consult the Chief Justice of India, where deemed necessary ... ’⁸⁵ The Chief Justice of India, in turn, would ‘tender such advice either directly or may initiate such action, as is deemed necessary ... ’, thereby allowing the Court to ‘[discipline] by self-regulation through in-house procedure’.⁸⁶ Judgments like *C Ravichandran Iyer* demonstrate the absence of any machinery for disciplinary action against judges of the superior courts short of removal by the process of impeachment.

There have been proposals for constitutional amendments and parliamentary

legislation to take disciplinary action against judges short of their transfer and removal. Such proposals appear to be potentially deleterious to judicial independence, and a better approach would focus on greater internal regulation within the judiciary. Any threat of removal or disciplining of a judge at the hands of any other authority would surely inject pusillanimity into the veins of the judge as he would constantly look over his shoulder before taking any decision for fear that it might annoy the powers that be. After all, the Emergency showed us that even judges of the Supreme Court wilted when the heat was on. In matters of appointments, tenure, transfer, disciplinary action, and removal, the Constitution has been deliberately designed to ensure absolute judicial independence, with no scope for Parliament or the executive to interfere with judicial conduct or influence judicial decisions in any covert manner. Despite the highfalutin discourse by politicians and parliamentarians, absent principles of constitutional morality and honest attempts to uphold the Constitution, tinkering with the existing provisions of the Constitution would permanently damage the characteristic fearlessness and independence of the superior judiciary in India. The remedies proposed may, in the long run, prove to be worse than the malaise itself.

V. CONCLUSION

As this chapter shows, the relationship between judicial independence and judicial accountability depends on the historical experience of how institutions operate. Embedded in the different choices that are made, and the corresponding shaping of constitutional doctrine, is a judgment of which risks are most serious. In the Indian context, it was the undermining of judicial independence during the Indira Gandhi era which led to the judiciary increasing its role in the appointments process, and it was through a series of cases on judicial appointments that judicial independence acquired a crucial place in the Constitution's Basic Structure. The Supreme Court's most recent decision in *Supreme Court Advocates-on-Record Association*, which struck down the Ninety-ninth Amendment to the Constitution, confirms this place.⁸⁷ Perhaps, the Supreme Court considered that the collegium system with all its so-called deficiencies was a lesser evil than what was enacted by the Ninety-ninth Amendment.

It should be noted that this chapter does not exhaust the ways in which judicial independence can be compromised and is secured. For example, it does not

delve into financial autonomy of courts, the absence of which can have major implications for its independence. In practice, budgetary allocations made by the High Court and approved by the Chief Justice are nearly always arbitrarily pared when forwarded to the executive government. Various expenses and bills are required to be sent to the State Government for approval, and often enough expenses are capriciously rejected by a member of the bureaucracy. The most serious forms of rejections take place with regard to administrative and institutional expenses. Another topic that is not fully explored is post-retirement benefits. Such benefits come in a variety of shapes. They could come by way of a grant of land at concessional rates to individuals or societies of individual judges. They could also come by way of post-retirement appointments on commissions and tribunals. Actions like the former are clearly condemnable, for it makes judges obligated to the executive. As far as the latter is concerned, there is no doubt that in the present set-up commissions and tribunals do need to be manned by persons of recognised integrity and competence in whom the public reposes faith. Indubitably, a retired judge would fit the bill. If the executive desires to exploit the talent of a retired judge for public benefit by appointment to a commission or a tribunal, there can in principle be no conceivable objection to it, if it is done honestly and transparently. What is objectionable would be any attempt to offer an allurement to a sitting judge or attempts to negotiate terms with a sitting judge with regard to post-retirement benefits. Another recent topic of discussion has been the disclosure of judges' assets. Although accountability does not necessarily mean disclosure of a judge's assets publicly, the judges of the Supreme Court and judges of several High Courts have voluntarily adopted the practice of placing details of assets and liabilities in the public domain. This is a right step in the direction of transparency and accountability in judicial affairs. The judgment of the Delhi High Court in *CPIO, Supreme Court of India v Subhash Chandra Agarwal* represents an attempt to make judges more accountable by seeking information on their assets and liabilities voluntarily disclosed to the Chief Justice by seeking disclosure under the Right to Information Act.⁸⁸

Future years are likely to see further debates on how to balance judicial independence with accountability in India. While judicial independence is an inviolable aspect of Indian constitutionalism, concerns about accountability remain, and doubtless the judiciary has a number of internal reforms to undertake. What remains clear is that whatever changes may occur in future years, whether they involve new procedures for appointing judges or new means for disciplining their behaviour, they are likely to be the subject of major constitutional debate and adjudication. Although studies on judicial power, both

in India and elsewhere, typically focus on the grounds of judicial review and the forms that judicial remedies take, a noteworthy aspect of Indian constitutionalism is the extent to which the very idea of judicial independence itself has been the topic of such intense contestation. In the final analysis, the best guarantee of judicial independence is the character of the person holding the office. Neither constitutional guarantees nor statutory provisions can ever be an effective substitute. Judges ultimately are products of society and we shall always get the judges that we deserve. Judicial independence ultimately would be directly proportional to the value attached by the citizens of the country and the judges to that signal virtue.

¹ *Union of India v Sankalchand Himmatlal Sheth* (1977) 4 SCC 193 [65].

⁵ *SP Gupta v Union of India* (1981) Supp SCC 67 [710–11].

² Constitution of India 1950, sch 3.

³ *Sankalchand Himmatlal Sheth* ([n 1](#)) [78–79].

⁴ Benjamin N Cardozo, *The Nature of Judicial Process* (Yale University Press 1921) 168.

⁶ Cardozo ([n 4](#)) 129, 136.

⁷ See Granville Austin, *The Indian Constitution: Cornerstone of a Nation* (Oxford University Press 1966) 218–29.

⁸ Constitution of India 1950, art 124(2).

⁹ Constitution of India 1950, art 217.

¹⁰ *Sankalchand Himmatlal Sheth* ([n 1](#)).

¹¹ (1969) 3 SCC 36.

¹² AIR 1953 Mad 392.

¹³ *Sankalchand Himmatlal Sheth* ([n 1](#)) [39].

¹⁴ *Sankalchand Himmatlal Sheth* ([n 1](#)) [41].

¹⁵ *Sankalchand Himmatlal Sheth* ([n 1](#)) [41].

¹⁶ *Subhash Sharma v Union of India* (1991) Supp (1) SCC 574.

¹⁷ *SP Gupta* ([n 5](#)).

¹⁸ *SP Gupta* ([n 5](#)) [29].

¹⁹ *SP Gupta* ([n 5](#)) [30].

²⁰ *Supreme Court Advocates-on-Record Association v Union of India* (1993) 4 SCC 441.

²¹ *Supreme Court Advocates-on-Record Association* ([n 20](#)) [478].

²² *Re Special Reference No 1 of 1998* (1998) 7 SCC 739.

²³ *Re Special Reference No 1 of 1998* ([n 22](#)) [6].

²⁴ *Re Special Reference No 1 of 1998* ([n 22](#)) [44].

²⁵ *Re Special Reference No 1 of 1998* ([n 22](#)) [44].

²⁶ *Re Special Reference No 1 of 1998* ([n 22](#)) [44].

²⁷ *Supreme Court Advocates-on-Record Association* ([n 20](#)) [450].

- ²⁸ *Re Special Reference No 1 of 1998* (n 22) [15].
- ²⁹ Statement of Objects and Reasons, Constitution (One-hundred-and-twenty-first Amendment) Bill 2014 <[http://www.prsindia.org/uploads/media/constitution%20121st/121st%20\(A\)%20Bill.%202014.pdf](http://www.prsindia.org/uploads/media/constitution%20121st/121st%20(A)%20Bill.%202014.pdf)>, accessed October 2015.
- ³⁰ *L Chandra Kumar v Union of India* (1995) 1 SCC 400.
- ³¹ *Supreme Court Advocates-on-Record Association v Union of India* 2015 SCC OnLine SC 964.
- ³² Memorandum showing the procedure for appointment of the Chief Justice of India and judges of the Supreme Court of India <<http://doj.gov.in/sites/default/files/memosc.pdf>>, accessed October 2015; memorandum showing the procedure for appointment and transfer of Chief Justices and judges of High Courts <<http://doj.gov.in/sites/default/files/memohc.pdf>>, accessed October 2015.
- ³³ *Supreme Court Advocates-on-Record Association* (n 31) [1051] (Lokur J).
- ³⁴ *Supreme Court Advocates-on-Record Association* (n 31) [1072] (Lokur J).
- ³⁵ Supersession of Justices JM Shelat, KS Hegde and AN Grover in 1993 by appointing Justice AN Ray as Chief Justice and appointment of Justice MH Beg as Chief Justice by superseding Justice HR Khanna, the most senior judge in 1977; there was also the transfer of a number of High Court judges during the period.
- ³⁶ Dieter Grimm, 'Constitutional Adjudication and Constitutional Interpretation: Between Law and Politics' (2011) 4 NUJS Law Review 15, 19.
- ⁴⁵ *T Gopalakrishnan Murthi* (n 44) [6].
- ³⁷ *Supreme Court Employees' Welfare Association v Union of India* (1989) 4 SCC 187; *All India Judges' Association v Union of India* (1992) 1 SCC 119.
- ³⁸ (1971) 2 SCC 137.
- ³⁹ *M Gurumoorthy* (n 38) [6].
- ⁴⁰ *M Gurumoorthy* (n 38) [11].
- ⁴¹ *M Gurumoorthy* (n 38) [11].
- ⁴² Government of India Act 1935, ss 241 and 242(2).
- ⁴³ (1975) 4 SCC 1.
- ⁴⁴ (1976) 2 SCC 883.
- ⁴⁶ *T Gopalakrishnan Murthi* (n 44) [7].
- ⁴⁷ *T Gopalakrishnan Murthi* (n 44) [8].
- ⁴⁸ *Supreme Court Employees' Welfare Association* (n 37).
- ⁴⁹ *Supreme Court Employees' Welfare Association* (n 37) [55].
- ⁵⁰ *Supreme Court Employees' Welfare Association* (n 37) [58].
- ⁵¹ (1993) 4 SCC 288.
- ⁵² *All-India Judges' Association* (n 51).
- ⁵³ *All-India Judges' Association* (n 51) [10].
- ⁵⁴ *All-India Judges' Association* (n 51) [10].
- ⁵⁵ *All-India Judges' Association* (n 51) [10].
- ⁵⁶ (1991) Supp (2) SCC 421.
- ⁵⁷ *HC Puttaswamy* (n 56) [11].
- ⁵⁸ *HC Puttaswamy* (n 56) [10].
- ⁵⁹ (1991) 4 SCC 699.
- ⁶⁰ See also *Sarojini Ramaswami v Union of India* (1992) 4 SCC 506 and *Krishna Swami v Union of India*

(1992) 4 SCC 605.

⁶¹ *Sub-Committee of Judicial Accountability* ([n 59](#)) [16].

⁶² *Sub-Committee of Judicial Accountability* ([n 59](#)) [16].

⁶³ *Sub-Committee of Judicial Accountability* ([n 59](#)) [17].

⁶⁴ *Sub-Committee of Judicial Accountability* ([n 59](#)) [36].

⁶⁵ *Sub-Committee of Judicial Accountability* ([n 59](#)) [69].

⁶⁶ *Sub-Committee of Judicial Accountability* ([n 59](#)) [82].

⁶⁷ *Sub-Committee of Judicial Accountability* ([n 59](#)) [106].

⁶⁸ *Sub-Committee of Judicial Accountability* ([n 59](#)) [110].

⁶⁹ *Sub-Committee of Judicial Accountability* ([n 59](#)) [112].

⁷⁰ *Sub-Committee of Judicial Accountability* ([n 59](#)) [112].

⁷¹ *Sub-Committee of Judicial Accountability* ([n 59](#)) [112].

⁷² (1991) 3 SCC 655.

⁷³ *K Veeraswami* ([n 72](#)) [43].

⁷⁴ *K Veeraswami* ([n 72](#)) [45].

⁷⁵ *K Veeraswami* ([n 72](#)) [52].

⁷⁶ *K Veeraswami* ([n 72](#)) [59].

⁷⁷ *K Veeraswami* ([n 72](#)) [60].

⁷⁸ *K Veeraswami* ([n 72](#)) [60].

⁷⁹ *K Veeraswami* ([n 72](#)) [60].

⁸⁰ (1995) 5 SCC 457.

⁸¹ *C Ravichandran Iyer* ([n 80](#)) [15].

⁸² *C Ravichandran Iyer* ([n 80](#)) [15].

⁸³ *C Ravichandran Iyer* ([n 80](#)) [22].

⁸⁴ *C Ravichandran Iyer* ([n 80](#)) [26].

⁸⁵ *C Ravichandran Iyer* ([n 80](#)) [40].

⁸⁶ *C Ravichandran Iyer* ([n 80](#)) [42].

⁸⁷ *Supreme Court Advocates-on-Record Association v Union of India* ([n 31](#)).

⁸⁸ 162 (2009) DLT 135.

CHAPTER 21

JURISDICTION

RAEESA VAKIL

I. INTRODUCTION

FOR Dr BR Ambedkar, chairman of the Drafting Committee of India's Constituent Assembly, a unified judicial structure was the means to 'have uniformity in the basic matters which are essential to maintain the unity of the country'.¹ The Supreme Court, at the head of this unified judiciary, was to play three roles. It would be a constitutional court, interpreting the Constitution, advising the President, and adjudicating disputes between the States and the Union. It would be, in addition, an appellate court, hearing criminal, civil, and other appeals certified to it by High Courts, but with the power to itself choose and hear any appeal, from any order, in any court. And it would be the final court; its judgments binding on all courts below, with powers to render 'complete justice' in all matters, to review its own judgments, and to punish for contempt of its orders. It is no wonder, then, that another member of the Drafting Committee noted of the Court that 'It has wider jurisdiction than any superior court in any part of the world.'² Indeed, in addition to all these powers, the Supreme Court would also have the role of the enforcer of fundamental rights, with powers to issue writs for this purpose.

This chapter examines the evolution of the jurisdiction of the Supreme Court in three aspects—as an appellate court (Section II), a constitutional court (Section III), and a 'final' court (Section IV). (I exclude from the scope of this study the Supreme Court's jurisdiction to issue writs for the enforcement of fundamental rights). In the conclusion, bringing these three threads together, I describe a few of the challenges the Court faces today.³

II. THE APPELLATE COURT

The immediacy of fundamental rights has led, inevitably, to a focus in contemporary writing on the Supreme Court's jurisdiction to issue writs for their

enforcement.⁴ This is despite the fact that the Supreme Court is primarily a court of appellate jurisdiction; a disproportionate part of its docket (approximately 80 per cent) consists of appeals.⁵ The Constituent Assembly debates bear witness to the fears of the drafters, that the Supreme Court would be ‘flooded’ with too many appeals.⁶ This, in turn, led to the drafting of a carefully considered set of regulations that governed which appeals would finally be heard by the Supreme Court. Despite this care, the Supreme Court has now reached a situation where the number of appeals it considers on a daily basis exceeds its ability to do justice to all of them.

1. The Supreme Court’s Appellate Jurisdiction: An Outline

The Constitution provides that four kinds of appeal may be heard by the Supreme Court: civil;⁷ criminal;⁸ questions of constitutional interpretation;⁹ and appeals by special leave of the Court.¹⁰ In addition, Parliament has the power to allow appeals to the Supreme Court on all matters on which it has legislative powers. A number of statutory enactments of Parliament now provide for appeals to the Supreme Court, from various courts and tribunals.¹¹

Of the four constitutional appeals, criminal appeals alone exist as a matter of right, in cases involving the sentence of the death penalty,¹² imprisonment for life or more than ten years.¹³ Criminal appeals in other circumstances, like civil appeals or appeals on constitutional interpretation, are dependent on the grant of a certificate from the High Courts, that is, the High Courts control what matters are appealed to the Supreme Court.¹⁴ Civil appeals must be on ‘substantial questions of law’ of ‘public importance’.¹⁵ Appeals concerning matters of interpretation of the Constitution, as discussed subsequently, are admissible regardless of the nature of the matter—civil, criminal, and so on.¹⁶ The fourth kind of appeal, ‘special leave appeals’, on the other hand, are not dependent on the grant of certificates by the High Court, and can be allowed directly by the Supreme Court, in any case, in any proceeding, from any court or tribunal.¹⁷

2. Uncertainty and Expansion in the Supreme Court’s Appellate Jurisdiction

Three threads emerge from the Supreme Court's approach to its appellate jurisdiction since its creation. First, there was an imbalance in jurisdictional reforms in the 1970s that was not, in turn, corrected by the Court's jurisprudence. Secondly, there has been a broad resistance by the Court to evolving guidelines in the exercise of discretion to hear appeals, and finally, there have been grave inconsistencies in the interpretation of constitutional restrictions on appeals. I discuss each of these threads and their implications below.

a. Imbalance in Jurisdictional Reforms

Although appeals on constitutional interpretation, special leave, and civil appeals were contained in early drafts of the Constitution, criminal appeals were introduced after much debate in the Constituent Assembly.¹⁸ The inclusion of criminal appeals against the initial views of the Drafting Committee engendered a compromise—a narrow jurisdiction would be granted for appeals on sentences of the death penalty only, with power to the Parliament to expand this if required.¹⁹ In the case of civil appeals, no such leeway was granted—civil appeals were originally a matter of right, provided a pecuniary limit on the value of the suit (originally of Rs 20,000) was met.²⁰

The restrictions on civil and criminal appeals were stringently applied in the initial two decades, and the Court routinely returned matters to the High Court on the grounds that a certificate to appeal ought not to have been granted, or was improperly granted. Jurisdiction in special leave appeals consequently widened, largely to repair injustices caused when civil and criminal cases could not otherwise be heard on appeal. Thus, the Supreme Court in its initial two decades often granted special leave to appeal under Article 136, sometimes *suo motu*, in cases where it noted that the requirements for civil appeals under Article 133 and criminal appeals under Article 134 were not met.²¹

In response to the difficulties faced by litigants, in the early 1970s the jurisdiction for criminal and civil appeals was widened, and Parliament, by the Supreme Court (Enlargement of Criminal Appellate Jurisdiction) Act 1970, introduced additional statutory rights in criminal appeals. Appeals would lie not only for sentences of the death penalty, but also for imprisonment for life, or for imprisonment for a period of not less than ten years.²² Similarly, following two Law Commission reports,²³ the Constitution (Thirtieth Amendment) Act 1972

removed the financial threshold for civil appeals and allowed them when a ‘substantial question of law of general importance’ arose.²⁴ In civil appeals, particularly, the Commission felt that the test of valuation led to ‘cases without merit’ going to the Supreme Court.²⁵ The Commission also noted observations to the effect that jurisdiction defined by the value of the suit resulted in discrimination on the grounds of wealth.²⁶ (‘Admittedly ... a line has to be drawn somewhere. We would like to avoid a line that merely divides the rich from the poor ... ’²⁷)

The widening of civil and criminal appellate jurisdiction should have led to less ‘special leave’ being granted, particularly in cases where the new, wider restrictions on such appeals were not met. As Dr Dhavan documents, this is not the case, and after the early 1970s, the number of special leave appeals of this nature only increased.²⁸ The alteration of the width of jurisdiction under Article 136 was not contemplated, nor did the Supreme Court, in response, choose to judicially temper the grant of special leave.²⁹ Today special leave is still granted in instances where the requirements for civil and criminal appeals have not been met. The implication that constitutional restrictions on appeals, therefore, are dispensable, is dangerous, particularly in circumstances where the Court refuses, or neglects to define when it will dispense with these restrictions, and when it will not. As the next section demonstrates, this is the current approach of the Supreme Court.

b. The Absence of Guidelines for the Exercise of Discretion

Article 136 places tremendous discretion in the hands of the Court to grant special leave, and hear any kind of appeal from any matter, from any court or tribunal. It is common for the Supreme Court to describe this power in an increasingly hyperbolic manner³⁰ (for instance, ‘an untrammelled reservoir of power incapable of being confined by definitional bounds’³¹), and to fiercely guard it from any intrusions—whether from lower courts or through statutes.³²

This was not the rationale behind granting such width to the Supreme Court: the Constituent Assembly repeatedly expressed two things. First, the assembly was confident that a process of internal restraint would ensure that the High Court would grant certificates sparingly,³³ just as the Supreme Court would grant leave cautiously.³⁴ Secondly, they believed that the Supreme Court would evolve principles on the manner of the use of its appellate jurisdiction, not just

under Article 136 but under Articles 133 and 134 as well.³⁵ The intention, evidently, was that the Supreme Court would regulate itself—a circumstance that has not, as it turns out, evolved.

The Supreme Court has been remarkably resistant to evolving principles to guide its discretion, repeatedly affirming that the power under Article 136, in particular, *cannot* by its nature be defined or controlled.³⁶ The Court, instead, tends to invoke phrases such as ‘grave injustice’³⁷ or ‘shocking the conscience of the court’³⁸ to justify its exercise of discretion. The problems with this approach are eloquently summarised by two commentators on the Constitution. Seervai notes, succinctly, that ‘to coin a phrase is not to indicate a standard’.³⁹ Justice Ruma Pal, a former judge of the Supreme Court, as well, warns that ‘This element of emotional subjectivity in the assessment of what constitutes an “injustice” would necessarily result in greater uncertainty in the outcome of a proceeding before the Supreme Court.’⁴⁰

Despite the increasing burden of the Court, a vast number of special leave appeals are rejected at the time of applying for special leave.⁴¹ The absence of established principles, however, renders this process somewhat inconsistent; the only standard applied appears to be that of judicial discretion. In 2010, however, the Supreme Court, noting the dramatic rise in special leave petitions and increasing delays, referred to a larger bench of judges several questions, requesting it to formulate ‘some broad guidelines as to when the discretion under Article 136 of the Constitution should be exercised, ie, in what kind of cases a petition under Article 136 should be entertained’.⁴² Perhaps this decision, when rendered, will clarify the position under Article 136 definitively; however, since the reference was made in 2010 and is yet to be heard, it appears for the moment to have been defeated by some of the problems it set out to address.

c. Inconsistency in Implementing Constitutional Provisions

Coupled with the Supreme Court’s resistance to framing guidelines for the exercise of its discretion, its jurisprudence suffers tremendously from the vice of inconsistency, a problem that is closely related to the practice of the Court of sitting in division benches of two.⁴³ Coordinate benches of similar strengths will naturally tend towards some discrepancies in interpretation, particularly given the volume of their work. This is very apparent when considering how the Court applies restrictions on the rights to appeal. The Court, when it does choose to

evolve principles on the exercise of its discretion, applies them erratically.

The Supreme Court, for instance, in special leave petitions, has permitted, early on, the raising of pleas on points of law that had not been made before lower courts,⁴⁴ but has continued to enunciate that new pleas ought not to be raised for the first time on appeals by special leave.⁴⁵ In some cases it has categorically refused to interfere with a lower court's decision entirely on the basis that there were concurrent findings of fact by two lower courts⁴⁶ (without considering the merits or legality of such findings) and in others has held that it may go into the questions of a lower court's decision despite concurrent findings of fact by lower courts.⁴⁷ In each successive case, the Court is not simply rephrasing a test; it is suggesting new grounds for granting leave in appeals, but in ignorance, or without relying upon previous tests; consequently, from decade to decade, the tests evolve in an apparently arbitrary manner.

3. The Appellate Court: Some Concluding Remarks

The width of the Supreme Court's appellate jurisdiction is extraordinary. A recent quantitative analysis of the Supreme Court's workload indicates that by 2011, 84.6 per cent of the cases heard by the Court were special leave appeals, and 3.1 per cent other kinds of appeals.⁴⁸ When the bulk of the Supreme Court's workload is appellate, the implementation of constitutional restrictions on appeals is vital. The Supreme Court's current mode of hearing appeals, however, subverts these restrictions. The result, as demonstrated, is the increase in the workload of the Court, but also in inconsistencies of approach. The appellate jurisdiction of a final court, against which there is no further appeal, cannot afford to be riddled with such uncertainties, and it is hoped that the Supreme Court will take the opportunities it has now been afforded to frame guidelines on special leave appeals. The Supreme Court, as the Constituent Assembly debates indicate, was given untrammelled jurisdiction because it was regarded as an institution that would regulate and correct itself; this impetus must therefore come from within.

III. THE CONSTITUTIONAL COURT

Unusually, the Supreme Court of India functions as both a national court of

appeal and a constitutional court. The Constitution in Article 143 empowers the President to refer any question of law or fact to the Supreme Court for its opinion, if he or she feels it 'expedient' to do so.⁴⁹ Article 131 of the Constitution vests the Supreme Court with the jurisdiction to hear disputes between States and the Union, or between States inter se.⁵⁰ Article 132 empowers it to hear appeals in cases involving a 'substantial question of law as to the interpretation of this Constitution'.⁵¹ The number of matters that the Supreme Court hears in its capacity as a constitutional court is small,⁵² yet, here it performs functions that have grave consequences, in terms of politics as well as precedent. The first part of this section examines the Court's advisory jurisdiction; the second, the adjudication of federal disputes; and the third, the jurisdiction to interpret the Constitution.

1. Advising the President

Justice Zafrulla Khan of the Federal Court wrote in 1944, that advisory opinions by the Supreme Court's predecessor were 'enveloped in a thick fog of hypotheses and uncertainties and an opinion delivered thereon could only rest upon a forest of assumptions which must rob it of all value'.⁵³ Advisory opinions rendered by the Supreme Court today face these same challenges, and exacerbate them by holding that these opinions, resting on their 'forests of assumptions', are nevertheless binding statements of law.

The President, by Article 143 of the Constitution, can consult the Supreme Court, if he or she feels it 'expedient' to do so, on any question of law or fact, which is of 'public importance'.⁵⁴ The Presidents, to date, have found it expedient to refer questions of law and fact to the Court fourteen times—of these, the Court has rendered opinions in twelve,⁵⁵ declined to render an opinion in one,⁵⁶ and is currently seized of the remaining question.⁵⁷

The constraints on the advisory jurisdiction of the Supreme Court appear to be minimal—the President may refer *any question* of law or fact, and the Court may choose whether it will answer, the sole test being 'expediency' at the discretion of the Court.⁵⁸ The power of a constitutional court to advise is not unusual, but holding that advice to be binding on all lower courts certainly is.

Advisory opinions are dangerous, in that they mimic, but do not reproduce, fair procedure in the conduct of hearings. Although required to be pronounced in open court,⁵⁹ they are based solely on one set of facts (the actual reference) outlined by the President. The Court is bound to accept this reference, and cannot question it, providing an inevitable bias to the Union government.⁶⁰ The Court is also not required to issue notice and hear all affected parties. More dangerously, unlike adjudicatory decisions, advisory opinions are open neither to appeal nor review. These procedural infirmities should imply that advisory opinions should, at the very least, not be binding as law. This is unfortunately not the case; the Court also performs, in advisory opinions, the function of reconsidering its own judgments—a practice that it has dubbed as 'interpreting', despite the fact that this effectively allows the executive to seek review against a decision where none should legally lie.⁶¹

Justice Zafrulla Khan's warning of the dangers of advisory opinions merits reconsideration. The permission to the executive to seek this manner of review on judgments that it finds politically inconvenient should not to be allowed,⁶²

particularly when it is the executive government that defines the reference and accordingly limits the scope of the opinion itself.

2. Adjudicating Federal Disputes

Article 131 of the Constitution vests the Supreme Court with original jurisdiction to hear suits between a State, or States and the Union, or between States *inter se*.⁶³ Although the Constitution also provides for an executive body—the ‘interstate council’⁶⁴—to promote cooperation between States, the Constituent Assembly did not seriously contest the notion that the Supreme Court (and not the executive) ought to be the arbiter in federal disputes between constituent units.⁶⁵ The Supreme Court has affirmed this understanding, and Bhagwati J goes so far as to argue that this jurisdiction to resolve federal disputes is a ‘necessary concomitant of a federal or a quasi-federal form of government’.⁶⁶ The Supreme Court’s jurisdiction under Article 131 is narrow in three ways—by limitations on the nature of the suits; by restrictions on the types of parties to the suits; and by constitutionally specified exclusions.

Restrictions on the nature of the suit usually relate to the exclusion of political disputes in adjudication by the Supreme Court.⁶⁷ This doctrine of ‘political questions’ has been treated with caution;⁶⁸ although the Court affirms in theory that ‘Mere wrangles between governments have no place under the scheme of the article’,⁶⁹ the Supreme Court chooses in practice to apply Seervai’s nuanced understanding of it. Seervai notes on this doctrine that ‘The judicial process involves the ascertainment of relevant facts, and the application of the law, or the Constitution, to the facts so ascertained. In this sense, there is nothing outside the judicial process.’⁷⁰ In accordance with this, the Supreme Court, when it does entertain disputes that are likely to be political, clarifies that it confines itself, per the language of Article 131, to the ‘legal right’ at stake.

When it comes to restrictions on the parties before the Court, litigation has focused on a common claim that the Union is able to make because of a drafting anomaly in Article 131. Article 131 makes reference to the ‘Government of India’ but also the ‘State’ and not, correspondingly, the ‘State Government’.⁷¹ The Union, therefore, commonly took the claim that action taken by it is against the transient State Government and not the State, and therefore lies outside Article 131.⁷² The Supreme Court held eventually that the individual State Governments, acting through their ministers, could be said to act for the States themselves.⁷³ Seervai supports this as the most pragmatic reading, pointing to the history of Article 131 in support of his claim that this was an inadvertent drafting error.⁷⁴ Even when reading ‘State’ to include ‘State Government’, the

Court has since held that suits by a single Government official (even if authorised by the State) are not maintainable under Article 131,⁷⁵ nor are suits by agents of the State, even if statutorily appointed.⁷⁶

The third and final limitation to the Supreme Court's jurisdiction under Article 131 is a constitutionally embedded restraint: Article 262, which creates a separate mechanism for the resolution of disputes relating to interState rivers.⁷⁷ Parliament, using powers under Article 262, enacted the Interstate River Water Disputes Act 1956 (IWDA), which excluded entirely the jurisdiction of the Supreme Court from 'water disputes'.⁷⁸ Applying this very categorical bar, the Supreme Court has ruled that its jurisdiction under Article 131 will extend only to the enforcement of an award by a tribunal under the Act,⁷⁹ or to any dispute that does not fall within the IWDA's definition of 'water dispute'.⁸⁰

3. The Jurisdiction to Interpret the Constitution

Dr Ambedkar's constitutional project of uniformity in the Indian legal structure was further advanced by the inclusion of Article 132 in the draft constitution, which allows appeals to the Supreme Court on cases involving 'a substantial question of law as to the interpretation of this Constitution'.⁸¹ Additionally, under Article 13, the Court can declare any law invalid if it is inconsistent with the fundamental rights enumerated in [Part III](#) of the Constitution.⁸² As this judicial review inevitably involves some measure of constitutional interpretation, the Court may consider a question of interpretation of the Constitution directly, if it concerns fundamental rights, and otherwise, on appeal under Article 132. I shall not address the question of *how* the Supreme Court has interpreted the Constitution; rather, I shall touch upon two key jurisdictional issues; that of the rationale behind the inclusion of this appellate provision, and of the restrictions upon its jurisdiction in such appeals.

During the debates around draft Article 110 (now Article 132), the Constituent Assembly was concerned primarily with whether separate appeals for questions of constitutional interpretation were necessary.⁸³ Article 132 was, however, retained, and the justification drawn by Dr Ambedkar was wholly technical. He intended, Dr Ambedkar said, to introduce a provision that would require all cases concerning constitutional interpretation to be heard by a bench of a minimum of five judges,⁸⁴ by introducing an amendment that later became the current Article 145(3). It was apparent that the intention was to ensure that

constitutional questions were not only heard, but authoritatively considered by a majority of the Court, which was already understood to be sitting in benches, and not *en banc*. The exclusivity of jurisdiction to interpret the Constitution traces back to this sole requirement—that there shall not be differing and competing interpretations of constitutional provisions, and that the Supreme Court while pronouncing the law that binds all courts should remain consistent. Later research has demonstrated, however, that this is not the practice, and there remains some reluctance to refer cases concerning constitutional interpretation to five-judge benches.⁸⁵

In addition to some reluctance to actually hear constitutional questions as a bench of five judges, the Supreme Court neglects Dr Ambedkar's unifying project by introducing limitations on its interpretive jurisdiction where none ought to exist. In an early decision, Subba Rao J noted that the principle that guides Article 132 is that the 'final authority of interpreting the Constitution must rest with the Supreme Court'.⁸⁶ It stands to reason, therefore, that the Court must have wide powers in interpreting the Constitution, and Article 132 was so designed to include all proceedings, civil, criminal, and otherwise.

The Supreme Court has nevertheless refused to hear appeals from the judgments of single judges in High Courts in India, on the grounds that there may lie an intra-court appeal to a larger High Court bench before it comes to them. Civil appeals from decisions of single judges in High Courts, it must be admitted, are specifically prohibited.⁸⁷ However, such appeals in constitutional questions are not prohibited, at all. Despite this, the Court early on dismissed the claim that appeals on matters of constitutional interpretation could not lie from decisions given by single judges in High Courts.⁸⁸ It has subsequently backtracked, holding that although this approach is 'technically correct', it should be avoided; but it has not given any reasons for either the initial holding, or the reading of 'technical' impropriety.⁸⁹

4. Constitutional Court: Some Concluding Remarks

The Supreme Court, as a constitutional court, therefore has evolved unevenly. As an arbiter of disputes between States inter se and the Union, it plays an increasingly diminishing role, choosing to interpret restrictions on its own jurisdiction strictly. As an advisor, in contrast, it reads its powers widely, according to itself the power to effectively review its own judgments without following the procedures that it otherwise safeguards adamantly. As an interpreter, it subverts the reason it was appointed, in choosing to narrow appeals concerning constitutional interpretation and to introduce limits that the Constitution itself does not provide. Dr Ambedkar's project of uniformity is not, therefore, borne out by the Supreme Court when it functions as a constitutional court. In any case, one may say, broadly, that the Court chooses to privilege appellate and advisory functions over discharging its constitutional functions.

IV. THE FINAL COURT

The Supreme Court of India is a final court. Its judgments are binding on all courts below;⁹⁰ and all civil and judicial authorities are directed to act in compliance with its orders.⁹¹ As a court of record, its judgments are to stand unalterable (except by the constitutional process of review) and it has the power to punish for non-compliance or disrespect of its orders, *suo motu*.⁹² However, the Court also has wide powers to 'do complete justice' in each case, and the frequent exercise of these powers sometimes disturbs the finality of its judgments. This is most clear when we see the court-evolved remedy of 'curative petitions'—effectively, a means of obtaining a second review after a first application for review is denied.

The Court justifies the wide use of its powers to 'do complete justice', as well as the creation of its 'curative' jurisdiction, on claims of an *inherent* power to do justice. Yet, the practice of the Court now shows that while the finality of judgments is still difficult to disturb, simultaneously, compliance with the Court's judgments is reducing, perhaps in response to the wide and creative use of its powers to 'do complete justice'. In this section, I take as my theme the consequences of Supreme Court judgments, and examine them from two perspectives. First, I examine the *finality* of these judgments, looking at the

Court's powers of review. Secondly, I look at the powers of the Court to enforce judgments, examining its ability to 'do complete justice' and punish for contempt. Finally, tying these two together, I examine the claim of the Court to powers that are *inherent*, and not directly drawn from the Constitution.

1. The Finality of Judgments—Correcting Errors: The Power to Review, and Curative Petitions

The Constituent Assembly may not have envisioned the Court's current diffused structure, but it did, however, contemplate a situation where the Court might fall into error, and have to correct itself. For this, the Supreme Court has been granted the power to review its own judgments, under certain limited circumstances. Article 127 of the Constitution permits reviews of Supreme Court judgments, and has both substantive and procedural limitations. Substantively, reviews are allowed on three grounds: when new and important evidence is discovered, when there is a mistake or an error that is 'apparent on the face of the record', and for 'any other sufficient reason'.⁹³ Procedurally, reviews have to be filed within thirty days of the judgment that is sought to be reviewed.⁹⁴ They must be heard by the same judges that originally passed the judgment sought to be reviewed (as far as possible) and oral arguments are not necessary—the Court may consider the review through 'circulation'—that is, the bench will discuss and decide whether to issue notice (ie, hear) the review, or to dismiss it.⁹⁵ The requirements of review, accordingly, are stringent, and have been stringently applied in review petitions. The Supreme Court is reluctant to grant review, holding categorically that it does *not* fall within the 'inherent powers' of the court,⁹⁶ and is a 'creature of statute' (presumably referring also to the Constitution).⁹⁷

Despite this stringent application, the Supreme Court has now judicially created the remedy of a 'curative petition', or a 'second review petition'. In *Rupa Ashok Hurra v Ashok Hurra*,⁹⁸ the Court, relying on its powers to do complete justice under Article 142 (discussed below) allowed the petitioners to seek a second review (by filing a 'curative petition') to correct the orders of the Court. Although Article 127 of the Constitution only allows the Court to review its orders under limited and specific circumstances, the Court held that a second review was permissible if three requirements were met:⁹⁹

[W]e think that a petitioner is entitled to relief *ex debito justitiae* if he establishes (1) violation of the

principles of natural justice in that he was not a party to the lis but the judgment adversely affected his interests or, if he was a party to the lis, he was not served with notice of the proceedings and the matter proceeded as if he had notice, and (2) where in the proceedings a learned Judge failed to disclose his connection with the subject-matter or the parties giving scope for an apprehension of bias and the judgment adversely affects the petitioner.¹⁰⁰

The claim in *Rupa Hurra* is that power to judicially evolve remedies that are neither in the Constitution nor in statute is *inherent* in the Court. The Court, as later discussed, has the power to ‘do complete justice’; this, in turn, allows it, presumably, to traverse restrictions on reviews and allow a second one, where one has been denied. The Supreme Court has now held that it will interpret the self-created conditions governing curative petitions, in turn, as strictly as reviews.¹⁰¹ The consequence is an anomalous situation, where the Court is unwilling to permit review except in strict compliance with constitutional requirements, but willing to accept a remedy that subverts the entire basis of review and finality of its judgments.

Criticism of review petitions, however, has been limited;¹⁰² the notion that the Court may itself override constitutional provisions to create additional remedies is not seriously challenged. Indeed, following the judgment in *Rupa Hurra*, the Supreme Court Handbook recognises the remedy and outlines the process of hearing a curative petition.¹⁰³ While the introduction of curative petitions has ended the practice of litigants attempting to challenge Supreme Court rulings by claiming violations of fundamental rights by the Court,¹⁰⁴ it has created yet another avenue for challenging the finality of its own decisions. This avenue remains improperly defined and tested, most of all because it follows neither of the procedures that could have introduced it—constitutional amendments, or introduction into the Supreme Court’s Rules.¹⁰⁵ Since *Rupa Hurra*, a curative petition has been successful only once.¹⁰⁶ It does, however, even in theory if not in practice, challenge the notions that there is in fact a substantial degree of finality that attaches to the Supreme Court’s judgments.

2. Enforcing Justice

a. *The Power to do ‘Complete Justice’*

Article 142 of the Constitution allows the Supreme Court in exercise of its jurisdiction to ‘pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it’. The Supreme Court has used these powers widely, largely in connection with the enforcement of fundamental rights, but also in appeals and other remedies. With the power to do ‘complete justice’¹⁰⁷ in each case, the Supreme Court has used its powers to frame guidelines to control executive action;¹⁰⁸ it has asked legislatures to frame appropriate laws where it finds lacunae that affect fundamental rights,¹⁰⁹ constituted special investigative teams and directed investigations to arrive at findings of fact,¹¹⁰ cancelled mining leases¹¹¹ and telecom licences¹¹² granted by the government, and granted interim bail in criminal matters,¹¹³ amongst other measures.

In exercising this wide power of relief, the Supreme Court has held that it cannot pass orders that contravene fundamental rights.¹¹⁴ It has, however, had an uneasy relationship with statutory law and exercising its powers under this provision. In early cases, such as *Arjun Khiamal Makhijani v Jamnadas Tuliani*,¹¹⁵ the Court held that it would not grant relief in derogation of statutory provisions. In subsequent cases, however, the position has reversed, with the Court declaring that there is no restriction that statutory law could place, it held, on its power to issue directions under Article 142;¹¹⁶ ‘Any prohibition or restriction contained in ordinary laws cannot act as a limitation on the constitutional power of this Court.’¹¹⁷ This rather categorical defiance of the law is now tempered by the notion that the Court, despite being (apparently) not bound by statute, would nonetheless have to ‘take into consideration the statutory provisions regulating the matter in dispute’.¹¹⁸ In recent times, the Supreme Court has returned to the position that it cannot ‘ignore the substantive rights of litigants’ while passing orders under Article 142, as indeed, it ought not.¹¹⁹

When read with the power to enforce fundamental rights, the Court has used powers under Article 142 to pass directions to ‘fill the gaps’ in existing laws, until the legislature steps in to address the same.¹²⁰ In recent times this has led to resistance from State authorities, who have delayed, and in some cases, outright

refused, to comply with such orders, charging the Supreme Court with overstepping its bounds.¹²¹ There has been a rise in pleas to address legislative deficits under Article 142, but this has now left the Court more reluctant to exercise its powers in this manner.¹²²

It is notable that a power so widely used by the Supreme Court today merited barely any discussion during the Constituent Assembly debates.¹²³ As with the provisions allowing appeals by special leave, Article 142 lacks internal or jurisprudentially evolved guidelines, leading to what one commentator calls a ‘wavering approach’ in its application.¹²⁴

b. The Power to Punish for Contempt of Court

The broad nature of orders that the Supreme Court can pass in exercise of this inherent jurisdiction to ‘do justice’ can lead to circumstances where the executive refrains from complying. In these circumstances, the Supreme Court, as a court of record, can exercise its ‘inherent’ powers to punish for contempt.¹²⁵ The power to punish for contempt is specifically provided, with the caveat that Parliament may legislate on how it is to be investigated and punished.¹²⁶

As with the powers under Article 142, the Supreme Court has routinely described its powers to punish for contempt as being in exercise of its ‘inherent’ jurisdiction.¹²⁷ This draws from the common-law doctrine that courts that record their orders are enabled to punish persons for not complying with them.¹²⁸ However, as Dr Ambedkar observed in the Constituent Assembly, the Supreme Court is a creature of the Constitution, and powers to punish for contempt are provided for, specifically because they are *not*, in fact, inherent.¹²⁹ The Supreme Court evidently does not agree; this has resulted in an almost constant tussle between the bar, the bench, and the legislature,¹³⁰ particularly when it comes to the Supreme Court enforcing contempt provisions against lawyers.¹³¹

Criticism of the Supreme Court’s power to punish for contempt, however, has not arisen from its use of what is now described as ‘civil contempt’, or the power to enforce its orders.¹³² Rather it has come from the Court’s use of its powers to punish for ‘criminal contempt’, which is statutorily defined as publishing, speaking, or otherwise doing any act which ‘scandalises or tends to scandalise, or lowers or tends to lower the authority of any court’, or which tends to prejudice, interfere with or obstruct any judicial proceedings.¹³³ The Supreme

Court appears to be easily scandalised—it has sentenced persons to jail for protesting its judgments outside the Court,¹³⁴ for criticising specific judges (holding that this may amount to the civil wrong of libel but punishing it as criminal contempt)¹³⁵ and pulling up newspaper editors and publishers for publishing what it does not deem to be ‘fair criticism’.¹³⁶ The term ‘scandalising the court’ is notoriously nebulous and hard to define, so much so that there have been repeated calls¹³⁷ to narrow or remove entirely the power to punish for criminal contempt. Most recently, however, the Supreme Court has reaffirmed that this power is not only advisable, but ‘necessary’ to the administration of justice.¹³⁸ The term ‘scandalising the court’, borrowed from common law in England, has undergone substantial scrutiny by the UK Law Commission.¹³⁹ A parallel effort is required in India if we are to ensure that powers to punish for contempt are used to enforce compliance with the court’s orders, and not to punish criticism of it.¹⁴⁰

3. The Supreme Court’s Claim to Inherent Powers

The Supreme Court, as we have seen, allows reviews of its own judgments outside the constitutional framework with some degree of ease—through advisory opinions, through the new remedy of curative petitions, and so on. It also exercises powers to address legislative ‘gaps’, frame guidelines and grant all kinds of relief to litigants; again, this is justified as an exercise of powers that *inhere* in the Court.

This ease can be attributed to two factors. First, as we have seen, although judgments of the Supreme Court bind all courts, they do not bind the Supreme Court itself. The Court is free to revisit its own judgments, although it has held that the operative factor is the bench strength—benches of smaller sizes may not overrule larger benches. Secondly, the Court draws from what it describes as its ‘inherent power’ to grant relief *ex debito justitiae*. With the introduction of the Constitution and specific delimitations on its jurisdiction, should the Supreme Court exercise ‘inherent powers’ to contravene them?¹⁴¹ The Supreme Court today reveals that it can, and will do so, in several circumstances: when granting curative petitions, when punishing for contempt, when exercising its powers to do complete justice, and when expanding its appellate jurisdiction in appeals for special leave.

The argument that the Supreme Court could exercise powers *ex debito*

justitiae (for the purpose of justice) was formally accepted in *Abdul Rehman Antulay v RS Nayak*.¹⁴² Mukharji J held¹⁴³ that the Court could exercise powers of review regardless of the nature of the proceeding—‘It can do so in exercise of its inherent jurisdiction in any proceeding pending before it before insisting on the formalities of a review application.’¹⁴⁴ The source of this power, according to Mukharji J, was twofold: first, the strength of the bench: a larger bench, he noted, could overrule a smaller bench regardless of the nature of proceeding.¹⁴⁵ Secondly, Mukharji J noted that the Supreme Court was not only empowered, but also obliged to ensure that no person suffered as a consequence of its error; this power could be exercised *ex debito justitiae* (by reason or obligation of justice).¹⁴⁶

The Court, then, uses the argument that it has ‘inherent powers’ to ‘do justice’ (which is how it interprets ‘*ex debito justitiae*’) in permitting acts that are otherwise in contravention of statutory and constitutional requirements. This, in turn, permits them to dispense with constitutional safeguards, such as those limiting the power to review, as ‘formalities’. As with appellate provisions, this easy dispensation of constitutional limits on its power results in a remarkable widening of the Court’s jurisdiction. The implication, additionally, is that the Court appears to view itself as an entity that can supersede the Constitution, instead of one that is created by it for the purpose of safeguarding constitutional rights and unifying constitutional interpretation.

V. CONCLUSION

The Supreme Court today is an institution struggling to manage the width of its own jurisdiction. Overwhelming arrears confirm the Constituent Assembly’s fears of ‘flooding’ the Court. In 1978, Rajeev Dhavan, after an exhaustive analysis of the Court’s docket from Independence until then, noted, ‘the Supreme Court is unable to discharge its extremely wide jurisdiction. It simply cannot do so.’¹⁴⁷ More than arrears, the inconsistencies that arise in decisions by disparate benches of two judges have led to conflicts in constitutional interpretation. This contravenes not only the Constitution’s mandate in Articles 132 and 145, but also the unifying principle that underlay the Constituent Assembly’s provisions for the Supreme Court. In addition to arrears and inconsistency, the Court now faces persistent non-compliance with its orders, particularly those concerning the power to do ‘complete justice’ under Article

142. The consequence, as the Supreme Court saw in the recent case of *Sahara*, is that it is forced to take recourse to powers of contempt to enforce compliance despite repeated flouting of its directions.¹⁴⁸

Responses to the rapid increase in the Supreme Court's burden have focused on institutional restructuring. The Law Commission of India, for instance, has recommended, variously, the creation of a 'constitutional' bench to hear important matters¹⁴⁹ or that the Supreme Court establish four divisions ('cassation courts') in different parts of the country to hear appellate matters¹⁵⁰ and increasing the number of judges further.¹⁵¹ The pendency of cases is seen largely as a technical matter, and little or no attention has been paid to the constitutional basis of this pendency, or to recommendations for altering the jurisdiction of the Court itself.¹⁵²

The Supreme Court's jurisdiction may well be wider 'than any superior court in any part of the world'. However, when exercised outside constitutional prohibitions that constrain it, it results in non-compliance, inconsistency, and erosion of the Supreme Court's authority. The Supreme Court is a creature of the Constitution; it draws its power from constitutional sources and not, as Dhavan once described it, as an 'abstract inherent jurisdiction'.¹⁵³ The root of its powers must draw from constitutional principles. At the same time, this impetus for self-correction must come from within the Court—it has been granted the latitude to evolve principles to guide the exercise of its jurisdiction. The evolution of such principles, it is hoped, will address not only structural difficulties of arrears, but also, over time, the deeper institutional problems of inconsistency and non-compliance.

¹ *Constituent Assembly Debates*, vol 7 (Lok Sabha Secretariat 1986) 37, 4 November 1948.

² Alladi Krishnaswamy Ayyar, a member of the Drafting Committee of the Constituent Assembly, was a lawyer himself.

³ This chapter does not address questions of jurisdiction of other constitutional courts and adjudicatory bodies, such as State High Courts, dealt with under Articles 225, 226 *et seq* of the Constitution, or the administrative tribunals constituted under Part XIV-A of the Constitution.

⁴ See eg, Burt Neuborne, 'The Supreme Court of India, a Constitutional Court Profile' (2003) 1(3) *International Journal of Constitutional Law* 1; Lavanya Rajamani and Arghya Sengupta, 'The Supreme Court of India: Power, Promise, and Overreach' in Niraja Gopal Jayal and Pratap Bhanu Mehta (eds) *The Oxford Companion to Politics in India* (Oxford University Press 2010).

⁵ For a contemporary quantitative analysis of the Supreme Court's docket from 1993 to 2011, see Nick Robinson, 'A Quantitative Analysis of the Indian Supreme Court's Workload' (2013) 10(3) *Journal of Empirical Legal Studies* 570, and for the first three decades since Independence (1950–80), see Rajeev Dhavan, *The Supreme Court under Strain: The Challenge of Arrears* (NM Tripathi 1978).

⁶ See eg, *Constituent Assembly Debates*, vol 8 (Lok Sabha Secretariat 1986) 620, 6 June 1949 (Shibban Lal Saksena). See also *Constituent Assembly Debates*, vol 8 (Lok Sabha Secretariat 1986) 841, 850, 14 June 1949 (Thakur Dass Bhargava, Bakshi Tek Chand).

⁷ Constitution of India 1950, art 133.

⁸ Constitution of India 1950, art 134.

⁹ Constitution of India 1950, art 132.

¹⁰ Constitution of India 1950, art 136.

¹¹ Art 138 allows Parliament to expand the jurisdiction of the Supreme Court with respect to any matters on which it is competent to legislate, a power that has been widely exercised. See eg, Central Excise and Salt Act 1944, s 35L; Advocates Act 1961, s 38; Customs Act 1962, s 130E; Contempt of Courts Act 1971, s 19(1)(b); Consumer Protection Act 1986, s 23; Special Court (Trial of Offences Relating to Transactions in Securities) Act 1992, s 10.

¹² Constitution of India 1950, art 134(1).

¹³ The latter two circumstances were introduced by Parliament by the Supreme Court (Enlargement of Criminal Appellate Jurisdiction) Act 1970. Art 134(2) allows Parliament to expand the jurisdiction of the Supreme Court in criminal matters.

¹⁴ Certificates from the High Court are requirements under arts 132(1), 133(1), and 134(1)(c). Art 134A was introduced in 1978 in an attempt to rationalise the process of grant of certificates.

¹⁵ Constitution of India 1950, art 133(1).

¹⁶ Constitution of India 1950, art 132. The Supreme Court has held that there is no classification by subject matter of appeals under art 132, relying primarily on the fact that art 132 mentions ‘civil, criminal or other proceedings’. See *SAL Narayan Row v Ishwarlal Bhagwandas* AIR 1965 SC 1818, in which other proceedings were clarified as including all kinds, including contempt and disciplinary matters. See also, on this point, *Ramesh v Gendalal Motilal Patni* AIR 1966 SC 1445.

¹⁷ Constitution of India 1950, art 136(1). The only exclusion is appeals from military tribunals.

¹⁸ See generally, Granville Austin, *The Indian Constitution: Cornerstone of a Nation* (Oxford University Press 2000); *Constituent Assembly Debates*, vol 8 (Lok Sabha Secretariat 1986) 820–36, 14 June 1949.

¹⁹ Constitution of India 1950, art 134(2).

²⁰ Constitution of India 1950, art 133(1).

²¹ See, for an indicative list, *State of Madras v Gurviah Naidu* AIR 1956 SC 158; *Baladin v State of Uttar Pradesh* AIR 1956 SC 181; *Pershad v State of Uttar Pradesh* AIR 1957 SC 211; *Chandi Prasad Chokhani v State of Bihar* AIR 1961 SC 1708; *Madamanchi Ramappa v Muthaluru Bojappa* AIR 1963 SC 1633; *Thansingh Nathmal v Superintendent of Taxes* AIR 1964 SC 1419; *Bankipur Club Ltd v CIT* (1972) 4 SCC 386.

²² Supreme Court (Enlargement of Criminal Appellate Jurisdiction) Act 1970, s 2.

²³ Law Commission of India, *The Appellate Jurisdiction of the Supreme Court in Civil Matters* (Law Com No 44, 1971) <<http://lawcommissionofindia.nic.in/1-50/report44.pdf>>, accessed October 2015; Law Commission of India, *Civil Appeals to the Supreme Court on a Certificate of Fitness* (Law Com No 45, 1971) <<http://lawcommissionofindia.nic.in/1-50/report45.pdf>>, accessed October 2015. Prior to this, the Law Commission of India had expressed concerns about the increasing use of art 136 for criminal matters, as well: Law Commission of India, *Reforms in Judicial Administration*, vol 1 (Law Com No 14, 1958) 47 <<http://lawcommissionofindia.nic.in/1-50/Report14vol1.pdf>>, accessed October 2015. This was echoed in another report: Law Commission of India, *Structure and Jurisdiction of the Higher Judiciary* (Law Com No 58, 1974) 40 <<http://lawcommissionofindia.nic.in/51-100/report58.pdf>>, accessed October 2015.

²⁴ Constitution (Thirtieth Amendment) Act 1972. See also Constitution of India 1950, art 133.

²⁵ Law Commission of India, *The Appellate Jurisdiction of the Supreme Court in Civil Matters* (n 23) 7.

²⁶ Law Commission of India, *The Appellate Jurisdiction of the Supreme Court in Civil Matters* (n 23) 4.

²⁷ Law Commission of India, *The Appellate Jurisdiction of the Supreme Court in Civil Matters* (n 23) 4.

²⁸ Dhavan ([n 5](#)) 46–60.

²⁹ It is difficult to winnow a list of decisions in which the Supreme Court has grant of leave despite prohibitions under arts 133 and 134, because of the overwhelming quantity of such instances. An indicative list of some instances is: *State of Assam v Basanta Kumar Das* (1973) 1 SCC 461; *Assam Railways and Trading Co v Collector of Lakhimpur* (1976) 3 SCC 24; *MM Gupta v State of Jammu and Kashmir* (1982) 3 SCC 412; *Delhi Judicial Service Association v State of Gujarat* (1991) 4 SCC 406; *Ajaib Singh v State of Haryana* (1992) Supp (2) SCC 338.

³⁰ See eg, *Pritam Singh v The State* AIR 1950 SC 169 [9] ('wide discretionary power'); *Bharat Bank Ltd v Employees* AIR 1950 SC 188 [25] ('wide and of comprehensive character. Powers given are those of an overriding nature'); *Muir Mills Co Ltd v Suit Mills Mazdoor Union* AIR 1955 SC 170 [18] ('exceptional and overriding power').

³¹ *Kunhayammed v State of Kerala* (2000) 6 SCC 359 (Lahoti J).

³² See eg, *Raj Krushna Bose v Binod Kanungo* AIR 1954 SC 202; *Zahira Habibullah Sheikh v State of Gujarat* (2004) 5 SCC 221; *Columbia Sportswear Co v DIT* (2012) 11 SCC 224.

³³ *Constituent Assembly Debates*, vol 8 (Lok Sabha Secretariat 1986) 628, 6 June 1949. See also *Constituent Assembly Debates*, vol 8 (Lok Sabha Secretariat 1986) 849, 14 June 1949 (Naziruddin Ahmad).

³⁴ See eg, *Constituent Assembly Debates*, vol 8 (Lok Sabha Secretariat 1986) 850–51, 14 June 1949 (Bakshi Tek Chand).

³⁵ See eg, *Constituent Assembly Debates*, vol 8 (Lok Sabha Secretariat 1986) 856, 14 June 1949 (BR Ambedkar); *Constituent Assembly Debates*, vol 8 (Lok Sabha Secretariat 1986) 639, 6 June 1949 (Alladi Krishnaswamy Ayyar).

³⁶ See eg, *Durga Shankar v Raghu Raj* AIR 1954 SC 520; *The Engineering Mazdoor Sabha v The Hind Cycles Ltd* AIR 1963 SC 874; *Penu Balakrishna Iyer v Ariya Ramaswamy Iyer* AIR 1965 SC 195; *Sadhanatham v Arunachalam* (1980) 3 SCC 141; *Ramakant Rai v Madan Rai* (2003) 12 SCC 395.

³⁷ *Pritam Singh* ([n 30](#)); *State of Madhya Pradesh v Ramkrishna Ganpatrao Limsey* AIR 1954 SC 20; *Gian Singh v State of Punjab* (1974) 4 SCC 305.

³⁸ *Haripada Dey v State of West Bengal* AIR 1956 SC 757; *Hindustan Tin Works v Employees* (1979) 2 SCC 80.

³⁹ HM Seervai, *Constitutional Law of India: A Critical Commentary*, vol 3 (4th edn, Universal Book Traders 2002) 2641.

⁴⁰ Justice Ruma Pal and Samaraditya Pal (eds) *MP Jain's Indian Constitutional Law*, vol 1 (updated 6th edn, LexisNexis 2013) 318.

⁴¹ See, on this point, Robinson ([n 5](#)).

⁴² *Mathai v George* SLP (C) No 7105/2010 (order dated 19 March 2010).

⁴³ See, on this point, Nick Robinson and others, 'Interpreting the Constitution: Supreme Court Constitution Benches since Independence' (2011) 46(9) *Economic and Political Weekly* 27; Nick Robinson, 'Structure Matters: The Impact of Court Structure on the US and Indian Supreme Courts' (2013) 61 *American Journal of Comparative Law* 173.

⁴⁴ *AJ Peiris v State of Madras* AIR 1954 SC 616 [9]; *Nawab Singh v State of Uttar Pradesh* AIR 1954 SC 278.

⁴⁵ *Kanta Prashad v Delhi Administration* AIR 1958 SC 350; *Madanraj v Jalamchand Locha* AIR 1960 SC 744; *Ram Sagar Pandit v State of Bihar* (1964) 2 Cri LJ 65.

⁴⁶ *Katar Singh v State of Uttar Pradesh* (1970) 3 SCC 188; *Union of India v Prafulla Kumar Samal* (1979) 3 SCC 4; *Gurdeep Singh v State of Rajasthan* (1980) Supp SCC 432.

⁴⁷ *Ramaniklal Gokaldas v State of Gujarat* (1976) 1 SCC 6; *Hansa Singh v State of Punjab* (1976) 4 SCC 255.

⁴⁸ Robinson ([n 5](#)) 587.

⁴⁹ Constitution of India 1950, art 143.

⁵⁰ Constitution of India 1950, art 131.

⁵¹ Constitution of India 1950, art 132.

⁵² Robinson ([n 5](#)).

⁵³ *Re Reference under Section 213, Govt. of India Act, 1935* AIR 1944 FC 73 [31].

⁵⁴ The Supreme Court, on the one occasion that it was referred a question of pure fact, declined to answer it: *Special Reference No 1 of 1993* (1993) 1 SCC 642. The Court is also obliged to answer references on historical treaties: Constitution of India 1950, art 143(2).

⁵⁵ *Re Delhi Laws Act 1912* AIR 1951 SC 332; *Special Reference No 1 of 1958* AIR 1958 SC 956; *Special Reference No 1 of 1959* AIR 1960 SC 845; *Special Reference No 1 of 1962* AIR 1963 SC 1760; *Special Reference No 1 of 1964* AIR 1965 SC 745; *Special Reference No 1 of 1974* (1974) 2 SCC 33; *Special Reference No 1 of 1978* (1979) 1 SCC 380; *Special Reference No 1 of 1991* (1993) Supp (1) SCC 96(2); *Re Special Reference No 1 of 1998* (1998) 7 SCC 739; *Re Special Reference No 1 of 2002* (2002) 8 SCC 237; *Special Reference No 1 of 2001* (2004) 4 SCC 489; *Re Special Reference No 1 of 2012* (2012) 10 SCC 1.

⁵⁶ *Special Reference No 1 of 1993* ([n 54](#)).

⁵⁷ *Re References under Section 14 of the Right to Information Act, 2005, Special Reference No 1 of 2013*.

⁵⁸ Constitution of India 1950, art 143(2), which relates to pre-constitutional treaties otherwise excluded from the Court's original jurisdiction, does not allow the Court to decline a reference. See, on this point, Seervai ([n 39](#)) 2683.

⁵⁹ Constitution of India 1950, art 145(4).

⁶⁰ *Special Reference No 1 of 1964* ([n 55](#)) [18].

⁶¹ The main instance of this is in the opinion rendered in *Re Special Reference No 1 of 2012* ([n 55](#)), where the Supreme Court heard an advisory opinion seeking clarifications on its own judgment in *Centre for Public Litigation v Union of India* (2012) 3 SCC 1, where the Court had cancelled 122 telecom licences issued by the then government. The Government of India preferred a review petition against this judgment, but withdrew it, in order to file a reference.

⁶² I am building, here, on arguments that I previously made in Raeesa Vakil, 'Advising the President' (2013) Seminar 642 <http://india-seminar.com/2013/642/642_raeesa_vakil.htm>, accessed October 2015.

⁶³ Constitution of India 1950, art 131.

⁶⁴ Constitution of India 1950, art 263.

⁶⁵ This point was raised only once, by Brajeshwar Prasad, in the Constituent Assembly debates. It was not taken up, possibly because he qualified this by clarifying that he was opposed to both, federalism *and* the Supreme Court. *Constituent Assembly Debates*, vol 8 (Lok Sabha Secretariat 1986) 589, 3 June 1949.

⁶⁶ *State of Karnataka v Union of India* (1977) 4 SCC 608 [201].

⁶⁷ *State of Bihar v Union of India* (1970) 1 SCC 67 [2].

⁶⁸ See eg, *AK Roy v Union of India* (1982) 1 SCC 271; *RC Poudyal v Union of India* (1994) Supp (1) SCC 324.

⁶⁹ *State of Rajasthan v Union of India* (1977) 3 SCC 592 [110].

⁷⁰ Seervai ([n 39](#)) 2641.

⁷¹ Constitution of India 1950, art 131.

⁷² See eg, *State of Rajasthan* ([n 69](#)).

⁷³ *State of Karnataka* ([n 66](#)) [143], Beg CJ (again for the majority) rejected the Union's argument, saying that 'The individual States, acting through their Governments and Ministers, could be said to represent the

people of each individual state and their interests.’

⁷⁴ Seervai ([n 39](#)) 2626–34.

⁷⁵ *Chief Conservator of Forests v Collector* (2003) 3 SCC 472.

⁷⁶ *Tashi Delek Gaming Solutions v State of Karnataka* (2006) 1 SCC 442.

⁷⁷ Constitution of India 1950, art 262.

⁷⁸ The InterState River Water Disputes Act 1956, s 11.

⁷⁹ *State of Karnataka v State of Andhra Pradesh* (2000) 9 SCC 572.

⁸⁰ See eg, *State of Haryana v State of Punjab* (2002) 2 SCC 507; *Atma Linga Reddy v Union of India* (2008) 7 SCC 788; *State of Tamil Nadu v State of Kerala* (2010) 12 SCC 399; *State of Himachal Pradesh v Union of India* (2011) 13 SCC 344.

⁸¹ Constitution of India 1950, art 132.

⁸² Constitution of India 1950, art 13(2).

⁸³ *Constituent Assembly Debates*, vol 8 (Lok Sabha Secretariat 1986) 591–608, 3 June 1949. Ahmad was supported in his arguments by Thakur Dass Bhargava (600), Shibban Lal Saksena (608), and Frank Anthony. In common, their objections stemmed from the lack of a provision for criminal appeals; this was later introduced by amendment to the draft constitution.

⁸⁴ Constitution of India 1950, art 145(3).

⁸⁵ Robinson ([n 43](#)).

⁸⁶ *State of Jammu and Kashmir v Thakur Ganga Singh* AIR 1960 SC 356.

⁸⁷ Constitution of India 1950, art 133(3).

⁸⁸ A constitutional bench decided this in *Election Commission v Saka Venkata Subba Rao* AIR 1953 SC 210. Civil appeals from single judges are specifically barred under art 133.

⁸⁹ *RD Agarwala v Union of India* (1970) 1 SCC 708. This was also decided by a constitutional bench, with Hidayatullah J speaking for the majority. Hidayatullah J makes no reference to the previous decision in *Saka Venkata Subba Rao*, leading Seervai to comment that *RD Agarwala* was decided *per incuriam*. See Seervai ([n 39](#)) 2643.

⁹⁰ Constitution of India 1950, art 141.

⁹¹ Constitution of India 1950, art 144.

⁹² Constitution of India 1950, art 127.

¹⁰⁰ *Rupa Ashok Hurra* ([n 98](#)) [51]. The Court also added that a designated senior advocate must certify along with the petition that these requirements have been met.

⁹³ These requirements are framed in Code of Civil Procedure 1908, Order 47, Rule 1.

⁹⁴ Supreme Court Rules 1966, Order 40, Rule 2.

⁹⁵ It was this last requirement that was the subject of challenge before a constitutional bench in 1980, which affirmed that a public hearing was *not* in fact mandatory, in *PN Eswara Iyer v Registrar, Supreme Court* (1980) 4 SCC 680. The Supreme Court has since held that public hearings are mandatory in reviews concerning the death penalty: *Mohd Arif v Registrar, Supreme Court of India* (2014) 9 SCC 737.

⁹⁶ See *Patel Narshi Thakershi v Pradyuman Singhji Arjunsinghji* (1971) 3 SCC 844; *Lily Thomas v Union of India* (2000) 6 SCC 224.

⁹⁷ *Haryana State Industrial Development Corporation v Mawasi* (2012) 7 SCC 200.

⁹⁸ (2002) 4 SCC 388.

⁹⁹ *Rupa Ashok Hurra* ([n 98](#)) [51].

¹⁰¹ The Supreme Court has subsequently held that the conditions in *Rupa Hurra* must be strictly complied with (*Sumer v State of Uttar Pradesh* (2005) 7 SCC 220). See also *Sidram Patil v Gurunath Shivappa Patil* (2005) 2 SCC 358; *CBI v Keshub Mahindra* (2011) 6 SCC 216.

¹⁰² See, however, Muteti Mutisya Mwamisi, ‘The Indian Supreme Court and Curative Actions’ (2007) 1

Indian Journal of Constitutional Law 202, arguing that the Court misapplied *Abdul Rehman Antulay v RS Nayak* (1992) 1 SCC 225 in allowing curative petitions.

¹⁰³ Supreme Court of India, 'Practice and Procedure, A Handbook of Information' (3rd edn, 2010) ch II, para F, 17 <<http://supremecourtfindia.nic.in/handbook3rdedition.pdf>>, accessed October 2015.

¹⁰⁴ See eg, *Naresh Shridhar Mirajkar v State of Maharashtra* AIR 1967 SC 1.

¹⁰⁵ The Supreme Court may frame rules under art 145, and these require the assent of the President to attain finality.

¹⁰⁶ *State of Madhya Pradesh v Sughar Singh* (2010) 3 SCC 719.

¹⁰⁷ Constitution of India 1950, art 142.

¹⁰⁸ An indicative list of cases in which the Supreme Court has done so is as follows: *Laxmi Kant Pandey v Union of India* (1984) 2 SCC 244; *Vishaka v State of Rajasthan* (1997) 6 SCC 241; *DK Basu v State of West Bengal* (1997) 1 SCC 416; *Vineet Narain v Union of India* (1998) 1 SCC 226. A turn in this approach, however, seems indicated in *Sahara India Real Estate Corporation Ltd v Securities and Exchange Board* (2012) 10 SCC 603; the Supreme Court refrained from framing broad guidelines on media reporting of judicial proceedings.

¹⁰⁹ See for instance, *Gainda Ram v Municipal Corporation of Delhi* (2010) 10 SCC 715.

¹¹⁰ See *RS Sodhi v State of Uttar Pradesh* (1994) Supp (1) SCC 143; *National Human Rights Commission v State of Gujarat* WP (Cr) 109/2003 (order dated 26 March 2008); *Rubabuddin Sheikh v State of Gujarat* (2010) 2 SCC 200; *Narmada Bai v State of Gujarat* (2011) 5 SCC 79; *ExtraJudicial Execution Victim Families Association v Union of India* (2013) 2 SCC 493.

¹¹¹ *MC Mehta v Union of India* (2009) 6 SCC 142.

¹¹² *Centre for Public Litigation* ([n 61](#)). The Union of India through the President then filed a special reference to the Court and an advisory opinion was issued in this matter, reported as *Special Reference No 1 of 2012* ([n 55](#)).

¹¹³ *KM Nanavati v State of Bombay* AIR 1961 SC 112.

¹¹⁴ *Prem Chand Garg v Excise Commissioner* AIR 1963 SC 996.

¹¹⁵ (1989) 4 SCC 612.

¹¹⁶ *Delhi Judicial Service Association* ([n 29](#)) [51]. See also *Union Carbide Corporation v Union of India* (1991) 4 SCC 584; *Maniyeri Madhavan v Sub-Inspector of Police* (1994) 1 SCC 536.

¹¹⁷ *Delhi Judicial Service Association* ([n 29](#)) [51].

¹¹⁸ *Delhi Judicial Service Association* ([n 29](#)) [51]; see also *Bonkya v State of Maharashtra* (1995) 6 SCC 447 [23]; *Supreme Court Bar Association v Union of India* (1998) 4 SCC 409 [48].

¹¹⁹ *MS Ahlawat v State of Haryana* (2000) 1 SCC 278; *MC Mehta v Kamal Nath* (2000) 6 SCC 213; *ESP Rajaram v Union of India* (2001) 2 SCC 186.

¹²⁰ See eg, *Vishaka* ([n 108](#)); *Vineet Narain* ([n 108](#)).

¹²¹ See for instance, executive responses in the case of *Prakash Singh v Union of India* (2006) 8 SCC 1, in which the Court passed a series of broad directives on police reforms.

¹²² The Supreme Court in 2014 refused to frame guidelines for the investigation of cases of deaths in police encounters, on a petition filed by the State of Gujarat. See *State of Gujarat v Union of India* Writ Petition (Crl) No 49/2012 (order dated 8 May 2014) (on file with the author).

¹²³ *Constituent Assembly Debates*, vol 8 (Lok Sabha Secretariat 1986) 387, 27 May 1949.

¹²⁴ Pal and Pal ([n 40](#)) 372.

¹²⁵ See generally, Constitution of India 1950, art 127, the Contempt of Courts Act 1971, and the Indian Law Institute and Supreme Court Project Committee on Restatement of Indian Law, *Restatement of the Law of Contempt* (Indian Law Institute 2011).

¹²⁶ The Contempt of Courts Act 1971 has accordingly been enacted.

¹²⁷ See *Supreme Court Bar Association* ([n 118](#)).

¹²⁸ See, on the evolution of the common law powers to punish for contempt, Christopher J Miller, *Contempt of Court* (Clarendon Law Press 1989).

¹²⁹ *Constituent Assembly Debates*, vol 8 (Lok Sabha Secretariat 1986) 376, 27 May 1949.

¹³⁰ See *Delhi Judicial Service Association* ([n 29](#)); *Supreme Court Bar Association* ([n 118](#)); *Pallav Sheth v Custodian* (2001) 7 SCC 549.

¹³¹ See *Re Vinay Chandra Mishra* (1995) 2 SCC 584, which was overruled in *Supreme Court Bar Association v Union of India* ([n 118](#)).

¹³² Contempt of Courts Act 1971, s 2(b).

¹³³ Contempt of Courts Act 1971, s 2(c)(ii) and (iii).

¹³⁴ *Re Arundhati Roy* (2002) 3 SCC 343.

¹³⁵ *Haridas Das v Usha Rani Banik* (2007) 14 SCC 1.

¹³⁶ Fair criticism is a defence to contempt. See the Contempt of Courts Act 1971, s 4. See, however, the Supreme Court's rulings in *Rajendra Sail v MP High Court Bar Association* (2005) 6 SCC 109; *Hindustan Times v High Court of Allahabad* (2011) 13 SCC 155.

¹³⁷ See eg, Rajeev Dhavan and Balbir Singh, 'Publish and Be Damned—the Contempt Power and the Supreme Court' (1979) 21(1) *Journal of the Indian Law Institute* 1; InterState Council, *Report of the Commission on Centre State Relations* (1988) ch 17, para 17.06.05; TR Andhyarujina, 'Scandalising the Court: Is it Obsolete?' (2003) 4 SCC J 12.

¹³⁸ *Bal Kishan Giri v State of Uttar Pradesh* (2014) 7 SCC 280.

¹³⁹ See Law Commission, 'Consultation Paper on Contempt of Court' (Consultation Paper 209, 2012); Law Commission, 'Contempt of Court: Scandalising the Court' (Law Com No 335, 2012).

¹⁴⁰ In *CK Daphtary v OP Gupta* (1971) 1 SCC 626.

¹⁴¹ Dr Rajeev Dhavan argues strongly against this in *Rupa Ashok Hurra* ([n 98](#)) [21]. He suggests that the Court should have the power to correct its own errors, even after a review judgment, but that being a creature of the Constitution, the Supreme Court must trace this power not to an 'abstract inherent jurisdiction' but to constitutional provisions—arts 129 and 137 read with Supreme Court Rules 1966, Order 40, Rule 5, and Order 47, Rules 1 and 6.

¹⁴² (1988) 2 SCC 602.

¹⁴³ Mukharji J's opinion was the majority, on behalf of himself and Oza and Natarajan JJ.

¹⁴⁴ *Abdul Rehman Antulay* ([n 102](#)) [48] (Mukharji J).

¹⁴⁵ *Abdul Rehman Antulay* ([n 102](#)) [54], [97], [109]–[110].

¹⁴⁶ In the traditions of common law, the meaning of the phrase *ex debito justitiae* differs significantly from the Supreme Court's interpretation. Black's Law Dictionary defines it as 'from or as a debt of justice, in accordance with the requirement of justice; as a matter of right'. As a judicial remedy it draws from the last of these, to mean a remedy that accrues as a matter of right, or one that a Court may not refuse to an applicant.

¹⁴⁷ Dhavan ([n 5](#)) 95.

¹⁴⁸ See *Sahara India Real Estate Corporation Ltd* ([n 108](#)); *Securities and Exchange Board of India v Sahara India Real Estate Corporation* (2014) 8 SCC 751.

¹⁴⁹ Constitution of India 1950, art 145(3).

¹⁵⁰ Law Commission of India, *Need for Division of the Supreme Court into a Constitution Bench at Delhi and Cassation Benches in Four Regions at Delhi, Chennai/Hyderabad, Kolkata and Mumbai* (Law Com No 229, 2009) <<http://lawcommissionofindia.nic.in/reports/report229.pdf>>, accessed October 2015; Law Commission of India, *A Proposal for Constitutional Division Within the Supreme Court* (Law Com No 95, 1984) <<http://lawcommissionofindia.nic.in/51-100/report95.pdf>>, accessed October 2015.

¹⁵¹ Law Commission of India, *Reforms in the Judiciary—Some Suggestions* (Law Com No 230, 2009)

para 1.11 <<http://lawcommissionofindia.nic.in/reports/report230.pdf>>, accessed October 2015.

¹⁵² A notable exception to this is Rajeev Dhavan's recommendation to reduce the Court's jurisdiction, particularly its special leave jurisdiction. See Dhavan ([n 5](#)) 95.

¹⁵³ This was in the arguments made in *Rupa Ashok Hurra* ([n 98](#)) [21].

CHAPTER 22

THE ADMINISTRATIVE AND REGULATORY STATE

TV SOMANATHAN*

I. INTRODUCTION

As originally enacted, the Indian Constitution had the standard three-branches-of-government structure as its conceptual base, with a few institutions like the Election Commission forming marginal exceptions. The growth of the so-called ‘regulatory State’ challenges this conception. This chapter examines how constitutional law in India has dealt with the administrative and regulatory State as it has developed outside the traditional branches of government, and how judicial review is exercised over it.

While the ‘administrative’ State is self-explanatory, the term ‘regulatory State’ is often used to denote institutions operating at arm’s length from the government, insulated from day-to-day political pressures and using technical expertise in reaching decisions.¹ However, viewed in terms of the economic functions performed, the ‘regulatory’ State does not necessarily mean *independent* regulators. Many aspects of financial, industrial, environmental, and labour regulation are implemented in India and elsewhere (including developed countries) through ministries and departments of the executive without an independent regulator. Indeed, independent regulators are not necessarily or always ‘better’ than traditional administrative structures. Thus, the ‘administrative’ State is much wider than the ‘regulatory’ State.

II. THE ADMINISTRATIVE STRUCTURE

Many functions and sectors now falling under ‘independent’ agencies outside the ‘traditional’ politically controlled executive branch remain executive/administrative functions in constitutional/legal terms and were earlier part of the traditional executive. The same functions in other sectors continue to be part of the ‘traditional’ administrative State. Therefore a brief overview of

constitutional issues relating to the administrative State as it functions *within* the executive branch becomes necessary.

The Government of India ('the Union government' or the 'Central government') consists of ministries and departments. A ministry may consist of one or more departments. Ministries are headed by Cabinet Ministers, who may be assisted by Ministers of States, Deputy Ministers, and Parliamentary Secretaries, all of whom are part of the political executive and have to be Members of Parliament. Each department is headed by a Secretary (equivalent to 'Permanent Secretary' in many Commonwealth countries), who is typically a career civil servant, most often from the Indian Administrative Service. Coordination between ministries is the role of the Cabinet Secretary, who is the Secretary to the Union cabinet and head of the civil service, and his office (known as the Cabinet Secretariat). There is also a Prime Minister's Office (PMO) which assists the Prime Minister and which has a combination of civil servants and political appointees. As of May 2014, the Government of India had fifty-one ministries and fifty-seven departments. There were twenty-eight Cabinet Ministers and forty-three Ministers of State.² The government can vary the number and sectoral jurisdiction of ministries and departments by executive order.

India has twenty-nine State Governments and seven Governments of Union Territories (one of them being the National Capital Territory of Delhi). State Governments have a similar structure of Cabinet Ministers, though it is less common for them to have Ministers of State, Deputy Ministers, or Parliamentary Secretaries. State Governments have multiple departments (not called ministries) and each department is typically headed by a Minister at the political level, with a Secretary who is normally a career civil servant (most often from the Indian Administrative Service). The structure and number of departments in the State Governments varies from State to State and is not necessarily aligned with the structure of ministries and departments at the central level. For example, in May 2014 the Government of Tamil Nadu had thirty-six departments, while the Government of West Bengal had sixty-one departments. Union Territories vary in size and structure, but typically have a similar structure to State Governments, albeit with fewer departments. The State-level equivalent of the Cabinet Secretary is the Chief Secretary, who is the Secretary to the State Cabinet and the head of the civil service. There is usually also a Chief Minister's Office, which may have both civil servants and political appointees, though typically far smaller in size than the PMO.

The Indian Administrative Service, the Indian Police Service, and the Indian Forest Service are 'All-India Services', most of whose members are recruited

through rigorous competitive examinations by the independent Union Public Service Commission (a minority of them are promoted from State civil services). Members of these services work in both the Union and State Governments. The Union government and the State governments also have their own civil services. The Secretary is the administrative head of each department, who exercises supervision over all staff and financial resources.

Table 22.1 List of Central Regulatory Authorities

Authority	Enactment	Functional area	Ministry
Agricultural and Processed Food Products Export Development Authority	Agricultural and Processed Food Products Export Development Authority Act 1985	To undertake measures for the development and promotion of export of scheduled products.	Ministry of Commerce and Industry
Airports Authority of India	Airports Authority of India Act 1994	To determine the tariff for aeronautical services; to determine the amount of the development fees in respect of major airports; to monitor the set performance standards relating to quality, continuity, and reliability of service as may be specified by the Union government.	Ministry of Civil Aviation
Airports Economic Regulatory Authority of India	Airports Economic Regulatory Authority of India Act 2008	Design, development, operation, and maintenance of international and domestic airports and civil enclaves; construction, modification, and management of passenger terminals; development and management of cargo terminals at international and domestic airports.	Ministry of Civil Aviation
Atomic Energy Regulatory Board	Atomic Energy Act 1962	Safety policies, guidelines, and standards for construction of nuclear facilities; compliance of regulatory requirements through inspections and review.	Department of Atomic Energy
Central Drugs Standard Control Organisation*	Drugs and Cosmetics Act 1940	Approval of new drugs; clinical trials in the country; laying down the standards for drugs; control over the quality of imported drugs; coordination of the activities of State drug control organisations.	Ministry of Health and Family Welfare
Central Electricity Regulatory Commission*	Electricity Regulatory Commissions Act 1998	Regulation of the tariff of generating companies owned or controlled by the Union government; regulation of the tariff of generating companies, other than those owned or controlled by the Union government.	Ministry of Power
Central Pollution Control Board*	Water (Prevention and Control of Pollution) Act 1974	Prevention and control of water pollution and the maintaining or restoring of quality of water.	Ministry of Environment and Forests
Coal Regulatory Authority	Ministry of Coal Resolution: F No 13011/04/2007—CA II/ Vol.5/pt. III	Advise to the Union government on pricing of raw coal, standards of performance of norms, and on formulation of policies in the coal sector.	Ministry of Coal

Coastal Aquaculture Authority	Coastal Aquaculture Authority Act 2005	Regulation of the construction and operation of aquaculture farms within coastal areas.	Ministry of Agriculture
Competition Commission of India	Competition Act 2002	Prevention of practices having adverse effects on competition; promotion and competition in the market; protection of the interest of consumers and freedom of trade.	Ministry of Company Affairs
Director General of Civil Aviation	Aircraft Act 1934	Registration of civil aircraft; formulation of standards of airworthiness for civil aircraft; licensing of pilots and flight engineers; licensing of air traffic controllers; certification of aerodromes.	Ministry of Civil Aviation
Director General of Hydrocarbons	Government of India Resolution No O-20013/2/92-ONG, D-III (1993)	Review exploration programmes of companies for adequacy; technical and financial evaluation and review of development plans of commercial discoveries; advice to Government on offering and award of acreages under the New Exploration Licensing Policy and coal bed methane rounds for exploration as well as matters relating to relinquishment of acreages; field surveillance of producing fields and blocks to monitor their performance.	Ministry of Petroleum and Natural Gas
Food Safety and Standards Authority of India*	Food Safety and Standards Act 2006	Regulation and monitoring of the manufacture, processing, distribution, sale, and import of food so as to ensure safe and wholesome food.	Ministry of Food Processing Industries
Forward Markets Commission	Forward Contracts (Regulation) Act 1952	Keeping forward markets under observation and taking such action in relation to them as it may consider necessary; also making recommendations generally with a view to improving the organisation and working of forward markets.	Ministry of Finance
Inland Waterways Authority of India	Inland Waterways Authority of India Act 1985	Development and regulation of inland waterways for shipping and navigation.	Ministry of Shipping
Insurance Regulatory and Development Authority	Insurance Regulatory and Development Authority Act 1999	Protection of the interests of policy holders in matters concerning assigning of policy, nomination by policy holders, insurable interest, settlement of insurance claim, etc; regulating investment of funds by insurance companies.	Ministry of Finance

National Disaster Management Authority*	Disaster Management Act 2005	Laying down of policies on disaster management; approval of the National Plan; laying down guidelines to be followed by the State authorities in drawing up the State Plan.	Ministry of Home Affairs
National Housing Bank	National Housing Bank Act 1987	Determining policy and issue directions to any housing financial institution.	Wholly owned subsidiary of the Reserve Bank of India (see below)
National Pharmaceutical Pricing Authority	Drugs (Prices Control) Order 1995	Implementing and enforcing the provisions of the Drugs (Prices Control) Order; dealing with all legal matters arising out of the decisions of the Authority; monitoring the availability of drugs, identify shortages, if any, and taking remedial steps.	Ministry of Chemicals and Fertilizers
Office of Controller of Certifying Authorities	Information Technology Act 2000	Exercising supervision over the activities of the certifying authorities and laying down the standards to be maintained by the certifying authorities.	Ministry of Communications and Information Technology
Pension Fund Regulatory and Development Authority	Pension Fund Regulatory and Development Authority Act 2013	Promoting old age income security by establishing, developing, and regulating pension funds; protecting the interests of subscribers to schemes of pension funds.	Ministry of Finance
Petroleum and Natural Gas Regulatory Board	Petroleum and Natural Gas Regulatory Board Act 2006	Protecting the interest of consumers by fostering fair trade and competition amongst the entities; registering entities to lay down the technical standards and specifications (including safety standards) in activities relating to petroleum, petroleum products, and natural gas.	Ministry of Petroleum and Natural Gas
Reserve Bank of India	Reserve Bank of India Act 1934	Regulating the issue of banknotes and the keeping of reserves with a view to securing monetary stability in India and generally to operate the currency and credit system of the country to its advantage.	Ministry of Finance
Securities and Exchange Board of India	Securities and Exchange Board of India Act 1992	Protecting the interests of investors in securities; promoting the development of, and regulating, the securities market.	Ministry of Finance
Tariff Authority for Major Ports	The Major Port Trusts Act 1963	Regulating all tariffs, both vessel related and cargo related, and rates for lease of properties in respect of Major Port Trusts and the private operators located therein.	Ministry of Shipping
Telecom Regulatory Authority of India	The Telecom Regulatory Authority of India Act 1997	Making measures to facilitate competition and promote efficiency in the operation of telecommunication services.	Ministry of Communications and Information Technology

* In these cases there are also separate State-level regulators.

Table 22.2 List of Regulatory Tribunals

Tribunal/Authority	Enactment	Functional area
Appellate Tribunal for Electricity	Electricity Act 2003	Appeals against the orders of the adjudicating officer or the Appropriate Commission (Central or State) under the Act.
Appellate Tribunal for Foreign Exchange	Foreign Exchange Management Act 1999	Appeals specified under the Foreign Exchange Management Act.
Authority for Advance Rulings	Income Tax Act 1961	To allow non-residents and certain categories of residents to ascertain their income tax liability in advance.
Board for Industrial and Financial Reconstruction	Sick Industrial Companies (Special Provisions) Act 1985.	Timely detection of sick and potentially sick industrial companies, speedy determination and enforcement of preventive, remedial, and other measures.
Company Law Board	Companies Act 1956	To carry out functions specified in the Companies Act 1956.
Copyright Board	Copyright Act 1957	To hear certain disputes under the Copyright Act.
Customs Excise and Service Tax Appellate Tribunal	Customs Act 1962	Appeals specified under the Customs Act 1962, Central Excise Act 1994, and the Finance Act 1994.
Cyber Appellate Tribunal	Information Technology Act 2000	Appeals against orders made by the Controller or by an Adjudicating Officer appointed under the Information Technology Act 2000.
Debt Recovery Appellate Tribunals	Recovery of Debts Due to Banks and Financial Institutions Act 1993	To entertain and decide applications from the banks and financial institutions for recovery of debts due to such banks and financial institutions.
Film Certification Appellate Tribunal	Cinematograph Act 1952	Appeals filed under Section 5C of the Act by any applicant for a Certificate in respect of a film who is aggrieved by an order of the Central Board of Film Certification (CBFC).
Income Tax Appellate Tribunals	Income Tax Act 1961	Appeals against orders passed by authorities under the Income Tax Act.
Intellectual Property Appellate Board	Trademarks Act 1999	Appeals from the order or decision of the Registrar and all cases pertaining to rectification of Register; appeals from the Geographical Indication of Goods Act 1999 and the Patents Act 1970.
National Company Law Tribunal and National Company Law Appellate Tribunal [not yet operational; provisions are under challenge in Supreme Court]	Companies Act 2013	To carry out the functions of the Company Law Board and the Board for Industrial and Financial Reconstruction.
National Green Tribunal	National Green Tribunal Act 2010	To effectively and expeditiously dispose of cases relating to environmental protection and conservation of forests and other natural resources.
Securities Appellate Tribunal	Securities and Exchange Board of India Act 1992	Appeals against orders passed by the Securities and Exchange Board of India or by an adjudicating officer under the Act.
Competition Appellate Tribunal	Competition Act 2002	Appeals against any direction, decision, or order passed by the Competition Commission of India.
Telecom Disputes Settlement and Appellate Tribunal	Telecom Regulatory Authority of India Act 1997	To adjudicate disputes between licensor and licensee, between service providers, between a service provider and a group of consumers, and to hear appeals against any decision or order of the Telecom Regulatory Authority of India.

III. THE REGULATORY STRUCTURE

In recent years, several new regulatory institutions have been created. The degree of independence of these institutions varies. Some of them are part of the traditional executive, some are outside but subject to a high degree of executive control, and some are independent of direct executive control. [Table 22.1](#) presents a list of major regulatory bodies that are either explicitly called ‘regulatory’ or, though not so called, in fact exercise regulatory functions.

While many of the regulatory bodies listed in [Table 22.1](#) are outside the traditional executive, there are now a number of tribunals that perform judicial functions outside the traditional judiciary. Several of these are specifically linked to the regulatory bodies listed in [Table 22.1](#), while some hear disputes relating to other administrative matters. Some of these handle both judicial and quasi-judicial functions. [Table 22.2](#) is a list of the main tribunals which deal with disputes arising from the decisions of regulatory bodies and administrative agencies.

IV. THE CONSTITUTION AND THE ADMINISTRATIVE AND REGULATORY STATE

The constitutional position of the administrative and regulatory State draws partly from the Constitution itself (as amended), but even more from judicial decisions, especially in the past twenty years, when judicial decisions have been far-reaching and in some cases have gone to the extent of moving beyond even express provisions of the Constitution.

Articles 53 and 154 provide that executive authority can be exercised by officers subordinate to the President (in the case of the Union) and the Governor (in the case of States).³ These Articles also allow Parliament/State legislatures to confer functions on authorities other than the President/Governor, and are thus the basic source allowing the creation of independent regulatory agencies. Articles 77/166 provide that the President/Governor shall ‘make rules for the more convenient transaction of business’ and for allocation of work among Ministers. The rules framed under this Article are called the ‘Business Rules’ or ‘Rules of Business’. These rules provide for the allocation of the work of government between different ministries and departments and they also enable delegation of authority from the Council of Ministers (cabinet) to individual Ministers and to officers subordinate to those Ministers. They specify which kinds of decisions need to come before the cabinet and the procedure in the

event of interdepartmental disagreement. Therefore, while all executive action is taken in the name of the President/Governor, actual authority to take those decisions may vest in lower levels of the executive. Under Articles 73 and 162 the executive power of the Union and State Governments, respectively, are coextensive with their legislative powers. Article 248 allocates legislative power on all residuary matters (ie, subjects not listed in the State or Concurrent List) to Parliament, and hence executive power thereon belongs to the Union government.

The Constitution does not explicitly mention or require ‘separation of powers’. This is particularly true of the separation between the executive and legislature, given that it is a parliamentary form of government. On the contrary, it has chapters on the ‘Legislative Powers of the President/Governor’, which confer the power to promulgate ordinances on the executive. It also implicitly allows the executive to exercise, to a limited extent, judicial powers insofar as the (subordinate) judicial services are part of the public services of the State; the separation of the subordinate judiciary is a ‘Directive Principle of State Policy’, and thus non-justiciable. However, the separation of powers between the judiciary and executive has been held by the Supreme Court to be part of the (unamendable) ‘basic structure’ of the Constitution.

Executive power is the residue of all powers that are not legislative or judicial (and thus inclusive of quasi-judicial powers). Mukherjea CJ stated in *Ram Jawaya Kapur v State of Punjab* that:

It may not be possible to frame an exhaustive definition of what executive function means and implies. Ordinarily the executive function connotes the residue of governmental functions that remain after legislative and judicial functions are taken away.⁴

It is sometimes argued that the power of regulatory bodies to make rules (ie, the power of delegated legislation) is not found in the Constitution and thus is a grey area and, further, that these regulatory bodies are ‘mini-States’ combining executive, quasi-judicial, and quasi-legislative (ie, subordinate legislation) powers.⁵ However, delegated legislation by the President or Governor is not specified anywhere in the Constitution as a ‘legislative’ function. Therefore the function of delegated legislation is encompassed within the ‘residual’ functions, which are *executive functions*. For that reason, Articles 53 and 154 would cover the function of delegated legislation and allow the delegation of that (executive) function by the legislature to authorities other than the President/Governor, such as independent regulators.

Under Articles 75(3)/164(2), Ministers of the Union/State government are collectively responsible to Parliament/State legislatures for actions of the

executive. The effect of Article 75(3)/164(2) read with Articles 77(2)/166(3) is that individual Ministers are personally accountable to Parliament/State legislatures for actions taken within their areas of responsibility, whether those actions were taken by them or by their subordinates. The conduct of ministries and departments is often the subject of comment and criticism in Parliament/State legislatures. The Supreme Court has stated that:

The Cabinet is responsible to the Legislature for every action in any of the ministries ... Similarly an individual Minister is responsible to the Legislature for every action taken or omitted to be taken in his ministry.⁶

This leaves the question of the degree of parliamentary accountability of Ministers for actions taken by organisations *outside* the traditional executive. The constitutional requirement of ministerial responsibility has been the basis for the control of the administrative ministry over public sector corporations and undertakings. It has also been the source of a provision (in the special Acts creating regulatory authorities, public corporations, and boards—including the Reserve Bank—and in the articles of association of ‘Government companies’),⁷ enabling the government to issue directions to such organisations. The principle is that since the Minister (and thus the ministry) remains accountable to the legislature, a commensurate degree of authority is necessary. No doubt, Ministers and officers in ministries are perceived to have often used this authority (without necessarily invoking the formal power to issue directions) to exercise direct control over public undertakings to the detriment of efficiency and public good.

The question of the extent of ministerial accountability for the actions of public undertakings and independent regulators has not yet been tested in court and remains ambiguous. The laws creating some of the new ‘independent’ regulatory bodies do not incorporate provisions for issuing directions,⁸ though some of them do.⁹ The ministry cannot, in many cases, supersede the management of these institutions. It would appear that the Minister cannot have the same degree of parliamentary accountability for the actions of these bodies. Thus the creation of ‘independent’ regulators does reduce the extent of democratic (parliamentary) accountability. However, parliamentary accountability is not totally absent to the extent that the budgetary appropriations for these bodies do need to be proposed by the ministry and voted by Parliament. This is unlike the funding for courts, which is charged expenditure that does not need to be voted. It has been suggested that there should be a Standing

Committee of Parliament on Independent Regulators.¹⁰

A case that has had a major influence on institutional design involved the Competition Commission of India. As originally legislated, the selection of the Chairman was to be done by the executive. The procedure was challenged on the grounds that some of the adjudicatory functions of the Commission were judicial functions and the appointment of the head of a judicial forum must necessarily be done through the Chief Justice of India or his nominee. The original Act had wording explicitly stating the proceedings were judicial.¹¹ Thus the Commission was clearly intended to perform judicial functions. A three-judge bench of the Supreme Court did not go into the substantive issues in detail but did state that ‘it might be appropriate’ to remove those functions that were of an ‘adjudicatory’ nature and entrust them to a separate tribunal.¹² This decision, albeit from a small bench and not a binding order, appears to have had a lot of influence on the design of regulatory bodies. The subsequent amendment, the Competition (Amendment) Act 2007, removed any reference to the proceedings being judicial, modified several substantive and procedural provisions, and created an appellate tribunal headed by a judge; this has become almost a template for regulatory design.

The various judgments of the Supreme Court contain a number of inconsistencies, but the following are the key principles that appear to govern the constitutionality and legality of regulatory bodies:

1. To the extent that regulation comprises executive functions, Parliament and the State legislatures may (in their respective areas of legislative competence) create independent regulators. All administrative decisions, and thus all decisions of regulators, are subject to judicial review in the High Courts and Supreme Court through their writ jurisdiction provided for in the Constitution. Parliament also has the power to create tribunals under its residuary powers.
2. If a regulatory body or tribunal (set up outside the traditional executive or traditional judiciary, respectively) involves performance of judicial functions, it cannot be constituted entirely of, or headed by, non-judges. In hearing matters having a judicial aspect, the bench must include a judicial member.
3. Whether a function is judicial is determined by the specific circumstances, wording, and substance of the legislation.
4. It should be noted that the reference above is to *judicial* and not to quasi-judicial functions. Many quasi-judicial functions are in fact performed by

the executive; not all adjudicatory functions are judicial and not all tribunals are judicial tribunals. No clear tests have been laid down as to the borderline between quasi-judicial and judicial, but a function previously discharged by a High Court will almost certainly be considered judicial.

5. Even if a statute explicitly provides for an appeal from the orders of a regulator to a tribunal and then to the Supreme Court, the High Courts will assert (and the Supreme Court will almost certainly uphold) their writ jurisdiction as being part of the basic structure of the Constitution. Thus review of decisions of a tribunal (effectively, an appellate jurisdiction, though not termed as such) by High Courts will always remain available to aggrieved parties, even if the tribunal itself is headed by High Court/Supreme Court-level judges.

V. THE REGULATORY STATE: A CONCEPTUAL OVERVIEW

Before considering some of the issues that arise from the emerging constitutional jurisprudence on the regulatory State, it is useful to briefly look at the conceptual underpinnings of, and justification for, the regulatory State.

The economic arrangements of modern times often require a more complex approach than the State was traditionally capable of. In particular, good decisions on many modern regulatory issues may require a degree of scientific, technical, or economic expertise that may not be found in the generalist civil servants and generalist judges who typify the traditional executive and judiciary, respectively. The case for the involvement of sectoral experts in regulation is thus self-evident. Of course, sectoral expertise can be brought into the administration by employing or consulting experts without necessarily changing institutional structure—in a sense, this objective can be achieved by ‘modernising’ the administrative State. By itself, the need for expertise does not explain the creation of the regulatory State.

The primary rationale for *independent* regulators in India was and still is the prevalent opinion that some kinds of economic decisions need to be insulated from the political process.¹³ This is based on the notion—particularly among economists—that ‘economic’ decisions should be made ‘rationally’ without being ‘distorted’ by political considerations. Indeed, the initial push for independent regulators came in India through transplantation of Anglo-American models by lending agencies like the World Bank and then was replicated through ‘copying’.¹⁴ In theory, such unelected bodies would play a major role in

achieving economic efficiency objectives, with the political process then stepping in through separate income redistribution to tackle any normative inequities in the outcomes.¹⁵ There is ample evidence in many sectors that even though optimal (or, at least, more efficient) solutions are known, those solutions are not implemented for political reasons.¹⁶

An additional impetus for the creation of regulatory bodies has been the higher degree of *operational flexibility* they have in personnel and other routine managerial matters *vis-à-vis* ministries; thus independent regulators may internally be more efficient than ministerial regulators.¹⁷

However, improving the overall level of economic welfare does not automatically improve the welfare of all participants and a solution that makes some people better off often makes others worse off. Questions of distribution of gains and losses essentially *are* political. Resolving them may require negotiation and persuasion and the trading of gains and losses, rather than legalistic adjudication or scientific determination. Thus it is not really possible to ‘exclude’ politics, as many economists and technocrats might wish to. As Dubash puts it, much of the clamour for independent regulation has been ‘based on the somewhat questionable premise that it is feasible to create an apolitical regulatory sphere simply by legislating one’.¹⁸ A consequence of the push towards independent regulation is not only that the political aspect is, so to speak, brushed under the carpet, but also that it is implicitly regarded as illegitimate. On the other hand, it should be noted that regulatory bodies are often required to follow procedures allowing for the consultation of the public, or more particularly, those affected by regulation; this can result in a better articulation of public reason and a better-informed process of regulation.

In addition to a rational-decision-taking dimension and a political-sharing-of-gains-and-losses dimension, regulatory decisions often affect the *legal* rights and responsibilities of citizens, going beyond voluntary agreements by contract. In essence, therefore, regulation involves three aspects:

1. a political aspect, relating to trading off benefits and costs to different parties which in turn may require or benefit from consultation, negotiation, collaboration and cooperation with and among them;
2. a technical aspect, relating to finding the best technical and economic solutions to a problem;
3. a legal aspect, relating to protecting legal and constitutional rights of various parties.

For a regulatory structure to earn the confidence of the regulated and of the broader citizenry, it needs to have democratic legitimacy, substantive competence, and legal legitimacy, respectively. The essential design issue in regulatory structure is the relative balance between these.

Regulation through the traditional State apparatus gives primacy to the political aspect since decisions are ultimately taken by, or under the authority of, the democratically elected political executive with advice from the civil service. Over the years, the relative importance of the political executive *vis-à-vis* the civil service has increased, and indeed political interference (politicians taking decisions that by law ought to be taken neutrally by civil servants) is perceived to have increased. In India, such decisions are always subject to judicial review, and this provides the legal protection. However, the traditional State is weak in factoring in technical expertise. As already pointed out, there is no intrinsic reason why this is so, and in theory, a modernised public administration would be able to bring in expert inputs. However, current civil service rules and pay structures in India may make this more difficult to do within the administration than under an independent regulator.

When independent regulators are created, the technical aspect is accorded primacy in two ways. First, these structures explicitly provide for and incorporate the dimension of sectoral expertise. Secondly, and more importantly, decisions are made independently of the political executive and are therefore more likely to be economically efficient. In India, legal protection is also safeguarded either through the inherent power of judicial review or through the creation of an appellate tribunal. By design, the political executive—depending on the degree of independence of the regulator—has only limited influence.

Rose-Ackerman points out that court-like procedures are very good at protecting individual rights but are poor at resolving policy issues. She adds that the bureaucracy is best placed to ‘balance conflicting interests ...’, though ‘not to discover scientific truths or to preserve rights’.¹⁹ In most cases, the task is to ‘strike a balance between the obligation of the government to make technically competent policy choices ...’ and the need to ‘respond to the concerns of citizens and organised groups’.²⁰ ‘Politically expedient choices are not per se illegitimate, but they should be acknowledged as such’, rather than masked as ‘scientific’ or ‘legal’ necessities.²¹ Further, as Parker and Braithwaite observe, regulation in modern times often requires ‘experimentalism’, whereby new arrangements are tried as needs and technologies change, and this kind of experimentalism is best done through participatory or democratic processes rather than a legalistic process. The central task of the new regulatory State is to

‘connect the private capacity and practice of pluralized regulation to public dialogue and justice’. Yet, courts ‘mostly reject experimentalism as a threat to the consistency of justice and scotch most kinds of collaboration as a threat to the independence of the judiciary’.²²

For these reasons, in the United States and most western countries, the involvement of the courts in the regulatory process is broad but shallow, and courts will usually not go into the details *de novo*.²³ The position in India is different, especially but not only in environmental matters. Indian courts’ involvement is broad and deep. In India, over the years, and through judicial pronouncements, the legal aspect of regulation has come to acquire a very large influence over the regulatory process, even overshadowing the technical aspect.

Independent regulators—while free from direct political control—are often required to follow consultative procedures before making regulatory decisions. Depending on the specific procedures, this allows all affected parties to make their views known before decisions are taken. In one sense, this process allows for a deeper and higher-quality participation in decision making than the processes of the administration, where the political representatives (Ministers, MPs, MLAs, or local councillors) are expected to reflect the views of constituents, and where structured consultation may not take place. When this happens, independent regulators may be able to achieve the best of both worlds—better substantive decisions (through the use of technical expertise and rational decision making), but informed by a deeper participatory process than the administration. If so, their decisions may not only be substantively better, but also more ‘legitimate’ and thus have greater public support.²⁴ This is the optimistic scenario for independent regulation.

However, consultative procedures have disadvantages too. They tend to be used more by parties who are willing to invest time and resources in responding to the consultation. The logic of collective action indicates that the general public—where a large number of people may face a small gain or loss from a decision—may not participate effectively, while a small number of people (regulated entities or well-organised interest groups) who have a lot to gain or lose may invest time and effort to make their case to the regulator. This can tilt regulatory decisions in favour of well-organised interest groups. Hochstetler argues that civil society in developing countries is more likely to be skewed in favour of the interests of relatively well-off groups.²⁵ In contrast to such processes, Rose-Ackerman points out, the elected political executive—because of its need to get reelected from the population as a whole—acts as a check against the dominance of particular narrow-interest groups.²⁶ Thus, as Levy and

Spiller point out, independent regulators have both strengths and weaknesses *vis-à-vis* the regulation by (or operation of economic entities by) the administrative State, and independent regulators are only appropriate in some contexts.^{[27](#)}

In the Indian constitutional context, the pros and cons of independent versus administrative regulators on the political, technical, and legal dimensions are summarised in [Table 22.3](#).

Given that India is a country where political corruption is widespread, it is sometimes thought that an advantage of independent regulators and judicial tribunals would be reduced scope for corruption. However, such a conclusion is difficult to support in the face of the facts that not only the civil services but even the judiciary are perceived as also suffering from corruption.^{[28](#)}

VI. CONCERNS WITH THE REGULATORY STATE

1. Legal Uncertainty

The regulatory State has functioned, and continues to function, under a considerable degree of legal uncertainty as to the validity of the statutes and institutional arrangements that have been set up. The primary reason for this is repeated challenges to legislation in the courts and the frequent invalidation of various parts of enactments by the courts on grounds of being unconstitutional. Several new regulators spent between five and ten years in limbo (while the legality of various sections were being adjudicated), since the courts declared that they should not function until the issues were sorted out. Surprisingly, most of the challenges to the laws passed by Parliament setting up independent regulators have:

- been through public interest litigation and not by aggrieved parties directly concerned with the subject matter of regulation;
- centred around the issue of who is appointed to the chairmanship and membership of the bodies, rather than to any substantive regulatory provisions of the enactments.

Table 22.3 Advantages and Disadvantages of Independent vs Administrative Regulators

Criterion		Independent regulator	Administrative regulator
Political aspect	Accountability to Parliament and general public	Low—no direct accountability but Government may have a formal power to give directions.	High—directly accountable to Parliament/State legislatures for policies and decisions.
	Quality of consultation	High if required under statute.	Usually low, though not necessarily so.
	Ability to reach negotiated compromises among interest groups	Medium to low, depending on flexibility/rigidity of policy framework and procedures prescribed in the legislation. Extent of compromise and innovation depends on extent of procedural restrictions. Failure to follow prescribed approach can lead to decisions being challenged.	High, since the process is explicitly political rather than 'rational'.
Technical aspect	Access to expertise	High—independent status and different service conditions enable easier recruitment of technical talent.	Medium—theoretically, can access in-house expertise in many fields and outside experts through consultation. In practice, bureaucratic process and tendency for generalist domination may reduce it.
	Ability to take decisions in an economically rational manner	High/Medium—high in theory, usually medium in practice, as seen from studies of actual behaviour.	Low—short-term political needs acquire much greater salience.
Legal aspect	Protection of legal rights	High—either through High Court/Supreme Court or through tribunal/High Court/Supreme Court.	High—through High Court/Supreme Court.
	Speed with which legal finality is reached	Can be lower if special tribunal is involved due to increased levels (and sometimes channels) of appeal.	Usually higher than for independent regulator as no tribunal is usually involved.

The challenge has usually been related to the issue or perception (almost always among lawyers practising in High Courts) that some of the functions of the regulator are actually judicial and therefore that the creation of the regulator and/or an associated judicial tribunal is a ‘usurpation of judicial power’, which in turn would be a violation of the basic structure of the Constitution.

At first glance, an outside observer might conclude that such repeated challenges must be the result of incompetent drafting, since something as basic as judicial independence is said to be at stake. In reality, the picture is more complicated, mainly because judicial dictums have themselves changed frequently.

Courts test new laws both against the written Constitution and against an expanding notion of the ‘basic structure’. Mehta has argued persuasively that the Indian judiciary is usually concerned with expanding its own authority.²⁹ In several cases, judicial decisions are, in substance, acts of legislation.³⁰ In some cases, courts have directly exercised executive functions in regulatory matters.³¹ An increasing variety of issues are now tested against the ‘basic structure’ doctrine, including seemingly small details. (For instance, in the case of the National Company Law Tribunal, the appointment of Joint Secretary-level

technical members was considered unconstitutional, while the appointment of Secretary-or Additional Secretary-level members was ruled to be constitutional.) This means that several questions may have to be tested each and every time a new regulator is created. It also means that entities subject to regulation cannot assume that the law as legislated will in fact be implemented; they must at all times be prepared for legislation by the court, the content of which can be unpredictable.

In matters relating to regulatory bodies, the Supreme Court often gives indications during hearings about its line of thinking and then the executive, to ‘save’ the regulatory statute from the possibility of being struck down, makes changes. The Court then does not actually adjudicate the issue but effectively ensures a change in the legislation. *Brahm Dutt v Union of India*³² and *Delhi Science Forum v Union of India*³³ are examples where the government made changes to the structure—in both cases by introducing a judge-headed tribunal above the regulatory body—while the case was in progress. Currently, the situation is that there is a presumption in the executive that if a new regulatory body is created, it must have an appellate tribunal because it may otherwise not survive challenge in the courts—though no such principle has explicitly been enunciated. This follows primarily from the judgments in *Brahm Dutt* and *Delhi Science Forum*, where the court indicated—but did not explicitly rule—that the existence of judicial review by the High Court and Supreme Court (applicable to all executive action) was not by itself sufficient (in the specific circumstances of those matters), and something more was necessary.

2. Excessive Delegation

Early in the life of the Indian Constitution, the Supreme Court departed from pre-Independence British tradition and introduced the concept of ‘excessive delegation’, namely, that *essential legislative functions could not be delegated*, and that the legislature must provide adequate guidelines for the exercise of delegated powers to avoid arbitrariness.³⁴ Rules made by independent regulators violating this doctrine have been struck down (for instance, when the Central Electricity Regulatory Commission introduced new disqualifications for the holding of an electricity trading licence not in consonance with the legislative policy in the statute).³⁵

3. A Turf War?

The overt reason for creating regulators is to secure independence from politics. The overt reasons for creating special tribunals are twofold: to speed up decisions (because the court system faces an enormous backlog of cases) and/or to bring in specialised expertise to assist in reaching better decisions than could be reached through a generalist judge. In many cases, the overt reasons are genuine and valid. However, it is widely perceived that in some cases at least other motivations may also be involved. There is a perception in the executive and in the legal profession that there has been a ‘turf war’ on the issue of regulatory bodies and that this is one of the causes of the repeated challenges on the issue of appointments.

On the one hand, the creation of regulatory bodies is perceived as a means for civil servants to secure post-retirement employment, and (where posts at the level of High Court judge are involved) to secure that employment at a higher status than most civil servants enjoy before retirement. There is considerable evidence that this has in fact been a motivation for civil servants involved in the design of such institutions. For instance, the facts that every one of these bodies specifies an age of mandatory retirement that is several years higher than the civil service retirement age, and that the overwhelming majority of those appointed are in fact at or above retirement age are clear pointers. There seems to be no objective reason that suitably qualified and competent regulators from the civil service or outside cannot be found until they reach the age of 60.

(Indeed, the ability to confer post-retirement employment on civil servants is arguably detrimental to civil service professionalism and ethics.)³⁶

A second perception among lawyers is that these bodies—this applies more to tribunals than to the regulators themselves—were created to reduce the role of the courts and to reduce the extent and quality of judicial review of executive action. There is clear evidence that, in the 1970s and 1980s, this was indeed a motivation for creating tribunals, especially the administrative tribunals. A third perception among lawyers is that allowing selection of members (particularly judicial members) by a mechanism that is not completely controlled by the High Courts or Supreme Court could result in reduced independence. Again, there is indirect evidence from the 1970s and 1980s (though not in recent times) that such a motivation within the political executive was present.

On the other hand, the counter-view is that the challenges are primarily motivated by the interests of the legal profession. A reduced role for the courts could also mean a reduced role for lawyers. Regulators do not require lawyers to represent parties before them. Some tribunals allow other professionals to represent applicants (eg, accountants) whereas this would not be possible in the courts. The tendency of the legal profession to argue that part of the work of regulators is ‘judicial’ is seen in the same light—as an attempt to avoid loss of work. Equally importantly, the selection for posts in tribunals would be controlled by a different process from that used in the courts, and this disturbs established patterns of advancement in the legal profession.

Based on this hypothesis, the usual approach has been to create, on top of each regulatory body, a special tribunal headed by a retired judge and comprising mainly retired judges. The premise appears to be that the post-retirement opportunities for civil servants can best be insulated from challenge by providing similar opportunities for lawyers and judges. This hypothesis is supported by a scrutiny of age limits for appointment. For example, in the National Green Tribunal (NGT), there are three different limits:

- 70 years for the Chairperson/Judicial Member if the person had previously been a Supreme Court judge (for whom the retirement age is 65)
- 67 if the Chairperson/Judicial Member if the person had previously been a High Court judge or Chief Justice (for whom the retirement age is 62) and
- 65 for non-Judicial Members (civil servants/technical experts, for whom the retirement age is 60).

For the same post, namely, Chairperson/Judicial Member, there are two different retirement ages based on previous employment, unconnected to any objective

determination of what would be a suitable maximum age. The only apparent operating principle seems to be ‘equality of post-retirement opportunity’ at exactly five years from the normal retirement age.

Thus, if this is a ‘turf war’, then the creation of tribunals—run by judges and with ample opportunities for lawyers—is seen as the terms of the ceasefire. A way to end any such war (or perception) would be to amend the statutes and turn these into career (rather than post-retirement) posts for all streams—judicial and non-judicial. That way the ‘noise’ arising from the (credible) belief that tribunals and regulators are created to serve bureaucratic or political interests can be avoided. It may also stiffen the backbone of retiring civil servants and increase judicial independence by eliminating the ‘carrot’ of post-retirement appointments.

4. Multiplicity of Channels of Appeal and Lack of Finality

Introducing independent regulators has the positive effect of increasing subject matter expertise and independence. But to the extent it involves the creation of a new appellate tribunal, it may increase the number of levels of appeal before a decision becomes final. This is of considerable importance because of several features of the Indian legal system:

1. Courts often go into the merits of executive action rather than confine themselves to the Wednesbury principles or procedural fairness. Therefore, persons aggrieved by a regulatory order have a chance of success in challenging it even if it was procedurally correct and fair.
2. *Stare decisis* often cannot be assumed because, as already mentioned, the Supreme Court has quite often reversed its earlier decisions. The presumption of constitutionality of statutes is weakly applied in the case of Acts creating regulators. Thus legal uncertainty is high.
3. Most courts have heavy backlogs of cases and final orders can take years at each level. Courts often grant interim stays of the action of a regulator, which may be in operation for several years.
4. Higher courts tend to overrule lower courts with a high frequency. Desai stated in respect of the telecom sector that ‘courts are more likely to dismiss than confirm the findings of the regulator’.³⁷
5. Though there are no rigorous statistics, it is generally believed that the proportion of cases appealed is very high. Partly this is because of the high

probability of reversal on appeal, the relative ease of obtaining interim stays (see 3 above) and relatively low legal costs at the High Court level.

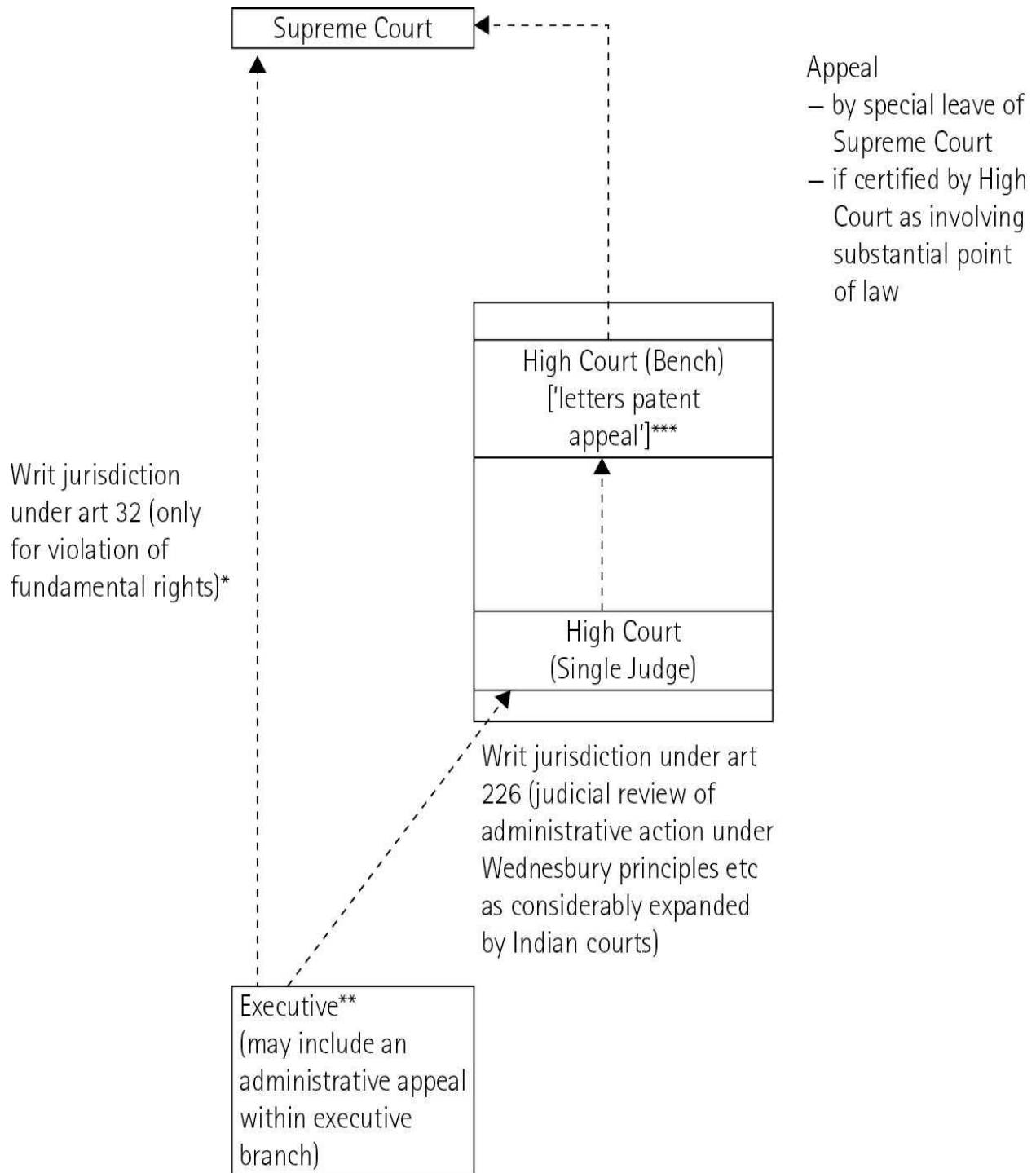
[Figures 22.1–22.3](#) outline the route that regulatory decisions take in different situations. [Figure 22.1](#) relates to decisions taken by regulators within the traditional executive (eg, the Directorate General of Civil Aviation (DGCA) or the Directorate General of Hydrocarbons (DGH)) and by regulators (like the Reserve Bank of India) who do not have a special tribunal attached to them. Here, there is no statutory right of appeal, but the High Court can review the matter under its writ jurisdiction based on the general principles of judicial review of administrative action. Appeal to the Supreme Court is by special leave or if the High Court certifies the case as fit for appeal due to its legal or constitutional importance. The dotted lines reflect the fact that appeal is not a matter of right, though in practice High Courts rarely refuse to hear writs on administrative matters.

[Figure 22.2](#) relates to a regulator with an attached tribunal with a single bench. The appeal to the Supreme Court may be statutory (ie, leave of the Court is not needed) or may be subject to special leave.

[Figure 22.3](#) relates to regulators (who may be part of the administration) for whom a national regulator with *multiple benches* exists. This is similar to [Figure 22.2](#), but with the additional possibility of more than one High Court being involved—this is because a bench of a national tribunal may cover more than one State. It is not inconceivable that more than one High Court may have jurisdiction in the same matter.

Yet another variant is the Company Law Tribunals where apart from the executive, there is a national tribunal and then an appellate tribunal, with further recourse to the High Court and Supreme Court (these are not yet functional, as their creation has been stayed by the Supreme Court). Tribunals may or may not have jurisdiction to hear challenges to delegated rule making by the regulator, depending on the wording of the relevant statute;³⁸ if jurisdiction exists, such cases follow a path analogous to that in [Figure 22.2](#). If the tribunal does not have jurisdiction—as has been held for the Telecom Disputes Settlement Appellate Tribunal, for example—the rule would have to be challenged in the High Court in the first instance. The Law Commission, when examining the issue of environment courts, had expressed the hope that if a statutory appeal to the Supreme Court were provided, then the High Courts would not entertain writs under Article 226 on the ground that a specific alternative remedy is available. However, in practice, the High Courts have not behaved as the Law Commission expected. For instance, the Madras High Court entertained a writ petition

challenging an order of the Chennai (Madras) bench of the National Green Tribunal on appeal against a decision of the environmental regulator in the neighbouring State of Karnataka (which has a separate High Court but no separate bench of the tribunal).³⁹ A safe operating principle is that if any court can possibly exercise jurisdiction on a matter, it will.



* Not routinely entertained.

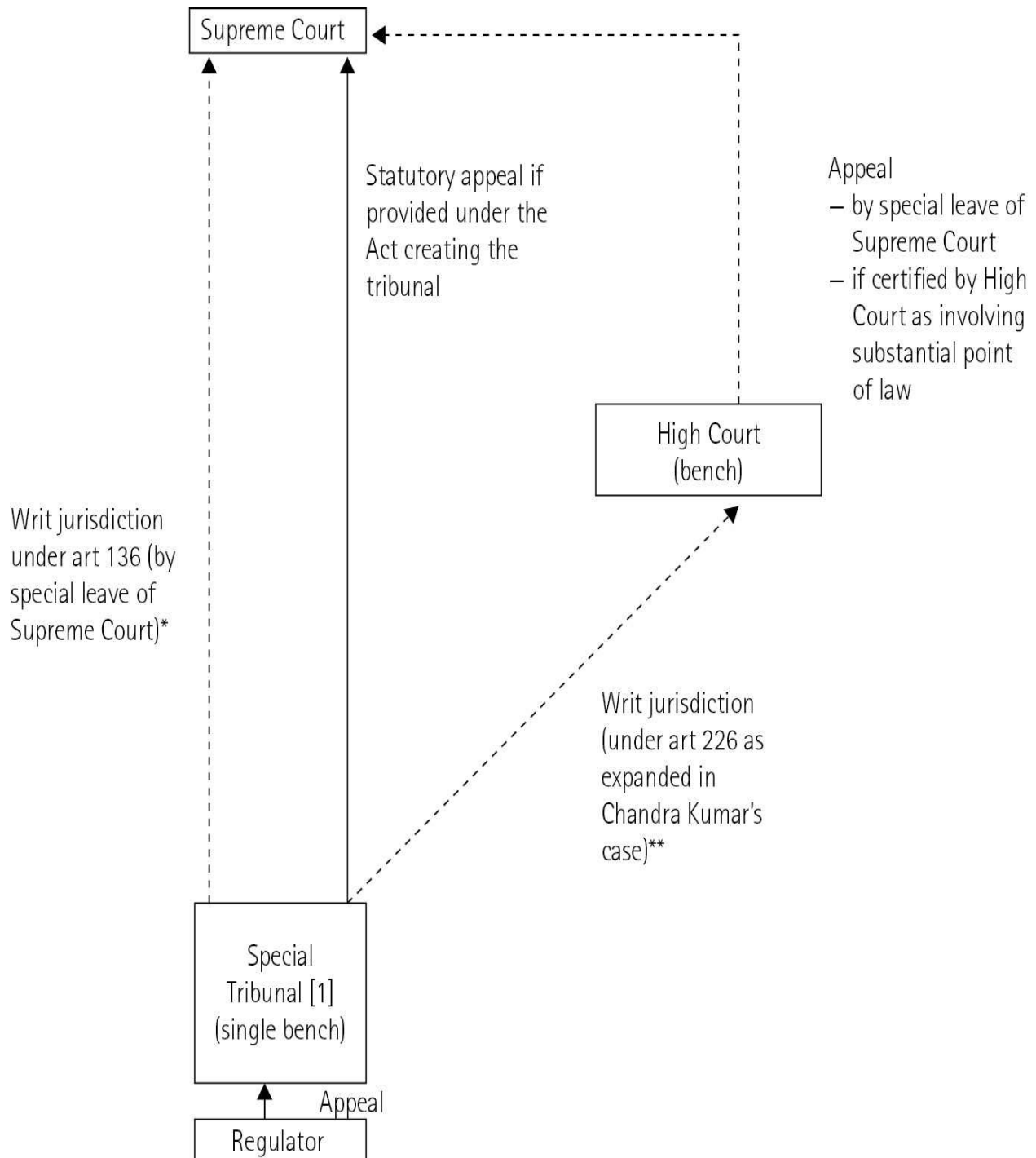
** Also applies to regulatory bodies not linked to a special tribunal—eg, Reserve Bank of India.

*** May not be available in certain High Courts/for certain matters.

-----> Appeal/Writ leave of the Court (not automatic)

————> Statutory appeal (ie, right to appeal)

FIGURE 22.1 Administrative Decisions: The Route to Finality (Type 1)



[1] Examples: TDSAT, CAT, SAT, Appellate Tribunal for Electricity.

* Rarely entertained after Chandra Kumar's case.

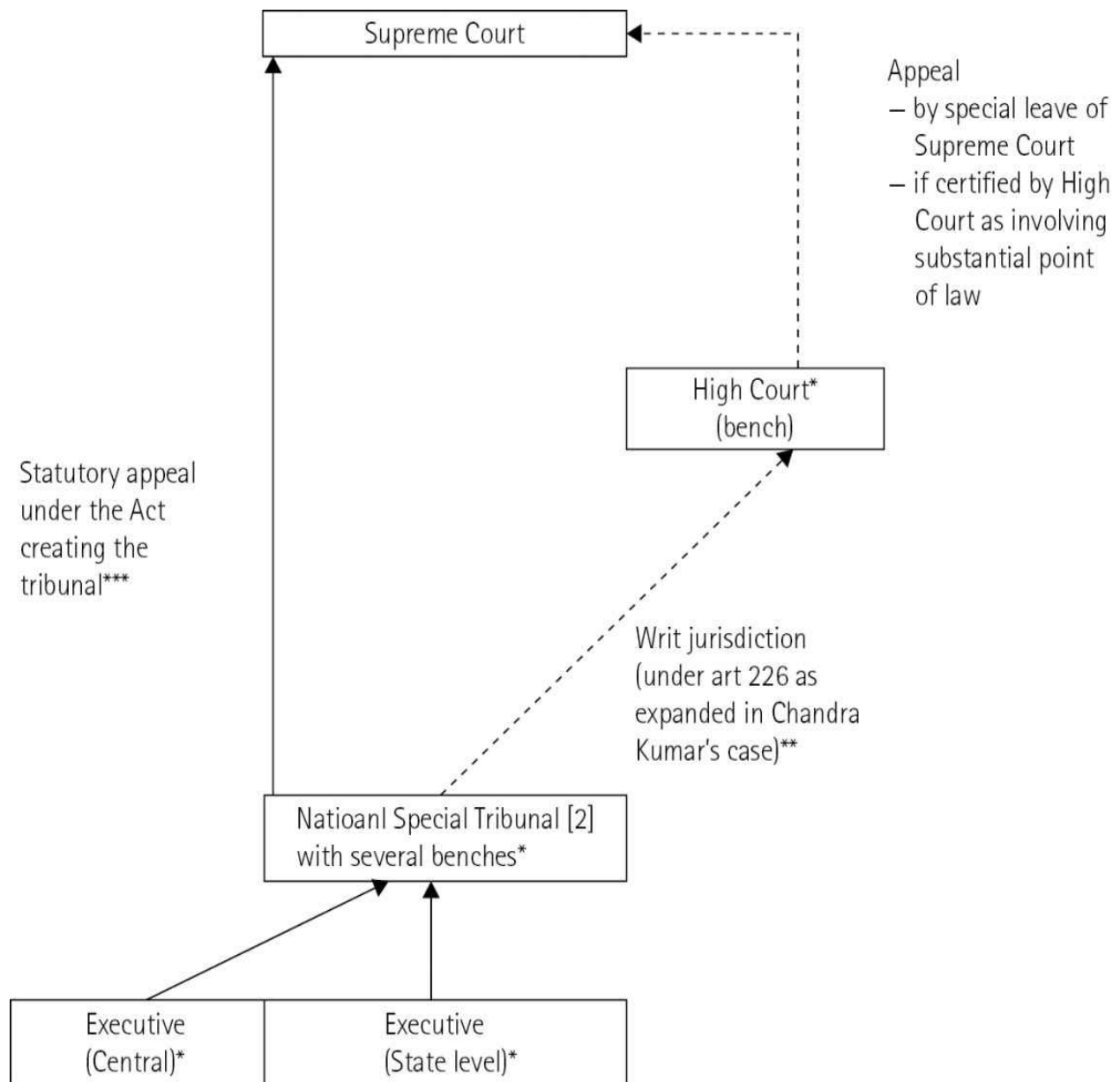
** Almost always entertained after Chandra Kumar's case.

-----> Appeal/Writ by leave of the Court (not automatic)

—————> Statutory appeal (ie, right to appeal)

FIGURE 22.2 Regulatory Decisions: The Route to Finality (Type 2)

The point to note is that if the creation of an independent regulatory body also involves the creation of a tribunal (as it often does, either for genuine substantive reasons or for reasons of expediency), then while there may be substantive benefits to the quality of regulation, the procedural effect is to increase the number of *levels* of appeal and in some cases to create multiple *channels* of appeal (ie, more than one route of appeal at a given stage). In 1987 the Supreme Court explicitly recognised the adverse effect of the additional layer of appeal if the High Courts were given jurisdiction, but reversed itself ten years later;⁴⁰ therefore such tribunals are effectively courts of first instance, even if their composition is akin to that of the High Court. The tribunals themselves may be quicker in disposing of cases, but if these decisions are again challenged in High Courts, the overall time taken increases. Thus the regulator-cum-tribunal structure may delay the attainment of finality of regulatory decisions and increase risks and uncertainty for the parties involved. The total time taken is generally long. For instance, a Competition Commission case was initiated in 2010, decided by the Commission (regulator) in August 2011, the appeal was decided by the Tribunal in May 2014 and then reached the Supreme Court on statutory appeal. (In this case, the parties—based in Delhi which is the seat of the Supreme Court—did not choose to take the matter to the High Court.)⁴¹



[2] Example: NGT

* The State where the cause of action arises and the tribunal bench may be in different States. If so, more than one High Court may have jurisdiction. The government of one State may have to argue a case in the High Court of another State.

** Currently maintainable, per interim decision of Supreme Court and decisions of Madras and Uttarakhand High Courts, even if statutory appeal to Supreme Court is provided.

*** If not provided for in the statute, then appeal by special leave under Article 136 would apply.

-----> Appeal/Writ by leave of the Court (not automatic)
 —————> Statutory appeal (ie, right to appeal)

FIGURE 22.3 Regulatory Decisions: The Route to Finality (Type 3)

The long route to finality does have effects on economic growth to the extent that it increases uncertainty in regulated sectors of the economy. Entities in those sectors must be prepared for this. One implication for regulated entities is that they need to try as far as possible to secure an initial order that is acceptable by making sure their point of view is adequately put forward. When deciding to appeal a decision, they need to weigh the expected benefits of changing the regulator's decision against the probability of success, the time and costs of the appellate process, and the financial consequences of the continuing uncertainty. They may sometimes be better off by not challenging a suboptimal decision of a regulator because of the uncertainties and costs of the appeal process. Of course, this cannot prevent a challenge by another party.

VII. CONCLUSION

In an important statement of modern regulation, Rubin has suggested that the 'essentially administrative character of the modern state is irreversible'⁴² and that the 'three branches of government exist only in our minds'.⁴³ He argues that the three-branch structure is a problematic and outdated metaphor that inadequately captures the reality of the modern State and which has been retained because of 'social nostalgia'.⁴⁴ Alternative metaphors must, he posits, be imagined, like that of a network of interconnected institutions. The evolution of Indian constitutional law lends strong support to Rubin's contention and reflects an attempt to deal with the emerging contours of the modern regulatory State.

Although some general principles have begun to emerge, as discussed above, the constitutional issues relating to the regulatory State are still relatively fluid. In the years to come, there are several possibilities on how this may evolve. Some of the possible scenarios are the following:

1. The current pattern—where the government continues to create new regulators and (partly to reduce the chance of the regulatory statute being struck down) tribunals—may continue. The issue of commonality of administration of the tribunals themselves and the volume of work relating to appointments to them may require some form of centralisation of the

tribunal administration. The Supreme Court in various cases has expressed itself in favour of all tribunals being administered by the Law Ministry. While this may work well for tribunals constituted entirely of judicial members, it has serious disadvantages when it comes to mixed tribunals involving the selection of non-judicial members and staff.

2. The current move to independent regulators may continue but the special tribunals may be supplanted by making provisions in the regulatory statutes for appeals to the High Court. This may also be accompanied—over time—by a creation of specialised divisions in the High Courts as is common in England and as advocated by the Malimath Committee.⁴⁵ This reversal of tribunalisation will greatly reduce the adverse perceptions of the legal profession and possibly eliminate challenges to the composition and membership of the regulators themselves.

3. The current pattern may continue but with the age of retirement for all members reduced to the normal age of retirement of their parent service so that the option of post-retirement employment is removed. This may reduce the incentive to create regulators without adequate justification to serve bureaucratic interests, and reduce adverse perceptions and apprehensions that have been generated in the minds of the courts and lawyers.

4. The government and other stakeholders may, considering the delaying effect of the additional layer of appeal, slow down the move to ‘independent’ regulators and stick to traditional administrative arrangements and regulators like the DGCA or DGH, whose status is (say) that of Secretaries/Additional Secretaries to Government rather than that of High Court judges. Expert opinion and input could be brought into the administrative procedures and supplemented by mandatory requirements to consult affected stakeholders and the public (eg, in the manner prescribed in the Administrative Procedures Act in the USA). This may produce outcomes that will be qualitatively—except for the presence of political influence which is not always a bad thing—as good as those with independent regulators. Judicial review will remain available through the traditional mode of writ jurisdiction.

* The views expressed in this chapter are strictly personal.

¹ Navroz K Dubash and Bronwen Morgan, ‘Understanding the Regulatory State of the South’ (2012) 6(3) Regulation & Governance 261.

² In recent years, Deputy Ministers and Parliamentary Secretaries have not been appointed in the Union government.

⁴ AIR 1955 SC 549 [12].

⁶ *A Sanjeevi Naidu v State of Madras* (1970) 1 SCC 443 [10].

³ All references to ‘Articles’ are to Articles of the Constitution of India. When a figure in parentheses follows the numbered Article, it denotes a clause of that Article, eg Article 77(3) means clause 3 of Article 77.

⁵ KP Krishnan, Remarks at the Conference to discuss draft chapters of this Handbook, 18 July 2014, New Delhi.

⁷ Broadly, companies where the Central and/or State Government(s) hold a majority of the shares or otherwise control the composition of the Board of Directors.

⁸ Eg, Central and State Electricity Regulatory Commissions where the Commission is only mandated to follow the *policy* laid down by the government.

⁹ Eg, the Competition Commission.

¹⁰ KP Krishnan, Remarks at the Conference to discuss Draft Chapters of this Handbook, 18 July 2014, New Delhi.

¹¹ Competition Act 2002, s 36(3):

Every proceeding before the Commission shall be deemed to be a judicial proceeding within the meaning of sections 193 and 228 and for the purposes of section 196 of the Indian Penal Code (45 of 1860) and the Commission shall be deemed to be a civil court for the purposes of section 195 (2 of 1974) and Chapter XXVI of the Code of Criminal Procedure, 1973.

¹² *Brahm Dutt v Union of India* (2005) 2 SCC 431 [6].

¹³ Kathryn Hochstetler, ‘Civil Society and the Regulatory South: A Commentary’ (2012) 6(3) *Regulation & Governance* 362, 362.

¹⁴ Dubash and Morgan ([n 1](#)) 264.

¹⁵ Dubash and Morgan ([n 1](#)) 265.

¹⁶ OP Agarwal and TV Somanathan, ‘Public Policymaking in India: Issues and Remedies’ (2005) Centre for Policy Research Working Paper, August 2005.

¹⁷ KP Krishnan, Remarks at the Conference to discuss Draft Chapters of this Handbook, 18 July 2014, New Delhi.

¹⁸ Navroz K Dubash, ‘Independent Regulatory Agencies: A Theoretical Review with Reference to Electricity and Water in India’ (2008) 43(40) *Economic and Political Weekly* 43, 46.

¹⁹ Susan Rose-Ackerman, ‘Law and Regulation’ in Keith E Whittington, R Daniel Kelemen, and Gregory A Kaldeira (eds) *The Oxford Handbook of Law and Politics* (Oxford University Press 2008) 582.

²⁰ Rose-Ackerman ([n 19](#)) 584.

²¹ Rose-Ackerman ([n 19](#)) 582.

²² Christine Parker and John Braithwaite, ‘Regulation’ in Mark Tushnet and Peter Cane (eds) *The Oxford Handbook of Legal Studies* (Oxford University Press 2005).

²³ Arun K Thiruvengadam and Piyush Joshi, ‘Judiciaries as Crucial Actors in Southern Regulatory Systems: A Case Study of Telecom Regulation’ (2012) 6(3) *Regulation & Governance* 327, 328.

²⁴ Dubash ([n 18](#)) 51.

²⁵ Hochstetler ([n 13](#)) 362.

²⁶ Rose-Ackerman ([n 19](#)) 588.

²⁷ Brian Levy and Pablo T Spiller, ‘The Institutional Foundations of Regulatory Commitment: A Comparative Analysis of Telecommunication Regulation’ (1994) 10(2) *Journal of Law, Economics, and Organization* 201.

²⁸ See eg, Ministry of Personnel, Public Grievances and Pensions, ‘Civil Services Day, April 21, 2012: Background Papers for Panel Discussions’

<http://darpn.nic.in/darpnwebsite/cms/Document/file/BG_Papers_CSD_2012.pdf>, accessed October 2015; ‘RS impeaches Justice Soumitro Sen for “misappropriating” funds’ *The Indian Express* (New Delhi, 18 August 2011) <<http://archive.indianexpress.com/news/rs-impeaches-justice-soumitro-sen-for-misappropriating-funds/833874/>>, accessed October 2015; Krishnadas Rajagopal, ‘President to look into complaint against ex-CJI Balakrishnan’ *The Indian Express* (New Delhi, 10 May 2012) <<http://archive.indianexpress.com/news/sc-directs-centre-to-probe-graft-charges-against-excji-balakrishnan/947658/>>, accessed October 2015; Dhananjay Mahapatra, ‘Eight Chief Justices were corrupt: Ex-law minister’ *The Times of India* (New Delhi, 17 September 2010) <<http://timesofindia.indiatimes.com/india/Eight-chief-justices-were-corrupt-Ex-law-minister/articleshow/6568723.cms>>, accessed October 2015.

²⁹ Pratap Bhanu Mehta, ‘India’s Judiciary: The Promise of Uncertainty’ in Devesh Kapur and Pratap Bhanu Mehta (eds) *Public Institutions in India: Performance and Design* (Oxford University Press 2005).

³⁰ For instance, the Supreme Court’s decision giving itself the power of appointment of judges has been described by legal scholars as ‘audacious’ and ‘hard to justify in the face of evidence that both the text of the Constitution and the expressed intention of the framers went against its reasoning and final outcome: Thiruvengadam and Joshi (n 23) 331.

³¹ See eg, *Swasthya Adhikar Manch v Union of India*, Writ Petition (Civil) No 33/2012, Supreme Court of India, order dated 21 October 2013.

³² (2005) 2 SCC 431.

³³ (1996) 2 SCC 405.

³⁴ See eg, *Rajnarin Singh v Chairman, Patna Administration Committee* AIR 1954 SC 569; *Devi Dass Gopal Krishnan v State of Punjab* AIR 1967 SC 1895.

³⁵ *Global Energy Ltd v Central Electricity Regulatory Commission* (2009) 15 SCC 570.

³⁶ KP Krishnan and TV Somanathan, *The Civil Service* (forthcoming).

³⁷ Ashok V Desai, *India’s Telecommunications Industry: History, Analysis, Diagnosis* (Sage Publications 2006) cited in Thiruvengadam and Joshi (n 23) 339.

³⁸ See *L Chandra Kumar v Union of India* (1997) 3 SCC 261 [93]; *Bharat Sanchar Nigam Ltd v Telecom Regulatory Authority of India* (2014) 3 SCC 222 [108], [124]–[126].

³⁹ *Vijayalakshmi Shanmugam v Secretary, Ministry of Environment and Forests* (2014) 2 MLJ 316.

⁴⁰ See *SP Sampath Kumar v Union of India* (1987) 1 SCC 124; *L Chandra Kumar* (n 38).

⁴¹ *DLF Ltd v Competition Commission of India* Appeal No 20/2011 (Competition Appellate Tribunal).

⁴² Edward L Rubin, *Beyond Camelot, Rethinking Politics and Law for the Modern State* (Princeton University Press 2005) 19.

⁴³ Rubin (n 42) 15.

⁴⁴ Rubin (n 42) 15.

⁴⁵ Government of India, ‘Report of the Arrears Committee’ (1990).

CHAPTER 23

TRIBUNALS

ARUN K THIRUVENGADAM*

I. INTRODUCTION

IN 1982, Upendra Baxi authored a withering critique of the Indian legal system arguing that it had failed to transform India into a democratic and egalitarian society as envisaged by its Constitution.¹ Baxi urged a thorough restructuring of—rather than mere tinkering with—the Indian legal system. His analysis highlighted the ‘frightful urgency’ for combating the problem of overload and arrears in the Indian legal system, and cited figures to demonstrate his central claim of a deep state of systemic crisis.²

Assessing the situation of backlog and pendency in the Indian legal system in contemporary times reveals an interesting paradox. While the problems of delay and backlog have increased exponentially, one rarely hears calls for a thorough overhauling of the Indian legal system. Baxi wrote against a backdrop when the Indian Supreme Court’s abdication, during the Emergency, of its primary function of acting as a guardian of the Constitution was fresh in public memory. The absence of a sense of crisis in the contemporary era can be attributed in part to the high esteem in which the Indian Supreme Court is held by the general public today. An important consequence of the judiciary’s higher public regard today is that the solutions offered for reform of the legal system tend to be far less radical.

This chapter’s focus on the constitutional status of tribunals must be understood against this backdrop. Tribunals have existed in India since the colonial era, but their existence was not regarded as constitutionally controversial for a quarter-century after the adoption of the Constitution. However, the introduction of provisions authorising the creation of tribunals through the Forty-second Constitutional Amendment in 1976 has led to a contentious debate over the ‘tribunalisation’ of the Indian legal system.

This chapter seeks to provide an overview of the constitutional issues and the body of case law that has developed around this issue since the early 1980s. Although I focus on the constitutional arguments raised to challenge the validity

of particular tribunals, the primary goal of the chapter is to probe the doctrinal consistency of the approach of the judiciary across a range of cases, and to assess why the shifts occurred over time.

A stated justification for the introduction of constitutionally authorised tribunals in the mid-1970s was the reduction of the problems of delay and backlog. Recent criticism of the growth of tribunals by practising lawyers tends to treat this as a fig leaf. This critique argues instead for upholding the integrity of the judicial system by refusing to outsource essential judicial functions to bodies such as tribunals where control over crucial decisions rests with members of the executive government. As I will argue, some of the objections advanced by the critics have considerable force, but since they offer no alternative suggestions for reforming the current system, this amounts to a *do nothing* approach, which is equally untenable.

What is striking about such critiques is that they ignore the contributory actions of the legal profession and do not suggest ways of reining in the acts of omission and commission by the legal profession and the judiciary that are a major reason for backlog and delay. The existing crisis of the legal system requires creative and unconventional solutions that will have to be crafted through coordinated action among a range of actors beyond those emanating from judges, lawyers, and government officials (the traditional sources of ideas for reform). Given that tribunals exist extensively across the Indian legal system, calls for their abolition altogether are impractical, even as there is a need to focus on removing defects in their structure and functioning, and integrating them within the overall legal system.

II. A BRIEF HISTORY OF THE EVOLUTION OF TRIBUNALS IN INDIA

1. Origin of Tribunals and Debates Among Law Reform Bodies from 1950 to 1975

Although the colonial government in British India had established some tribunals in the 1940s, they were of marginal significance in the colonial legal order. The original Constitution too refers to tribunals only incidentally—they find mention in Articles 136 and 227, which specify that the Supreme Court and

the High Courts respectively will have the power to review decisions delivered by tribunals. In the post-Independence era, tribunals were first created in the sphere of tax laws. To understand why tribunals began to find favour with legislators, judges, and members of government over time, one has to track the growth of the backlog in the legal system more generally.

The Indian judiciary as a whole consists of about 12,000 courts. Below the Supreme Court are arraigned 24 High Courts, 3,150 district courts, 4,816 *Munsif*/magistrate courts and 1,964 class II magistrate and equivalent courts.³ The total number of cases before the judicial system has been growing steadily since the colonial era. I focus first on the Supreme Court of India, which in many ways has a superior managerial capacity to handle backlog and delay. In 1950, the number of cases pending before the Supreme Court was only 771.⁴ By 1978, that number had grown to 23,092, crossing 100,000 in 1983.⁵ Following a series of measures, this number came down to as low as 19,806 in 1998, but has continued to increase thereafter, standing at 63,843 as of May 2014.⁶ This is an extraordinary increase within a single court. The Supreme Court has generally been better than the rest of the judicial hierarchy in handling its backlog.

The crisis has been much more severe in the High Courts and lower judiciary. At the first conference of Chief Ministers held in 1957, Prime Minister Nehru reported that the total number of arrears in the entire judicial system was 164,000 cases.⁷ By the time Baxi speaks of their having assumed crisis proportions in 1982, that number had swelled to 600,000 within only the High Courts and Supreme Court. As of March 2013, the total number of cases had reached a colossal 31.39 million: 64,330 in the Supreme Court, 4.5 million in the twenty-four High Courts, and 26.83 million in the district and subordinate courts.⁸ The backlog has also resulted in long delays. News reports of cases being decided nearly twenty years after they were instituted are becoming distressingly common.

Delay and backlog were a problem even during the colonial era. The earliest available report suggesting a slew of reforms to handle backlog and delay was the 1924 report of the Justice Rankin Committee. Since then, there have been a number of such expert body reports, including several reports of the permanent body constituted for suggesting legal reforms in post-colonial India, the Law Commission of India.⁹ An issue on which there has been a shift of opinion is the desirability of instituting tribunals, and formulating how they would interact with the regular judiciary. In what follows, I choose examples selectively to emphasise the shift in thinking among policymakers.

The First Law Commission of India was constituted in 1956, and had an

impressive membership.¹⁰ Its first term of reference was ‘to review the system of judicial administration in all its aspects and suggest ways and means for improving it and making it speedy and less expensive’.¹¹ Our focus is on its Fourteenth Report issued by the First Law Commission in 1958, entitled *Reforms of Administration of Justice*, which is regarded as one of the earliest and most comprehensive studies of the issues affecting administration of justice in India.

A major issue that the Law Commission had to confront was whether to recommend the creation of tribunals for specific subject areas such as administrative law. The Fourteenth Report canvasses the issue by extensively examining comparative experiences in England, France, and the US, before concluding that the ‘creation of a general administrative body like the *Conseil d’etat* in France is not feasible’ in India.¹² Its reasons are worth examining, as similar arguments have reappeared in more recent times in calls for the abolition of tribunals in general:

It would be derogatory to the citizens’ rights to establish a system of administrative courts which would take the place of ordinary courts of law for examining the validity of administrative action. It may be that in view of the inherent advantages like speed, cheapness, procedural simplicity and availability of special knowledge in extrajudicial tribunals, these may be useful as a *supplementary* system. But it will not be right to conceive them as a device to *supplant* the ordinary courts of law. It would be unthinkable to allow judicial justice administered by courts of law to be superseded by executive justice administered by administrative tribunals. It would be a step backward to erect in the place of deliberate judicial tribunals restrained by formal procedure and deciding according to notions for the time being of administrative officers, unfettered by any rules as to what general interest or good conscience demands. So conceived, the administrative court might well be regarded ‘as a court of politicians enforcing a policy, but not a court enforcing a law’—a description which Maitland gave to the Court of Star Chamber.¹³

In this single paragraph, the Law Commission summarised a number of points that have been raised by critics of tribunalisation in later years: (i) the fear of executive-minded adjudication which would detract from the impartiality of judicial decision making; (ii) the substitution of principles of general interest and good conscience by the subjective interests of administrators; (iii) the replacement of legal considerations by political ones.

Significantly, however, even as it rejected the idea of a general system of administrative courts, the Law Commission endorsed the creation of a specific type of tribunal to deal with cases where ‘government servants seek redress for real or fancied violations of their constitutional safeguards or the breach of rules regulating their conditions of service’.¹⁴ Recognising that a large volume of cases had developed on this subject and their number was increasing, it

recommended that while the jurisdiction of the High Courts under Article 226 should be retained for such matters, a new system of tribunals at the Centre and the States should also be set up. These tribunals, according to the Commission, should be presided over by a legally qualified Chairman (with qualifications similar to those of a High Court judge), with experienced civil servants serving as other members.¹⁵

It bears emphasis that the recommendation to create a separate system of administrative tribunals for service matters came as early as in 1958, from the venerable First Law Commission speaking in its much-lauded Fourteenth Report. Another influential reform body, which reiterated the recommendation to set up specialised administrative tribunals, was the High Court Arrears Committee, set up under Justice Shah of the Supreme Court, and delivered its report in 1972.

In 1974, the Sixth Law Commission¹⁶ came to the opposite conclusion, and recommended against the creation of a separate system of tribunals or courts for administrative/service law matters.¹⁷ It is important, however, to emphasise the reason that the Law Commission advanced in support of this conclusion. The Commission recognised that having a separate system might have positive benefits for the increasing backlog situation, but felt that this could be effective only if the writ jurisdiction of the High Courts under Article 226 and the special leave petition (SLP) jurisdiction of the Supreme Court under Article 136 was curtailed, which it was not prepared to do.¹⁸ The identification of this issue is prescient, as in later years the issue of striking the right balance between a separate system of tribunals and maintaining the writ and SLP jurisdiction of the superior courts would become a centre of controversy in the litigated cases that followed in the 1980s and 1990s.

2. The Push for Tribunals During the Emergency (1975–77)

At least part of the hostility towards the idea of tribunals can be attributed to their insertion into the constitutional scheme during the Emergency imposed by the Indira Gandhi government. The Emergency refers to the period between 26 June 1975 and 21 March 1977 when constitutional government was suspended through a Presidential proclamation of Emergency at the instance of Prime Minister Indira Gandhi's Congress government. The official justification for the Emergency was that it was necessary not just for preserving order by preventing

turmoil and incipient rebellion, but also for saving democracy, protecting the social revolution guaranteed by the Indian Constitution, and maintaining national integrity.¹⁹ The Emergency is today associated with the excesses of authoritarian policies adopted during the time, which resulted in across-the-board censorship and muzzling of the press, ‘the jailing of over one hundred thousand “enemies”, the brutality of Sanjay Gandhi’s sterilization and slum clearance programmes, and the terrorizing of Parliament into obedience’.²⁰ An aspect of the Emergency that dominates the legal community’s memory of the period is the blatant attempt of the regime to constrain and emasculate the higher judiciary in India. To appreciate this, some background context is necessary.

The Supreme Court and the Congress government under Prime Minister Indira Gandhi had been at loggerheads since the time she first came to power in 1966. Three decisions of the Supreme Court—in *Golak Nath v Union of India*,²¹ *Rustom Cavasjee Cooper v Union of India*,²² and *Madhavrao Scindia v Union of India*²³—that resulted in the striking down of major governmental initiatives as unconstitutional led Prime Minister Indira Gandhi to cast the higher judiciary as the enemy of social progress in the electoral campaign for the 1971 elections.

After being returned to power in the 1971 elections with an enhanced majority in Parliament (352 seats in the 518 member Lower House), the Congress government under Prime Minister Indira Gandhi became more determined to take on the judiciary, and the tensions continued from the early to the mid-1970s. Matters were not helped by the ruling in *Kesavananda Bharati v State of Kerala*²⁴ which, even as it overruled the *Golak Nath* case, nevertheless held that it was the Supreme Court which would have the final say on stipulating the features of the Constitution that were beyond the amending power of Parliament. Prime Minister Indira Gandhi’s petulant response to the *Kesavananda Bharati* judgment was to supersede the three seniormost judges of the Supreme Court, all of whom had been part of the majority in *Kesavananda Bharati*, and to appoint the relatively junior Justice AN Ray as the new Chief Justice of India. This decision created shockwaves in the legal community in particular, which justifiably regarded the decision as a blow, not just to the independence of the judiciary, but also to democratic constitutionalism in India. Many commentators believe that the event that had a decisive influence on the imposition of the Emergency by Prime Minister Indira Gandhi also involved the judiciary. On 12 June 1975, Jagmohan Lal Sinha J of the Allahabad High Court delivered judgment in *State of Uttar Pradesh v Raj Narain*²⁵ and held that Prime Minister Indira Gandhi’s election from the Rai Bareilly constituency in Uttar Pradesh was invalid, since she had been found guilty of a corrupt practice which amounted to

an electoral offence under Section 123(7) of the Representation of the People Act 1951. Within a fortnight after Justice Sinha delivered his judgment, the Proclamation of Emergency was in place.

Two important developments during the Emergency played a pivotal role in the introduction of tribunals within the Indian legal and constitutional system, and also affected how they would be perceived by many sections of the bar and bench until the present day, nearly four decades on. These were the report of the Swaran Singh Committee, which had been constituted by the Congress Party, and the consequent adoption of many of its recommendations in the Forty-second Constitutional Amendment that was enacted by the Congress government during the Emergency.

One of the hallmarks of the Emergency was the frequent tendency among those in power to call for fundamental changes in the constitutional framework to restore the balance in constitutional power arrangements which, according to them, had been undone in the years preceding the Emergency. In this view, members of the judiciary, who were from—and represented—landholding, privileged, and elite sections of society, had used constitutional discourse to uphold their own interests and subvert the Congress's social programmes including land reform, nationalisation of banks, and abolition of privy purses. At the annual session of the Congress Party held at the end of 1975, a resolution was passed urging a review of the Constitution:

If the misery of the poor and vulnerable sections of our society is to be alleviated, vast and far-reaching changes have to be effected in our socioeconomic structure ... The Congress ... urges that our Constitution be thoroughly re-examined in order to ascertain if the time has not come to make adequate alterations to it so that it may continue as a living document.^{[26](#)}

Shortly thereafter, on 26 February 1976, the Swaran Singh Committee (known after its chairman who was the Union minister for Defence) was appointed 'to study the question of amendment to the Constitution in the light of ... experience'.^{[27](#)}

a. The Swaran Singh Committee

The report of the Swaran Singh Committee recommended the setting up of tribunals for three broad subject areas to combat delays in the Indian legal system.^{[28](#)} The report also recommended that the decisions of all these tribunals should be subject to the SLP jurisdiction of the Supreme Court under Article 136

of the Constitution, but should exclude the jurisdiction of all other courts, including the writ jurisdiction of the Supreme Court under Article 32 and the High Courts under Article 226 of the Constitution.²⁹ These recommendations were accompanied by more drastic steps to curtail the power of the superior courts to strike down laws as unconstitutional,³⁰ and to limit the writ jurisdiction of High Courts under Article 226.³¹

The Swaran Singh Committee's report was perceived as seeking to muzzle the High Courts and the Supreme Court, which were among the few institutions that had stood up to the Congress government during the Emergency in a bid to preserve some freedoms.

b. The Forty-second Amendment to the Constitution and the Attempt to Undo its Effect by the Forty-fourth Amendment

The Constitution (Forty-second) Act, drawing in part from the report of the Swaran Singh Committee, was introduced in the Lok Sabha in September 1976. Given the Congress's control of Parliament, its fate was preordained, even as outside of Parliament many citizens and groups expressed concern about its content. It quickly passed through the various constitutionally prescribed stages and came into force in January 1977.

In many respects, the Forty-second Amendment went beyond the recommendations of the Swaran Singh Committee and has justifiably gained a reputation for being a draconian attempt to derail constitutional democracy in India. However, in respect of tribunals, the Amendment closely followed the recommendations of the Swaran Singh Committee. As a consequence of the Forty-second Amendment, a new Part XIV-A was introduced into the Constitution, consisting of two new provisions, namely Articles 323A ('Administrative Tribunals') and 323B ('Tribunals for other matters'). The official justification for these provisions is to be found in the Statement of Objects and Reasons:

To reduce the mounting arrears in High Courts and to secure the speedy disposal of service matters, revenue matters and certain other matters of special importance in the context of the socioeconomic development and progress, it is considered expedient to provide for administrative and other tribunals for dealing with such matters while preserving the jurisdiction of the Supreme Court in regard to such matters under article 136 of the Constitution. It is also necessary to make certain modifications in the writ jurisdiction of the High Courts under article 226.³²

Following the logic of the Swaran Singh Committee, a distinction was made between administrative tribunals and tribunals for other matters. Where the Swaran Singh Committee made a further distinction between labour and industrial cases and other matters, the Amendment put all other issues in a broad category of 'Tribunals for other matters', which was also defined more expansively to include rent and election cases.³³ The Amendment followed the report in excluding the jurisdiction of all courts except that of the Supreme Court under Article 136 of the Constitution.

A few weeks after the Forty-second Amendment became law, Prime Minister Indira Gandhi called for elections, which were held in March 1977. The main opposition party was the Janata Party, which had been formed as late as January 1977. Interestingly, the contents of the Forty-second Amendment were a significant part of campaign battles. In its manifesto, the Congress Party claimed that the Amendment had been enacted 'to overcome the various obstacles put by economic and political vested interests, and not for the purpose of increasing the power of the executive at the expense of the judiciary or the legislature'.³⁴ The Janata Party responded by promising to release the people of India 'from the bondage of fear' that had become a characteristic feature of the Emergency, and also promised to rescind the 'anti-democratic Forty-second Amendment'.³⁵

In the general elections of 1977, the Congress Party suffered a massive defeat, winning only 153 seats out of the 542 seats in the Lok Sabha. The Janata Party won 270 seats, and with the help of its allies, was able to command a majority in the Lok Sabha. For the first time in independent India's history, a non-Congress government took office, but occupied it for a mere sixteen months. Our focus is on the chief success of the Janata government, which consisted in repairing some of the damage brought about by the Congress and in restoring, to a large extent, the independence of the judiciary through changes brought about by the Forty-fourth Amendment to the Constitution.

At the time it was voted into government in 1977, the Janata Party could count on its majority in the Lok Sabha, but had only 27 out of 244 seats in the Rajya Sabha, where the Congress Party still held 154 seats. It was therefore crucial for the Janata Party to secure votes of Congress Rajya Sabha MPs, who had only recently voted overwhelmingly in favour of the Forty-second Amendment. Given this scenario, it took a great deal of diplomacy and tact for the Janata government to secure the passage of the Forty-fourth Amendment into law, reversing many of the problematic provisions inserted through the Forty-second Amendment. However, there were some losses as well. The Law Minister under the Janata government, Shanti Bhushan, and several officials within the Ministry

of Law ‘wanted to remove tribunals entirely from the Constitution because they had the taint of the Emergency and seemed subject to executive branch manipulation’.³⁶ Buoyed by this belief, the originally proposed text of the Forty-fourth Amendment contained a clause deleting the constitutional provisions introducing tribunals, and was passed by the Lok Sabha by a huge majority on 23 August 1978. However, this attempt to reverse the introduction of the new Part XIV-A failed when the clause to this effect did not pass in the Rajya Sabha when the Forty-fourth Amendment was moved before it on 28 August 1978. The rest of the Forty-fourth Amendment came into force weeks before the Janata government led by Morarji Desai fell.

Thus, while many of the provisions that were introduced by the Forty-second Amendment were reversed by the passage of the Forty-fourth Amendment, Articles 323A and B, which introduced tribunals as constitutional entities, were retained.

III. CONSTITUTIONAL LITIGATION OVER TRIBUNALS (1985–2014)

1. The Administrative Tribunals Act 1985 and *Sampath Kumar*

Although Indira Gandhi was returned to power as Prime Minister in 1980, perhaps because of the taint of the Emergency that tribunals had come to be associated with, her government did not seek to follow through on plans to establish tribunals and implement the mandate of Articles 323A and B. Those plans were revived only after the Congress (I) government under Prime Minister Rajiv Gandhi took office in 1984. The first such step was the enactment by Parliament of the Administrative Tribunals Act 1985, which authorised the creation of administrative tribunals at the Centre and in the States as envisaged by Article 323A.

Almost immediately after the enactment of this law, several writ petitions were filed before various High Courts and the Supreme Court challenging the constitutional validity of the authorising constitutional provision and law. The main ground of attack in these petitions was that the jurisdiction of the Supreme Court under Article 32 and that of the High Courts under Article 226 had been excluded, which was unconstitutional. This led, eventually, to the judgment of a

constitutional bench of five judges of the Supreme Court in *SP Sampath Kumar v Union of India*, which was delivered in December 1986.³⁷

At the initial stage of the case, on 31 October 1985, a two-judge division bench of the Supreme Court consisting of PN Bhagwati CJ and Ranganath Misra J heard the initial petition, admitted the writ petitions, and issued interim orders, while the case was assigned to be heard by a constitutional bench consisting of five judges of the Supreme Court. Even as it passed the interim order, which was designed to make the newly created tribunals conform more closely to the expectations that the legal community had of judicial institutions, the Supreme Court gave an early indication of its approach to the case. It directed that a bench of the tribunal should consist of at least one ‘judicial member’, and that a seat of the tribunal be located wherever the High Court was seated.³⁸ The interim order also noted, somewhat unusually, that the Attorney General had agreed that whatever changes were required to be made to the law to make it acceptable would be ‘introduced shortly in Parliament’.³⁹

This approach of the Court is worth reflecting upon. In other contexts, particularly in those involving public interest litigation (PIL) cases, Bhagwati J has counselled the Court to abandon the traditional common law adversarial approach and adopt a dynamic approach that was more suited to the situation in India.⁴⁰ However, it is not clear that such an approach was applicable in *Sampath Kumar*, which was not a classic PIL case. The petitioners in *Sampath Kumar* had raised constitutional objections to the law because it excluded the jurisdiction of the High Courts and potentially of the Supreme Court under Article 32, and thus violated their constitutional rights to judicial review. As will be clear from an analysis of the constitutional bench’s decision in *Sampath Kumar*, the Court appeared to be unduly sympathetic to the impugned law. One gets the sense that the Court was eager to work with the government to save the law and the system of administrative tribunals that was being ushered in. However, by not taking the constitutional objections seriously enough in the first instance, the Court contributed to a situation where, a decade later, those problems resurfaced, resulting in a new round of litigation over the same issues.

The final decision of the constitutional bench of the Supreme Court in *Sampath Kumar*’s case, delivered a year later, consists of two separate judgments. The main judgment was delivered by Ranganath Misra J, with Bhagwati CJ authoring a separate, concurring judgment. Misra J’s judgment focuses on two main questions: (i) whether by excluding the jurisdiction of the Supreme Court and the High Courts, the law was violating the Constitution by adversely affecting judicial review, which had been held to be a part of the basic

structure of the Constitution; and (ii) whether the tribunals created under the Administrative Tribunals Act were capable of being substitutes for the High Courts and would inspire trust in parties subjected to their jurisdiction.⁴¹ Misra J first noted that pursuant to the Court's initiative at the interim stage, the government had amended the law to save the jurisdiction of the Supreme Court under Article 32 as well as Article 136, removing one problem with the law as originally enacted. Turning to the power of the High Courts under Article 226, Misra J relied on Bhagwati J's separate judgment in *Minerva Mills v Union of India*, where, while holding that the power of judicial review was an integral part of the Indian constitutional system, Bhagwati J had held that this would not prevent Parliament from providing for 'effective alternative institutional mechanisms'.⁴² Misra J noted the growing problems of backlogs and arrears, which had only worsened by the mid-1980s. He reasoned that taking those special circumstances into account, Parliament was justified in setting up an 'effective alternative institutional mechanism' in the form of administrative tribunals for service matters. Turning to the second question, he emphasised that the High Courts had a long tradition of a century and a quarter that had enabled them to gain the trust of the people. He held that for this reason it was 'of paramount importance that the substitute institution—the tribunal—must be a worthy successor of the High Court in all respects'.⁴³ He held that if this did not happen, 'the constitution of the tribunal as a substitute of the High Court would be open to challenge'.⁴⁴ His judgment ended by expressing the hope that the law would be amended to enable the administrative tribunals to act as true substitutes for the High Courts. This too is unusual in a judgment. Judges do not typically see their task as helping create institutions. Their task is to make hard judgments about whether an institutional innovation measures up to the demands of the Constitution or not. Misra J's judgment seems to leave the issue open and dependent upon the implementation of the law in the future.

While agreeing with Misra J's judgment and its reasons, Bhagwati CJ's concurring judgment focused on aspects of the qualifications and appointments of the Chairman, Vice Chairman, and members of the tribunals which would be necessary, in his view, to save the law from invalidation. Bhagwati CJ endorsed Misra J's identification of the 'effective alternative institutional mechanism' theory (which had been drawn from Justice Bhagwati's own minority opinion in *Minerva Mills*, which he somewhat unpersuasively argued could be attributed also to the majority since it did not disagree with him on the point).⁴⁵ He held that in order for the tribunals to fit this theory, it was necessary that appointments to the tribunals be made by the government in consultation with

the Chief Justice of India.⁴⁶ He also recommended further amendments to the Administrative Tribunals Act.⁴⁷

What is unusual about the *Sampath Kumar* case is that it ignored previous Supreme Court rulings that had held the jurisdiction of High Courts under Article 226 to be part of the basic structure of the Constitution. These precedents included *Kesavananda Bharati v State of Kerala*,⁴⁸ *Re Powers, Privileges and Immunities of State Legislatures*,⁴⁹ *Indira Gandhi v Raj Narain*,⁵⁰ and the majority judgments in *Minerva Mills v Union of India*.⁵¹ The sole authority cited by the two main judgments for the ‘alternative institutional mechanism’ theory that enabled the bypassing of the writ jurisdiction of the High Courts was Bhagwati J’s minority judgment in *Minerva Mills*. As we have noted earlier, the First Law Commission, in its Fourteenth Report, while calling for the creation of service tribunals had expressly recommended retaining the Article 226 jurisdiction of the High Courts. The ‘alternative institutional mechanism’ theory was thus conceived on shaky conceptual and practical foundations, as was to become clear in the aftermath of *Sampath Kumar*.

2. The Post-*Sampath Kumar* Cases (1986–93)

Shortly after the *Sampath Kumar* decision was delivered, the Administrative Tribunals Act was amended along the lines suggested in the judgments of Misra J and Bhagwati CJ. However, these did not, by themselves, take care of problems with the administration of the newly established tribunals.

The initial round of cases dealt with fairly minor issues.⁵² However, by the early 1990s, severe problems of management and operation began to emerge in various tribunals, some of which were created not under Articles 323A or B but under pre-existing statutes. However, their structure and operation had also been affected by the application of the theory of ‘alternative institutional mechanism’ created in *Sampath Kumar*. As is detailed below, the administrative tribunals created under Article 323A had their share of problems. However, by then, some had also created tribunals under Article 323B. This latter category of tribunals had faced problems in coordinating their jurisdiction with their parent High Courts, whose jurisdiction they were supposed to exclude under the ‘alternative institutional mechanism’ theory propounded in *Sampath Kumar*.

The first doubts about the validity of the theory propounded in the *Sampath Kumar* case were expressed by the Supreme Court in the case of *RK Jain v*

Union of India (hereinafter *RK Jain*).⁵³ Decided in May 1993, a mere eight years after the *Sampath Kumar* ruling, the case dealt with problems in the functioning and appointment of members in the Customs, Excise, and Gold Control Appellate Tribunal (hereinafter CEGAT) that had been established in 1982. While dealing with problems in CEGAT, a three-judge bench of the Supreme Court consisting of Ramaswamy, Ahmadi, and Punchhi JJ drew attention to the malfunctioning and maladministration in tribunals as a whole, and recommended that the Law Commission review the situation of coordinating functions between tribunals and the regular courts as also the issue of appointments to tribunals, which were not being able to act credibly as substitutes for the High Courts.

3. Revisiting and Revising *Sampath Kumar*: *Sakinala Harinath* and *L Chandra Kumar* (1993–97)

Later that same year, the High Court of Andhra Pradesh issued a bold judgment authored by MN Rao CJ that dealt a severe blow to the legitimacy of the system of administrative tribunals authorised by the *Sampath Kumar* decision. In *Sakinala Harinath v State of Andhra Pradesh*,⁵⁴ Rao CJ held that Article 323A(2)(d) of the Constitution was unconstitutional to the extent it empowered Parliament to exclude the jurisdiction of High Courts under Article 226. Rao CJ explicitly held that the theory of ‘alternative institutional mechanisms’ propounded in *Sampath Kumar* flew in the face of earlier constitutional bench decisions of the Supreme Court that had expressly held judicial review enshrined in Articles 226 and 32 to be a basic feature of the Indian Constitution.⁵⁵ He emphasised that the judgments of Misra J and Bhagwati CJ had not referred to those decisions, which were binding upon them, and had also not considered whether Article 323A was itself unconstitutional.⁵⁶

The judgment in *Sakinala Harinath* is bold because even *per incuriam* decisions of the Supreme Court are usually treated as binding by High Court benches. However, Rao CJ’s judgment astutely drew support from the judgments of Ramaswamy and Ahmadi JJ in *RK Jain*’s case, which had also expressed criticism and doubt over the reasoning in *Sampath Kumar*. By noting that the *Sampath Kumar* judgments had skirted around the arguments of constitutionality raised by the petitioners, Rao CJ was also subtly criticising the abdication by the judges in *Sampath Kumar* of their responsibility to adjudicate constitutional questions that arose for consideration before them.

In March 1997, a seven-judge constitutional bench of the Supreme Court, speaking through Ahmadi CJ, effectively buried the ‘alternative institutional mechanism’ theory propounded in *Sampath Kumar* even as it sought to bolster the system of tribunals that had been ushered into the Indian legal system through that decision. Ahmadi CJ’s judgment in *L Chandra Kumar v Union of India* sought to perform a delicate balancing act in handling the several issues before it.⁵⁷ On the central question before it, the court endorsed the reasoning of MN Rao CJ’s judgment in *Sakinala Harinath* that the judgments in *Sampath Kumar* had ignored binding precedents in holding that the writ jurisdiction of the High Courts under Article 226, which was part of the basic structure of the Constitution, could be excluded by the Administrative Tribunals Act. The Court went on to assert its own reasons for holding that the power of judicial review over legislative action vested in the superior courts in India (ie, the High Courts and the Supreme Court) could not be ousted or excluded. Ahmadi CJ argued that the inclusion of elaborate provisions relating to tenure, salaries, retirement age, etc for judges was evidence that the framers sought to insulate judges of superior courts from any executive or legislative interference with their decisions.⁵⁸ He reasoned that since these safeguards were not available to judges of the subordinate judiciary or those who sat on tribunals, ‘they could not be considered full and effective substitutes for the superior judiciary in discharging the function of constitutional interpretation’ and adjudication.⁵⁹ Employing this logic, the Court rejected the theory—advanced in *Sampath Kumar*—that tribunals could act as *substitutes* for the High Courts. Instead, the Court suggested that tribunals perform a *supplemental* role to the High Courts.⁶⁰ Although the Court did not expressly cite the Law Commission’s Fourteenth Report on this point, this is the exact language used by the First Law Commission to explain what it thought was a justifiable role for tribunals. Significantly, the Court went on to hold that:

[T]he power vested in the High Courts to exercise judicial superintendence over the decisions of all courts and tribunals within their respective jurisdictions is also part of the basic structure of the Constitution. *This is because a situation where the High Courts are divested of all other judicial functions apart from that of constitutional interpretation, is equally to be avoided.*⁶¹

The Court therefore disagreed with Rao CJ’s conclusion that Article 323A was unconstitutional for enabling the creation of tribunals, and asserted that there were ‘pressing reasons why we are anxious to preserve the conferment’ of adjudicative power on tribunals.⁶² The Court acknowledged that Misra J’s judgment in *Sampath Kumar* had correctly identified the colossal backlog before

the superior courts as justifying the creation of administrative tribunals. The Court noted that *Sampath Kumar* drew justification from expert bodies (including the Shah Committee Report and the Administrative Reform Commission) for supporting the introduction of tribunals.⁶³ Ahmadi CJ's judgment for the Court rejected the suggestion of the Malimath Committee (1990) that tribunals be abolished, holding as follows:

That the various tribunals have not performed up to expectations is a self-evident and widely acknowledged truth. However, to draw an inference that their unsatisfactory performance points to their being founded on a fundamentally unsound principle would not be correct. The reasons for which tribunals were constituted still persist; indeed, those reasons have become even more pronounced in our times.⁶⁴

The Court went on to suggest several steps to improve the functioning of tribunals. It emphasised that the selection committee for members of tribunals had been changed to include a Supreme Court judge as its head (to be nominated by the Chief Justice), which would provide an important safeguard.⁶⁵ It also recommended that all existing tribunals be within the administrative supervision of a single nodal ministry, preferably the Ministry of Law, to overcome the absence of administrative coordination between tribunals.⁶⁶

4. The Immediate Aftermath of *Chandra Kumar* (1997–2004)

A trend is discernible in the cases decided across the decades of the 1990s and 2000s. In the early part of the 1990s, as we have noted, complaints about the functioning of tribunals led to calls for their abolition. In the wake of *Chandra Kumar*, the judiciary appears to have accepted the legitimacy of the system of tribunals. The focus of attention, instead, has turned to the practical conditions of their operation in order to ensure that tribunals are able to function effectively and maintain the quality and standards expected of regular courts.

A similar trend came to be seen with tribunals constituted under laws that did not fall under Articles 323A and B. Debt Recovery Tribunals (DRTs) were constituted under the Recovery of Debts Due to Banks and Financial Institutions Act 1993. Consequently, DRTs were established across the nation, starting with Delhi. Almost immediately, a case was filed before the High Court of Delhi challenging the constitutional validity of the enabling statute. In March 1995, the Delhi High Court held in *Delhi High Court Bar Association v Union of India* that the parent law was unconstitutional as it eroded the independence of the

judiciary and violated the equal protection guarantee in Article 14.⁶⁷ Appeals from this and allied cases were heard by the Supreme Court and decided in a judgment delivered by Kirpal J in March 2002 in *Union of India v Delhi High Court Bar Association*.⁶⁸ While the case was pending before the Supreme Court, the government framed rules to address the concerns raised by the Delhi High Court. As a consequence, appointments to the DRTs would be made by a selection committee that would consist of the Chief Justice of India or a judge of the Supreme Court nominated by him.

Kirpal J's judgment rejected the argument that establishing DRTs violated judicial independence by referencing the fact that tribunals under Articles 323A and B were not considered to violate that same principle.⁶⁹ He drew a direct connection to the fact that decisions of the DRTs would be subject to the writ jurisdiction of the High Courts under Articles 226 and 227.⁷⁰ Implicitly drawing upon the logic and reasoning used in *Chandra Kumar*, he emphasised that tribunals for income tax, sales tax, and for excise and customs had become 'an essential part of the judicial system' in India, and upheld the constitutionality of the law creating DRTs.⁷¹ He also clarified that the effect of incorporating Articles 323A and B was not to attenuate the power of Parliament to create tribunals for subjects not contemplated by those two provisions.⁷²

5. The National Company Law Tribunals—Round I (2004–10)

Several of the tribunals discussed here were created by Congress governments at the Central and State levels. However, it is now clear that the phenomenon of creating tribunals has transcended politics, as governments of every political persuasion have come to embrace them over time. In 2002, the National Democratic Alliance (NDA) coalition government (consisting of the Bharatiya Janata Party (BJP) and its allies) shepherded the Companies (Amendment) Act 2002, which sought to create the National Company Law Tribunal (NCLT) and the National Company Law Appellate Tribunal (NCLAT). The justification for this move was the considerable delay in dissolution of companies, caused in part by a multiplicity of forums which included the High Courts, the Company Law Board, the Board for Industrial and Financial Reconstruction (BIFR) and the Appellate Authority for Industrial and Financial Reconstruction (AIFR). The new law proposed to replace all these forums with a single NCLT. This was to be a three-member body based in New Delhi that would hear appeals from

benches of the NCLT located across the nation.

The Madras Bar Association filed a writ petition before the High Court of Madras challenging the constitutional validity of the amendments to the Companies Act that would lead to the creation of the NCLT. Its principal objection was to the growing trend of tribunalisation which, in its view, would lead to executive aggrandisement of power, and violated the principles of separation of power and judicial independence. The High Court of Madras delivered its judgment in *R Gandhi v Union of India* in March 2004.⁷³ Jayasimha Babu J held that Parliament was competent to create the NCLT. However, the High Court went on to hold that several of the provisions of the amended law were unconstitutional for neglecting the imperatives of the principles of separation of powers and the independence of the judiciary. It gave detailed reasons why the scheme of the appointments procedure was fundamentally flawed in many respects, and held that until the identified defects were removed, it would be unconstitutional to constitute the NCLT.

On appeal, a five-judge bench of the Supreme Court in *Union of India v R Gandhi* delivered a judgment that endorsed much of the reasoning in Justice Babu's judgment.⁷⁴

Raveendran J's judgment for the Supreme Court reviewed existing precedents and laid down the following broad principles that would apply to the creation and functioning of tribunals:

- (i) Parliament has the power to create tribunals on subjects over which it possesses subject matter competence. However, following *Chandra Kumar*, the creation of tribunals cannot exclude the writ jurisdiction of the High Courts and the Supreme Court under Articles 226 and 32.⁷⁵
- (ii) While the legislature can make a law providing for tribunals, the superior courts can, in exercise of the power of judicial review, examine whether the qualifications and eligibility criteria provided for selection of members are proper and adequate.⁷⁶
- (iii) Parliament cannot pack tribunals with members from the civil service. Considerations of separation of powers and the independence of the judiciary must be respected.⁷⁷

Applying these principles to the NCLT, the Supreme Court held that the presence of grave defects in its structure rendered the actual operation of the NCLT unconstitutional. The Supreme Court listed fourteen major defects in extensive detail in its judgment, and held that until the defects were cured

through legislative amendments, the NCLT would continue to be unconstitutional.⁷⁸

6. The National Tax Tribunal Decision (2014)

In September 2014, a five-judge bench of the Supreme Court rendered judgment in the case of *Madras Bar Association v Union of India*.⁷⁹ This judgment extended the logic of *Chandra Kumar* and *R Gandhi* to spell out how the power of judicial review vested in the superior courts must be respected while creating tribunals. The National Tax Tribunal Act, 2005 enabled the creation of a National Tax Tribunal (NTT), to adjudicate appeals from appellate tax tribunals created under several statutes, and to effectively be a substitute for the jurisdiction of the High Courts as appellate bodies. As justification for the NTT, the government cited the following reasons: (i) the huge arrears in tax cases that afflicted High Courts across the country; (ii) the diversity in interpretation of tax law on account of differences between the various High Courts requiring a single forum that would deliver uniformity in the law; and (iii) the need for specialist tax adjudication.

The main judgment delivered by Kehar J found several constitutional problems in the structure and content of the law creating the NTT. It held that since the NTT was seeking to *supplant* rather than *supplement* the jurisdiction of the High Courts, and since it did not provide enough guarantees of independence to those who were appointed to the NTT, it fell foul of the various stipulations set out in *Chandra Kumar* and *R Gandhi*. Going beyond those cases, the Court held that the parent law was unconstitutional as a whole. In so doing, the *Madras Bar Association* judgment went beyond the somewhat more restrained approach in *Chandra Kumar* and *R Gandhi*, where the judges had sought to save parts of the scheme of the legislature. Nariman J's separate judgment argued that the Act sought to take away the core judicial function of deciding substantial questions of law away from the High Courts. This may account for why the Supreme Court was intolerant of this particular legislative attempt to create tribunals.

7. The National Company Law Tribunals—Round II (2010–15)

On 14 May 2015, a five-judge constitutional bench of the Supreme Court

delivered judgment in the case of *Madras Bar Association v Union of India (Madras Bar Association II)*,⁸⁰ which it termed as a ‘sequel’ to the earlier round of litigation on the NCLT. As we have noted, in the first round of litigation on this issue in the *R Gandhi* case, both the High Court of Madras and the Supreme Court rejected the argument that the constitution of NCLTs was per se unconstitutional. However, both courts also held that while Parliament could constitute tribunals on subjects within its legislative domain, the manner in which the NCLT had been constituted was problematic and resulted in violations of the principles of judicial independence and the separation of powers. The Supreme Court’s judgment in *R Gandhi* therefore issued specific directions indicating how Parliament could remedy the problems identified by it.

The second round of litigation arose as a result of the enactment of a new company law, the Indian Companies Act 2013, which had specific provisions dealing with the establishment of the NCLT and the NCLAT. The Madras Bar Association, which had also been a principal petitioner in the *R Gandhi* case, challenged the provisions of the new Indian Companies Act on the ground that the provisions relating to the establishment of the NCLT and the NCLAT ignored the elaborate recommendations issued in the *R Gandhi* case relating to the qualifications and appointments of members of these tribunals as well as the structure of their appointments procedure, and were thus liable to be struck down as unconstitutional. The Madras Bar Association also sought to rely on the judgment in the NTT case in support of its stance that the very creation of the NCLT was unconstitutional.

AR Sikri J’s judgment for the Court in *Madras Bar Association II* essentially reiterated the judgment in *R Gandhi*, and refused to advance the more aggressive trend witnessed in the NTT judgment. Thus, Sikri J held that Parliament was entirely competent to establish the NCLT and the NCLAT. However, he accepted the argument of the petitioner that the provisions dealing with the prescription of qualifications of the head and members of the NCLT and the NCLAT, as well as the structure of the selection of the personnel of these two tribunals, did not meet with the requirements laid down in *R Gandhi* and struck them down as being invalid. Sikri J’s judgment specifically distinguished the NTT judgment and noted that that situation may have been exceptional. It is worth noting that Nariman J, who adopted a bold position on the question of judicial independence in the NTT judgment, was also a signatory to Sikri J’s judgment.

Some observers, writing in the immediate aftermath of the NTT judgment, felt that it may signal a new trend where the judiciary would not condone the creation of new tribunals. However, the judgment of Sikri J—the latest at the

time of writing—seems to indicate that such claims may have been overstated, and the logic and reasoning employed in *Chandra Kumar* continues to hold the ground, at least for the foreseeable future. Sikri J's judgment ends by expressing concern that the NCLT and the NCLAT should be constituted soon, so that they can start functioning in earnest.

IV. CONCLUSION

The law and policy on tribunals has witnessed several shifts over the period covered in this chapter. Playing a relatively insignificant role in the first quarter-century of the working of the Constitution, tribunals became more crucial actors as a result of their insertion into the constitutional scheme through the Forty-second Amendment in 1976. Thereafter, successive governments, regardless of political persuasion, have consistently resorted to creating tribunals, especially in the more recent era. The stance of the Supreme Court has also shifted from its enthusiastic endorsement of tribunals in *Sampath Kumar* to a more cautious approach in *Chandra Kumar*, where it accepted the need for tribunals but insisted on safeguards to ensure that their independence was ensured. The more recent trend, in *R Gandhi*, *Madras Bar Association* and *Madras Bar Association II*, indicates that the Supreme Court is more vigilant about ensuring that tribunals are not controlled by the executive and that their working conditions and standards meet constitutionally specified standards. As I have shown, the continuously increasing backlog and delay in the overall Indian legal system has been an important causal factor for the rise of tribunals. At the time of writing, cases challenging the structure and functioning of existing tribunals such as the Intellectual Property Appellate Tribunal and the National Green Tribunal are pending before the courts and may cause a further shift in the evolution of the narrative relating to tribunals.

There has been considerable commentary in academic journals and newspaper reports on the growing trend of tribunalisation over the past two decades.⁸¹ Practising lawyers tend to argue for the jettisoning of tribunals entirely, pointing to some justifiable concerns about executive encroachment over what used to be judicial functions. These critiques are reminiscent of the misguided opposition of the English jurist AV Dicey to the French system of tribunalisation, which led a generation of common law lawyers to imbibe the same prejudices. Even in the UK, however, a later generation of British jurists embraced tribunals that perform a major role in the contemporary British legal system. Comparative

experience in the UK and Australia suggests that tribunals can be integrated into a well-functioning legal and judicial system.⁸² The Supreme Court's recent jurisprudence shows that it has not yet embraced this critique in its entirety (even as it has sympathy for the logic); and has, for now, chosen to uphold Parliament's power to constitute tribunals while retaining for itself the power to scrutinise how the appointments and qualifications are set for these tribunals, in order to ensure that the principles of independence of the judiciary and separation of powers are complied with.

What is more troubling about the critiques offered by the practising bar is that they do not offer much by way of solving the more fundamental problems of delay and backlog in the overall legal system that have caused tribunals to be advanced as solutions. None of them offer, for instance, an exhaustive empirical critique of various tribunals that have been functioning for over a quarter-century.⁸³ The mainstream legal profession and judiciary seem to be in denial over the severe damage caused to the overall legitimacy of the legal system by the worsening state of affairs of backlog and delay. Official bodies of judges and lawyers continue to rely on stale, empirically unsound, short-term solutions such as increasing the judge strength of existing courts. Scholars who have conducted sound empirical studies on backlog have offered unconventional solutions that are unacceptable to the mainstream legal profession and judiciary because they require a fundamental reordering of the current system, and would threaten the vested interests of dominant sections of the legal profession.⁸⁴

In trying to understand the causes for the 'crisis' of delay and backlog that he identified in 1982, Upendra Baxi identified four principal types of delays in the legal system: those caused in turn by the State, the Courts, the litigants, and lastly, by the legal profession. Baxi was particularly critical of the active contributions of the legal profession to the problems of backlog and delay.⁸⁵ Writing more recently, Pratap Bhanu Mehta has argued that '[t]he single biggest weakness of the Indian justice system is its legal profession'.⁸⁶ To justify this assessment, Mehta notes the number of strikes resorted to by the profession, and argues that 'almost every single attempt by the Courts to reform their procedures in any way that would expedite matters has met stiff resistance from the respective Bar Associations concerned'.⁸⁷ By way of evidence for this claim, Mehta describes how lawyers sabotaged attempts made to reform the Code of Civil Procedure in the early part of this century.

In contemporary India, the legal profession has lost credibility in part because, while lawyers were at the forefront of demanding professional regulation of other professionals such as doctors, the Bar Council of India's own system of

disciplining lawyers who bring disrepute to the profession is non-existent. Given these realities, the legal profession's perception that the problems in the Indian legal system are caused by self-interested bureaucrats is not one that will find general support. What is required instead is a dispassionate, non-partisan examination of the root causes for the problems of delay and backlog in the Indian legal system, problems that threaten to fundamentally undermine its promise and potential for delivering justice to ordinary Indians.

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¹ Upendra Baxi, *The Crisis of the Indian Legal System* (Vikas Publishing 1982).

² Baxi (n 1) 58.

³ See Nick Robinson, 'Judicial Architecture and Capacity' (chapter 19, this volume).

⁴ Bibek Debroy, 'Justice Delivery in India—A Snapshot of Problems and Reforms' (2008) Institute of South Asian Studies Working Paper 47/2008, 6 <http://mercury.ethz.ch/serviceengine/Files/ISN/91150/ipublicationdocument_singledocument/80daa505-0e21-4871-a190-2b22ea81642d/en/46.pdf>, accessed October 2015.

⁵ Debroy (n 4) 6.

⁶ Information obtained from the website of the Supreme Court of India <http://www.supremecourtfindia.nic.in/p_stat/pm01052014.pdf>, accessed October 2015.

⁷ Granville Austin, *Working a Democratic Constitution: A History of the Indian Experience* (Oxford University Press 2000) 139.

⁸ Supreme Court of India, Court News (January–March 2014) 9(1) <http://supremecourtfindia.nic.in/courtnews/2014_issue_1.pdf>, accessed 3 November 2014.

⁹ See reports of the Law Commission numbered 14, 44, 45, 58, 77, 79, 80, 120, 121, 124, and 215.

¹⁰ Its chair was MC Setalvad, the first Attorney General of India, who is generally regarded as the most independent and distinguished occupant of the office. Other members included MC Chagla, KN Wanchoo, and SM Sikri, all of whom were or went on to become among the most significant superior court judges in India.

¹¹ Terms of reference of the First Law Commission, cited in Law Commission of India, *Reform of Judicial Administration* (Law Com No 14, vol 1, 1958) 3 <<http://lawcommissionofindia.nic.in/1-50/Report14Vol1.pdf>>, accessed 3 November 2014.

¹² Law Commission of India, *Reform of Judicial Administration* (Law Com No 14, vol 2, 1958) 694 <<http://lawcommissionofindia.nic.in/1-50/Report14Vol2.pdf>>, accessed October 2015.

¹³ Law Commission of India (n 12) 693.

¹⁴ Law Commission of India (n 12) 692.

¹⁵ Law Commission of India (n 12) 692.

¹⁶ The Chair of the Sixth Law Commission was PB Gajendragadkar, who had been a former Chief Justice of India.

¹⁷ Law Commission of India, *Structure and Jurisdiction of the Higher Judiciary* (Law Com No 58, 1974) 126 <<http://lawcommissionofindia.nic.in/51-100/Report58.pdf>>, accessed October 2015.

¹⁸ Law Commission of India (n 17) 102.

¹⁹ Austin (n 7) 293–430.

²⁰ Austin ([n 7](#)) 389.

²¹ AIR 1967 SC 1643.

²² (1970) 1 SCC 248.

²³ (1971) 1 SCC 85.

²⁴ (1973) 4 SCC 225.

²⁵ Judgment and order dated 12 June 1975 of the Allahabad High Court in Election petition No 5/1971.

²⁶ Resolution passed at the Congress annual session 1975, cited in Austin ([n 7](#)) 350.

²⁷ Austin ([n 7](#)) 353.

²⁸ The full text of the report is published in ‘Swaran Singh Committee Report’ (1976) 2 SCC (Jour) 45.

²⁹ ‘Swaran Singh Committee Report’ ([n 28](#)) 49, Item 5, [Part IV](#).

³⁰ Item 1 (Constitutional Validity of Laws), [Part IV](#) of the report. These recommendations sought to impose constraints on the power of High Courts and the Supreme Court to strike down parliamentary laws as unconstitutional. They sought to do so by laying down grounds upon which legislation could not be challenged (excluding legislative competence, repugnancy, and violation of fundamental rights as grounds of challenge) and prescribing a minimum of seven judges of the Supreme Court for hearing constitutional challenges and specifying that two-thirds of the full strength of the Supreme Court would have to agree to a law being held unconstitutional before it could have the force of law. ‘Swaran Singh Committee Report’ ([n 28](#)) 47, Item 1, [Part IV](#).

³¹ ‘Swaran Singh Committee Report’ ([n 28](#)) 48, Item 2, [Part IV](#).

³² Statement of Objects and Reasons appended to the Constitution (Forty-second Amendment) Act 1976.

³³ Constitution of India 1950, arts 323A and 323B.

³⁴ Austin ([n 7](#)) 399.

³⁵ Austin ([n 7](#)) 399.

³⁶ Austin ([n 7](#)) 414.

³⁷ (1987) 1 SCC 124.

³⁸ *SP Sampath Kumar v Union of India* (1985) 4 SCC 458 [3].

³⁹ *SP Sampath Kumar* ([n 38](#)) [4].

⁴⁰ In *SP Gupta v Union of India* (1981) Supp SCC 87, Bhagwati J argued that the traditional judicial role of a neutral arbiter was unsuited in PIL cases:

The judiciary has therefore a socioeconomic destination and a creative function ... It cannot remain content to act merely as an umpire but it must be functionally involved in the goal of socioeconomic justice ... Where the contest is between those who are socially or economically unequal, the judicial process may prove disastrous from the point of view of social justice, if the Judge adopts a merely passive or negative role and does not adopt a positive and creative approach. The judiciary cannot remain a mere bystander or spectator but it must become an active participant in the judicial process ready to use law in the service of social justice through a proactive goal-oriented approach.

⁴¹ *SP Sampath Kumar v Union of India* (1987) 1 SCC 124 [10] (Misra J).

⁴² *SP Sampath Kumar* ([n 41](#)) [13] (Misra J), citing *Minerva Mills v Union of India* (1980) 3 SCC 625 [87] (Bhagwati J).

⁴³ *SP Sampath Kumar* ([n 41](#)) [18] (Misra J).

⁴⁴ *SP Sampath Kumar* ([n 41](#)) [21] (Misra J).

⁴⁵ *SP Sampath Kumar* ([n 41](#)) [3] (Bhagwati CJ).

⁴⁶ *SP Sampath Kumar* ([n 41](#)) (Bhagwati CJ).

- ⁴⁷ *SP Sampath Kumar* ([n 41](#)) (Bhagwati CJ).
- ⁴⁸ (1973) 4 SCC 225.
- ⁴⁹ *Special Reference No 1 of 1964* AIR 1965 SC 745.
- ⁵⁰ (1975) Supp SCC 1.
- ⁵¹ (1980) 3 SCC 625.
- ⁵² See eg, *JB Chopra v Union of India* (1987) 1 SCC 422; *MB Majmudar v Union of India* (1990) 4 SCC 501.
- ⁵³ (1993) 4 SCC 119.
- ⁶¹ *L Chandra Kumar* ([n 57](#)) [79] (emphasis added).
- ⁶⁴ *L Chandra Kumar* ([n 57](#)) [89].
- ⁵⁴ (1993) 3 ALT 471.
- ⁵⁵ *Sakinala Harinath* ([n 54](#)) [96].
- ⁵⁶ *Sakinala Harinath* ([n 54](#)) [101].
- ⁵⁷ (1997) 3 SCC 261.
- ⁵⁸ *L Chandra Kumar* ([n 57](#)) [78].
- ⁵⁹ *L Chandra Kumar* ([n 57](#)) [79].
- ⁶⁰ *L Chandra Kumar* ([n 57](#)) [80].
- ⁶² *L Chandra Kumar* ([n 57](#)) [82].
- ⁶³ *L Chandra Kumar* ([n 57](#)) [83].
- ⁶⁵ *L Chandra Kumar* ([n 57](#)) [95].
- ⁶⁶ *L Chandra Kumar* ([n 57](#)) [96].
- ⁶⁷ AIR 1995 Del 323.
- ⁶⁸ (2002) 4 SCC 275.
- ⁶⁹ *Delhi High Court Bar Association* ([n 68](#)) [24].
- ⁷⁰ *Delhi High Court Bar Association* ([n 68](#)) [25].
- ⁷¹ *Delhi High Court Bar Association* ([n 68](#)) [25].
- ⁷² *Delhi High Court Bar Association* ([n 68](#)) [12]. In *State of Karnataka v Vishwabharathi Housebuilding Cooperative Society* (2003) 2 SCC 412, this case was cited as precedent by the Supreme Court for similarly holding that the consumer forums and courts created under the Consumer Protection Act 1986 were valid.
- ⁷³ (2004) 2 Comp L J 274 (Mad).
- ⁷⁴ (2010) 11 SCC 1.
- ⁷⁵ *R Gandhi* ([n 74](#)) [83]–[84].
- ⁷⁶ *R Gandhi* ([n 74](#)) [96].
- ⁷⁷ *R Gandhi* ([n 74](#)) [107].
- ⁷⁸ *R Gandhi* ([n 74](#)) [120]–[121].
- ⁷⁹ Judgment of the Supreme Court dated 25 September 2014 in Transferred Case (C) No 150/2006.
- ⁸⁰ MANU/SC/0610/2015.
- ⁸¹ Arvind P Datar, ‘The Tribunalisation of Justice in India’ (2008) *Acta Juridica* 287; Ananth Padmanabhan, ‘Copyright Board and Constitutional Infirmities: Failure of the Copyright (Amendment) Act’ (2012) 5 *NUJS Law Review* 703; Prashant Reddy, ‘The trouble with tribunals’ *Open Magazine* (18 May 2013) <<http://www.openthemagazine.com/article/nation/the-trouble-with-tribunals>>, accessed October 2015.
- ⁸² MP Singh, ‘Administrative Justice in India: The Urgency of Reforms’ (2013) 1 SCC (J) 65.

⁸³ For some analysis that is beginning to emerge, see Alok Prasanna Kumar and Rukmini Das, 'State of the Nation's Tribunals' (Vidhi Centre for Legal Policy, June 2014) <<http://static1.squarespace.com/static/551ea026e4b0adba21a8f9df/t/55704d3be4b06ce94faf1b3b/143342316+TDSAT.pdf>>, accessed October 2015.

⁸⁴ See eg, Simi Rose George, 'Releasing India's Supreme Court from the Shadow of Delay' <http://www.hks.harvard.edu/var/ezp_site/storage/fckeditor/file/pdfs/degree-programs/mpaid/SYPA_SimiGeorge_2014.pdf>, accessed October 2015.

⁸⁵ Baxi ([n 1](#)) 75.

⁸⁶ Pratap Bhanu Mehta, 'India's Judiciary: The Promise of Uncertainty' in Devesh Kapur and Pratap Bhanu Mehta (eds) *Public Institutions in India* (Oxford University Press 2005) 158, 188.

⁸⁷ Mehta ([n 86](#)) 188.

CHAPTER 24

REVIEW OF ADMINISTRATIVE ACTION

PRATEEK JALAN AND RITIN RAI*

I. INTRODUCTION

THE inclusion of a chapter on administrative review in a handbook on the Indian Constitution may at first blush appear misplaced (and indeed, in many jurisdictions, it perhaps would be). However, in the context of the Indian Constitution, the concept of administrative review derives from substantive constitutional provisions, and its scope takes colour from the great body of jurisprudence that has grown around the fundamental rights guaranteed in [Part III](#) of the Constitution. This is because [Part III](#) opens with the definition of ‘State’ in Article 12, and makes no distinction between the legislative and administrative branches of government. Similarly, Article 13, which provides that ‘laws’ which take away or abridge fundamental rights will be void, defines ‘laws’ to include not just legislation but also instruments of executive administration, such as orders, by-laws, rules, and notifications. Thus, as far as the text of the Constitution is concerned, there is no distinction between the rights of a citizen in the context of legislative action and in respect of the executive functions of the government. In the sphere of administrative review, the Supreme Court’s attention has been focused on the width of the concept of ‘reasonableness’ derived from the equality guarantee in Article 14 of the Constitution and this chapter explores the development of this concept in the context of the Court’s administrative review judgments.

Although the Supreme Court, as early as 1967, observed that ‘the scope of Article 14 has been so well settled that it does not require further elucidation’,¹ unfortunately time has proven the Court wrong. Article 14 has continued to generate a large volume of case law, which sits in sharp contrast to the directness and brevity of its language. The requirement of ‘reasonableness’ has been described as ‘an essential element of equality or non-arbitrariness [which] pervades Article 14 like a brooding omnipresence’.² This chapter first examines whether the grounds of judicial review under Article 14 apply to the same extent when considering the validity of legislation compared with administrative action.

It then examines the scope of the power of administrative review under the concept of ‘reasonableness’ and whether this concept has been applied consistently. It concludes that the inherently abstract and imprecise nature of the concept of ‘reasonableness’ has led to the lack of a judicially manageable test or standard by which to analyse the diverse cases that the Court has been called upon to adjudicate. We then examine whether it is more appropriate to understand the judgments of the Court with reference to the nature of the power being exercised by the executive and the manner in which this may influence an adjudication of reasonableness. In conclusion, we suggest that the Court is in fact taking the nature of the power into account while deciding the various cases that it is confronted with, but that its judgments do not always enunciate that approach as explicitly as they can.

II. IS ADMINISTRATIVE REVIEW DIFFERENT FROM LEGISLATIVE REVIEW?

Judicial review of the ‘reasonableness’ of all government action—whether administrative or legislative—is rooted in Article 14 of the Constitution. The first and foremost question which therefore arises is whether there is any distinction in the level of scrutiny courts would adopt while adjudicating on the validity of administrative actions as compared with legislation. The distinction between executive and legislative actions has been highlighted in a number of Supreme Court decisions, including in *Maneka Gandhi*. There the Court noted that ‘[o]fficial arbitrariness is more subversive of the doctrine of equality than statutory discrimination. In respect of a statutory discrimination one knows where he stands, but the wand of official arbitrariness can be waved in all directions indiscriminately’.³ Although it is not entirely clear why arbitrariness or inequality perpetuated by one branch of the State should be less problematic than that propagated by another, this view is perhaps premised on a conception of parliamentary supremacy, which the Court was seeking to reconcile with the fact that the mandate of Article 14 applies to all branches of the State equally.

Despite this distinction recognised by the Court, judgments are not consistent as to the width of the difference. This is evident from an analysis of the Court’s jurisprudence on the grounds upon which legislation can be struck down for want of compliance with Article 14. Although a constitutional bench of the Supreme Court had a recent opportunity to clarify the law on this aspect, unfortunately its decision does not satisfactorily reconcile earlier judgments.⁴

The reference to the constitutional bench arose in the context of two distinct lines of precedent. One line mandated a limited scope of Article 14 review of legislation, confined to questions of classification and excessive delegation of power. The other line of decisions suggested a far greater degree of scrutiny, touching upon the substantive ‘reasonableness’ of the legislative provision or act under challenge.

Although the first line of authority required considerable deference to be accorded to legislative decision making, it held differently in this regard. In *State of Andhra Pradesh v McDowell & Co*, for example, the Court held that the scope of judicial review is restricted to (a) legislative competence; (b) violation of fundamental rights guaranteed in [Part III](#) of the Constitution; and (c) violation of any other provision of the Constitution.⁵ However, in view of the fact that questions of reasonableness could certainly be brought within these parameters, the Court cautioned that an enactment cannot be struck down by a mere finding that it is arbitrary or unreasonable and that ‘some or other constitutional infirmity has to be found before invalidating an Act’.⁶ Although the Court’s reasoning is somewhat tautological (because a more expansive scope of review could indeed have resulted in a finding of constitutional infirmity by reason of breach of Article 14), the *McDowell* judgment is instructive regarding the scope of Article 14 review in the case of administrative decisions. The Court held that, even in the case of administrative action, the scope of judicial review is limited to three grounds, namely, (a) unreasonableness or irrationality; (b) illegality; and (c) procedural impropriety. The Court described the applicability of the doctrine of proportionality in administrative law as ‘yet a debatable issue’,⁷ and therefore ruled out its applicability as a ground for striking down legislation.⁸ Another constitutional bench of the Supreme Court in *Ashoka Kumar Thakur*, while dealing with reservations in educational institutions, held that unreasonableness ‘by itself’ does not constitute a ground for invalidating legislation and that ‘[t]he validity of a constitutional amendment and the validity of plenary legislation have to be decided purely as questions of constitutional law’.⁹ The same approach was adopted by another constitutional bench in *KT Plantation*, where the Court articulated the underlying premise of parliamentary supremacy:

Plea of unreasonableness, arbitrariness, proportionality, *etc.* always raises an element of subjectivity on which a court cannot strike down a statute or a statutory provision, especially when the right to property is no more a fundamental right. Otherwise the court will be substituting its wisdom to that of the legislature, which is impermissible in our constitutional democracy.¹⁰

In contrast with this line of decisions is another significant body of case law that

indicates that, even while adjudicating upon the validity of legislative provisions, the Court has in fact entered upon a substantive review of the ‘reasonableness’ of the statute. In *Ajay Hasia v Khalid Mujib Sehravardi*,¹¹ Bhagwati J, speaking for a constitutional bench, implicitly equated the level of Article 14 scrutiny in cases of executive and legislative actions. In the Court’s words, ‘Wherever therefore there is arbitrariness in State action whether it be of the legislature or of the executive or of an “authority” under Article 12, Article 14 immediately springs into action and strikes down such State action.’¹²

Several other judgments also exemplify this approach. For example, in *Mardia Chemicals v Union of India*,¹³ the challenge was to various provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act 2002. While striking down the statutory requirement of a pre-deposit as a condition of appeal, the Supreme Court entered into an assessment of the reasonableness of the substantive provision, holding it to be ‘unreasonable, arbitrary and violative of Article 14 of the Constitution’.¹⁴ In *Malpe Vishwanath Acharya v State of Maharashtra*,¹⁵ the Court struck down the standard rent provision of a rent control legislation passed in 1947 as it had become unreasonable with the passage of time. In *Virender Singh Hooda v State of Haryana*,¹⁶ the Court adopted the test of whether the statutory provision would be ‘unreasonable, harsh, arbitrary and violative of Article 14 of the Constitution’.¹⁷ Other formulations of the test are in terms of ‘substantive unreasonableness’ and ‘manifest arbitrariness’ of the statute.¹⁸ Although the precise test in each of these decisions is worded differently, they indicate a scope of review that involves adjudication upon the merits of the legislative provision.¹⁹

Faced with these inconsistencies, a three-judge bench of the Supreme Court in *Subramanian Swamy v Director, Central Bureau of Investigation*²⁰ referred this question for the consideration of a constitutional bench. In that case, the Court was concerned with a challenge to the constitutional validity of Section 6A of the Delhi Special Police Establishment Act 1946, which required the Central Bureau of Investigation to obtain Union government sanction before conducting an inquiry or investigation into any alleged offence committed under the Prevention of Corruption Act 1988, if the officer concerned was of the rank of Joint Secretary or above. The decisions in *Mardia Chemicals*, *Ajay Hasia*, and *Malpe Vishwanath Acharya* were amongst those cited before the three-judge bench. It held that the question of ‘whether arbitrariness and unreasonableness or manifest arbitrariness and unreasonableness, being facets of Article 14 of the

Constitution of India are available or not as grounds to invalidate a legislation’²¹ was required to be finally decided by the constitutional bench.

Answering the reference, the constitutional bench has recently held that the only grounds on which legislation can be struck down under Article 14 are (a) improper classification; and (b) excessive delegation of power.²² While striking down the legislative provision (on the ground that the classification of officers by rank bore no rational nexus to the objectives of the statute in question), the Court referred to the ‘presumption of constitutionality of an enactment’ and ‘the fundamental nature and importance of the legislative process’,²³ and cautioned as follows:

The Court also needs to be mindful that a legislation does not become unconstitutional merely because there is another view or because another method may be considered to be as good or even more effective, like any issue of social, or even economic policy. It is well settled that the courts do not substitute their views on what the policy is.²⁴

Unfortunately, however, the constitutional bench in *Subramanian Swamy* has proceeded on a consideration of only those authorities which mandated a limited scope of review of legislative acts, and has not referred to any of the inconsistent decisions in order to resolve the conflicting approaches which the order of reference expressly acknowledged. Therefore, while this decision, having been rendered by a constitutional bench, may guide the Court in applying a comprehensible framework for deciding future cases involving legislative challenges, the limited analysis represents a missed opportunity to clarify and reconcile the Court’s precedents on this point. The Court did not shed any new light upon whether a meaningful distinction exists between adjudicating challenges to legislation, on the one hand, and administrative action, on the other. The observation of the earlier constitutional bench in *Ajay Hasia* having also been overlooked, it is likely that *Subramanian Swamy* is not the last word on this subject. At present, however, the decision implies that all other grounds of judicial review under Article 14 are available only when an administrative act is under challenge.

III. GROUNDS OF ADMINISTRATIVE REVIEW

The power of a court to review administrative action on the grounds that the action is ‘unreasonable’ or ‘arbitrary’ and therefore hit by the equality promise enshrined in Article 14 is now well established. This section examines the

contours and meaning of that power and whether it has been consistently applied.

The proposition that a decision that is arbitrary is necessarily unequal was articulated in three seminal decisions authored by Bhagwati J. The first of these, *EP Royappa v State of Tamil Nadu*,²⁵ dealt with a challenge by an Indian Administrative Service officer to an order transferring him to a temporary post. Bhagwati J, speaking for the Court, rejected the challenge and explained the scope and reach of Article 14 as follows:

Equality is a dynamic concept with many aspects and dimensions and it cannot be 'cribbed, cabined and confined' within traditional and doctrinaire limits. From a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14, and if it affects any matter relating to public employment, it is also violative of Article 16. Articles 14 and 16 strike at arbitrariness in State action and ensure fairness and equality of treatment.²⁶

Four years thereafter, in *Maneka Gandhi*, Bhagwati J also authored the lead judgment, noting that '[t]he principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness, pervades Article 14 like a brooding omnipresence'.²⁷ In the third judgment in this series, *Ramana Dayaram Shetty v International Airport Authority of India*,²⁸ Bhagwati J found that the principle that Article 14 strikes at arbitrariness was 'now well-settled'.²⁹

After these three judgments, the concept of 'unreasonableness' was further explained in *GB Mahajan v Jalgaon Municipal Council*,³⁰ where the Court was faced with a challenge to the manner in which a governmental authority sought to finance a project. *Ramana Dayaram Shetty* was relied upon and the Court noted that there is 'general misapprehension of the scope of the "reasonableness" test in administrative law' and that 'some phrases which pass from one branch of law to another ... carry over with them meanings that may be inapposite in the changed context'.³¹ In the context of the term 'reasonableness', the Court reproduced the following observation of Frankfurter J in *Tiller v Atlantic Coast Line Rail Road Company*:

A phrase begins life as a literary expression; its felicity leads to its lazy repetition; and repetition soon establishes it as a legal formula, indiscriminatingly used to express different and sometimes contradictory ideas.³²

The Court, thereafter, contrasting the administrative law test of reasonableness

with the test of reasonableness under tort law, explained the administrative law test. In its view the standard of reasonableness in administrative law, quoting Professor Wade, was:

[T]he standard indicated by a true construction of the Act which distinguishes between what the statutory authority may or may not be authorized to do. It distinguishes between proper use and improper abuse of power. It is often expressed by saying that the decision is unlawful if it is one to which no reasonable authority could have come.³³

This is understood as the essence of the *Wednesbury* unreasonableness test. Three years later, the Supreme Court delivered its judgment in *Tata Cellular v Union of India*,³⁴ which is generally regarded as laying down the scope of judicial review of administrative action. In this case, the Court considered a challenge to the manner in which licences were granted by the Department of Telecommunications to private players to offer cellular mobile telephone services. The Court noted that its role was limited to considering the manner in which decisions had been taken, and did not extend to considering whether a particular policy or particular decision taken in the fulfilment of that policy was fair. The grounds on which administrative action is subject to control by judicial review were identified as:

- (i) Illegality: this means the decisionmaker must understand correctly the law that regulates his decisionmaking power and must give effect to it.
- (ii) Irrationality, namely, *Wednesbury* unreasonableness.
- (iii) Procedural impropriety.³⁵

However, despite restricting the ground of challenge to ‘irrationality, namely, *Wednesbury* unreasonableness’,³⁶ the Court expanded this to state that the decision ‘must not only be tested by the application of the *Wednesbury* principle of reasonableness (including its other facets pointed out above) but must be free from arbitrariness’.³⁷ It is also worth noting that the decision in *Tata Cellular* did not cite the three aforementioned decisions of the Court authored by Bhagwati J, rendering an organised analysis of the scope of judicial review of administrative action under Article 14 problematic.

The decision in *Tata Cellular* is commonly cited as the authority which sets out the grounds on which administrative action is tested on the touchstone of Article 14. However, the contours and scope of the grounds established in that judgment as regards ‘irrationality, namely *Wednesbury* unreasonableness’ have not been carefully examined or applied. This has resulted in an uncertain body of law on the test of reasonableness (or more appropriately, unreasonableness) to be

applied in administrative law. Courts have used the terms ‘unreasonableness’, ‘irrationality’, and ‘arbitrariness’ interchangeably. This is perhaps in part because the terms themselves are abstract in meaning and imprecise in scope. The difficulty in providing a precise and definite meaning to these terms was acknowledged in *Shrilekha Vidyarthi v State of Uttar Pradesh*:

The meaning and true import of arbitrariness is more easily visualized than precisely stated or defined. The question, whether an impugned act is arbitrary or not, is ultimately to be answered on the facts and in the circumstances of a given case. An obvious test to apply is to see whether there is any discernible principle emerging from the impugned act and if so, does it satisfy the test of reasonableness. Where a mode is prescribed for doing an act and there is no impediment in following that procedure, performance of the act otherwise and in a manner which does not disclose any discernible principle which is reasonable, may itself attract the vice of arbitrariness. Every State action must be informed by reason and it follows that an act uninformed by reason, is arbitrary. Rule of law contemplates governance by laws and not by humour, whims or caprices of the men to whom the governance is entrusted for the time being. It is trite that ‘be you ever so high, the laws are above you’. This is what men in power must remember, always.³⁸

Five years after *Shrilekha Vidyarthi*, the same thought was expressed by Jeevan Reddy J, who referred (in a footnote in *McDowell*) to Frankfurter J’s statement in *Tiller v Atlantic Coast Line Railroad Co.*³⁹ Interestingly, this time Frankfurter J was cited with respect to the word ‘arbitrary’. In the past few years, *Shrilekha* has been reiterated in *East Coast Railway v Mahadev Appa Rao*⁴⁰ (in which the Court held that a failure to give reasons is a manifestation of arbitrariness), and Jeevan Reddy J’s footnote has been reproduced in *Special Reference No 1 of 2012*,⁴¹ leading us to the conclusion that the Court has (perhaps justifiably) forsaken any attempt to define an Article 14 test which is comprehensible and judicially manageable. This is borne out by the Court’s decision in *Special Reference No 1 of 2012*. After referring to the development of the case law on arbitrariness as a facet of judicial review under Article 14, the Court noted that it ‘has also alerted against the arbitrary use of the “arbitrariness” doctrine’⁴² and that ‘[s]ome decisions have commented on the doctrinal looseness of the arbitrariness test and tried keeping its folds within permissible boundaries’.⁴³ However, in its conclusion, the Court ultimately found an impossibly wide range of principles inherent in the fundamental concept of Article 14, stating as follows:

The [State] action has to be fair, reasonable, non-discriminatory, transparent, non-capricious, unbiased, without favouritism or nepotism, in pursuit of promotion of healthy competition and equitable treatment. It should conform to the norms which are rational, informed with reasons and guided by public interest, etc. All these principles are inherent in the fundamental conception of Article 14.⁴⁴

Another aspect that is unclear in the test of irrationality in the *Tata Cellular* judgment is whether and to what extent the ‘doctrine of proportionality’ applies. Although in *Jai Bhagwan v Commissioner of Police*,⁴⁵ the Supreme Court concluded that the doctrine of proportionality had been gradually accepted as a facet of judicial review, beginning with the Court’s decision in *Ranjit Thakur v Union of India*,⁴⁶ the issue bears closer examination. A close reading of *Ranjit Thakur* reveals that, while the Court included the doctrine of proportionality in the concept of judicial review, it did not explain the doctrine. In fact, the Court applied the test of *Wednesbury* unreasonableness in the case to set aside the order under challenge.⁴⁷ It is perhaps for this reason that in *McDowell*, the Court observed that ‘[t]he applicability of doctrine of proportionality even in administrative law sphere is yet a debatable issue’.⁴⁸

Yet the Court struck a different note in *Union of India v G Ganayutham*.⁴⁹ Jagannadha Rao J analysed the earlier decision in *Ranjit Thakur* and concluded that although the doctrine of proportionality was referred to, the Court arrived at its decision by applying irrationality in the sense understood by earlier decisions (ie, by applying *Wednesbury* unreasonableness).⁵⁰ He concluded, also based on *Tata Cellular* and *McDowell*, that it is still debatable whether proportionality is part of our administrative law. The Court in *Ganayutham* examined the issue of whether the doctrine of proportionality applied or whether the principle of *Wednesbury* unreasonableness still held the field. It noted that:

Whether in the case of administrative or executive action affecting fundamental freedoms, the courts in our country will apply the principle of ‘proportionality’ and assume a primary role, is left open, to be decided in an appropriate case where such action is alleged to offend fundamental freedoms. It will be then necessary to decide whether the courts will have a primary role only if the freedoms under Articles 19, 21 etc. are involved and not for Article 14.⁵¹

Thus, even as there is a lack of clarity as to whether the doctrine of proportionality applies as a facet of arbitrariness under Article 14 to test administrative decisions, there is also considerable doubt as to whether it replaces the principle of *Wednesbury* unreasonableness or coexists with it. In *State of Madhya Pradesh v Hazarilal*,⁵² the Supreme Court observed that ‘the legal parameters of judicial review have undergone a change. *Wednesbury* principle of unreasonableness has been replaced by the doctrine of proportionality.’⁵³ On the contrary, in *Chairman, All India Railway Recruitment Board v K Shyam Kumar*,⁵⁴ the Court was of the opinion that ‘it is not safe to conclude that the principle of *Wednesbury* unreasonableness has been replaced by the doctrine of proportionality’ and that both tests were to be applied

simultaneously.⁵⁵

There is therefore considerable lack of clarity on the test to be applied to challenge administrative decisions under Article 14. The contours of the term ‘irrationality’ (as used in *Tata Cellular*) are unclear for the reasons discussed above—the term is used interchangeably with other terms such as ‘unreasonable’ and ‘arbitrary’ and the Court has acknowledged the difficulty in defining the term. Further, it is also unclear whether irrationality has to be understood only in a *Wednesbury* sense, or whether it now encompasses a doctrine of proportionality. This lack of a judicially manageable test or standard becomes evident from an analysis of the Court’s decisions on some of the specific elements that have been held to constitute facets of arbitrariness or irrationality. Two examples should suffice.

1. ‘Undue Haste’ as a Ground of Review

In two relatively recent decisions, the Court has indicated that ‘undue haste’ in decision making can lead to an adverse inference being drawn against the authorities.⁵⁶ Had quick decision making per se led the Court to a presumption of *mala fides*, that would have been a startling comment both on the normal pace of government action, and on the suspicion attracted by the institutions of governance in India. However, a scrutiny of other judgments indicates that a decision made with unexpected haste would be quashed only if there are other attendant circumstances to demonstrate lack of bona fides or some other independent ground of review. For example, in *D Sudhakar (2) v DN Jeevaraju*⁵⁷ and *Balchandra L Jarkiholi v BS Yeddyurappa*,⁵⁸ the decision of the Speaker of a Legislative Assembly to disqualify members under the anti-defection provisions of the Constitution were quashed on the ground of denial of natural justice, which resulted in a hasty decision. Similarly, in *Bahadursinh Lakhubhai Gohil v Jagadishbhai M Kamalia*,⁵⁹ the Court quashed a decision of a newly appointed minister to grant a lease of land to a private person, citing the short period he was in office, presumably on the ground that this shows non-application of mind.

In *Chairman & MD, BPL Ltd v SP Gururaja*,⁶⁰ the Court has also expressly held that haste can be a ground for review only when the impugned action is held to be *mala fide*.⁶¹ Further, the Court noted that:

The question as to whether any undue haste has been shown in taking an administrative decision is

essentially a question of fact ... A decision which has been taken after due deliberations and upon due application of mind cannot be held to be suffering from malice in law on the ground that there had been undue haste on the part of the State and the Board.⁶²

This argument is a circular one: if an action is taken in haste, it is liable to be quashed because it is presumed to be mala fide, but it can be quashed on this ground only if it is mala fide. Ultimately, the only possible resolution of this conundrum perhaps lies in the almost ironic observation of Mukharji J, in *Narendra Kumar Maheshwari v Union of India*,⁶³ that '[s]peed is good; haste is bad, and it is always desirable to bear in mind that one should hasten slowly. However, whether in a particular case, there was haste or speed depends upon the objective situation or on overall appraisal of the situation.'⁶⁴

2. Promissory Estoppel

The applicability of the doctrine of promissory estoppel to administrative law was established fairly early in our constitutional jurisprudence.⁶⁵ Later judgments have located this ground of challenge in Article 14.⁶⁶ The scope of the doctrine of promissory estoppel was explained by the Court in *Motilal Padampat Sugar Mills Co Ltd v State of Uttar Pradesh*.⁶⁷ Upholding the challenge to the withdrawal of a sales tax exemption on the ground that the petitioner had set up an industry relying upon the representation of the authorities that the exemption would be available for a fixed period, Bhagwati J described the doctrine as derivative of the rule of law:

It is indeed the pride of constitutional democracy and rule of law that the Government stands on the same footing as a private individual so far as the obligation of the law is concerned: the former is equally bound as the latter. It is indeed difficult to see on what principle can a Government, committed to the rule of law, claim immunity from the doctrine of promissory estoppel ... why should the Government not be held to a high standard of rectangular rectitude while dealing with its citizens?⁶⁸

However, despite the lofty ideals upon which the doctrine was held to rest, the Court provided for a 'public interest' exception. In the words of the Court:

When the Government is able to show that in view of the facts as have transpired since the making of the promise, public interest would be prejudiced if the Government were required to carry out the promise, the Court would have to balance the public interest in the Government carrying out a promise made to a citizen which has induced the citizen to act upon it and alter his position and the public interest likely to suffer if the promise were required to be carried out by the Government and determine which way the equity lies.⁶⁹

This 'overriding public interest' exception recognised in *Motilal Padampat* has been used in subsequent cases to dilute the scope of the doctrine.⁷⁰ A case in point (factually similar to *Motilal Padampat*) is *Shree Sidhballi Steels Pvt Ltd v State of Uttar Pradesh*,⁷¹ wherein the Court upheld the withdrawal of a power tariff rebate (granted as an incentive for industrialisation of hill areas), reverting to a more restrictive scrutiny attracted by policy decisions and based on classification.

These illustrations suggest that the Court's Article 14 jurisprudence cannot be explained by enumerating a catalogue of tests or indicia that are predictable and consistent. The Court itself has eschewed a doctrinaire approach and favoured a more flexible method of adjudication based on 'the facts and circumstances of

the case'. While this is understandable given the tremendous diversity of situations to which the Article extends, it does not lend itself to any meaningful analysis by applying tests or indicia alone.

IV. THE FORMS OF ADMINISTRATIVE ACTIONS

In this context, perhaps the judgments of the Supreme Court can be more clearly understood by classifying them according to the form of administrative action. The range of executive actions giving rise to Article 14 claims is vast—from the general (eg, challenges to delegated legislation, economic policy decisions, etc) to the specific (eg, grant of licences, withdrawal of benefits, personal liberty cases, and public service cases). An analysis of the decisions along these lines suggests that the Court generally (but not always) accords a higher level of deference to the authorities in the former category and exercises greater scrutiny in the latter.

This distinction is expressly acknowledged in *Union of India v Cynamide India Ltd*,⁷² which concerned price fixation in relation to drugs. While holding that price fixation would ordinarily attract a relatively low level of Article 14 scrutiny, Chinnappa Reddy J distinguished cases of price fixation which are legislative (ie, of general application) from those which are quasi-judicial or administrative in character, where a more thorough scrutiny would be justified (such as specific cases of acquisition or requisition of property).⁷³ Another example of this tendency to distinguish different types of actions is in relation to delegated legislation, where the Court appears to take an approach that is closer to the scope of challenge of plenary legislation than of other administrative actions. In *Indian Express Newspapers v Union of India*,⁷⁴ the Court held that subordinate legislation does not carry the same degree of immunity which is enjoyed by a statute passed by a competent legislature, and (in addition to the grounds of challenge available in the case of plenary legislation) may also be questioned on the ground that it does not conform to the statute under which it is made or that it is contrary to some other statute. However, with respect to a challenge on the ground of unreasonableness, the Court adopted tests similar to those laid down for plenary legislation, namely 'manifest arbitrariness',⁷⁵ or that it is 'so arbitrary that it could not be said to be in conformity with the statute or that it offends Article 14 of the Constitution'.⁷⁶ In this context, the Court also held that, unlike administrative actions, delegated legislation cannot be

challenged on natural justice grounds. The Court's application of differing standards of scrutiny, dependent upon classification of administrative acts by the generality of their application, becomes apparent from the following passage in its judgment:

A distinction must be made between delegation of a legislative function in the case of which the question of reasonableness cannot be enquired into and the investment by statute to exercise particular discretionary powers. In the latter case the question may be considered on all grounds on which administrative action may be questioned, such as, non-application of mind, taking irrelevant matters into consideration, failure to take relevant matters into consideration, *etc. etc.* On the facts and circumstances of a case, a subordinate legislation may be struck down as arbitrary or contrary to statute if it fails to take into account very vital facts which either expressly or by necessary implication are required to be taken into consideration by the statute or, say, the Constitution. This can only be done on the ground that it does not conform to the statutory or constitutional requirements or that it offends Article 14 or Article 19(1)(a) of the Constitution. It cannot, no doubt, be done merely on the ground that it is not reasonable or that it has not taken into account relevant circumstances which the Court considers relevant.⁷⁷

More recently, in *JK Industries v Union of India*,⁷⁸ the Court elaborated upon *Indian Express* and held that a challenge to the vires of subordinate legislation should be answered by asking whether the power given to the rule-making authority has been used for the purpose for which it was given. The approach of the Court was clear from its observation that it would begin with a presumption that the subordinate legislation is intra vires, and read it down only if that presumption is successfully rebutted by the challenger. Another way of looking at this is to say that (a) a 'presumption of legality' operates with respect to delegated legislation (which resembles the notion of presumption of constitutionality with respect to primary statutes); and (b) that any subordinate legislation which is in conformity with the parent statute and not inconsistent with any other statute is entitled to the same level of deference as parliamentary legislation. As examined earlier in this chapter, one of the tests laid down by the Court in respect of parliamentary legislation is the test of 'manifest arbitrariness'. It is significant that exactly the same formulation has been used in respect of delegated legislation in *Indian Express* and explained in *Sharma Transport v Govt of Andhra Pradesh*,⁷⁹ where again the distinction between 'executive action' and 'delegated legislation' was expressly made.

The Court's response to challenges to government policy, particularly economic policy, have been of a similar effect. The disinvestment of a public sector undertaking was challenged by its employees in *BALCO Employees' Union (Regd) v Union of India*.⁸⁰ The challenge was repelled by the Court, holding that it was neither within the domain of the courts nor the scope of the

judicial review to inquire whether a particular public policy is wise, or whether a more scientific or logical public policy can be evolved. In reaching this conclusion, the Court relied upon several precedents which dealt with primary legislation rather than executive actions, and expressly drew an analogy between deference to the 'of Parliament in enacting a law' and a policy decision of the administrative authority.⁸¹ One of the judgments relied upon in *BALCO* was *State of Madhya Pradesh v Nandlal Jaiswal*.⁸² This case concerned the liquor policy of the State of Madhya Pradesh, and here the Court had held that executive actions related to economic activities are entitled to greater latitude than those touching upon civil rights. The Court noted that the greater latitude allowed to legislation relating to economic matters must also apply in relation to executive action relating to economic activities, 'though the executive decision may not be placed on as high a pedestal as legislative judgment in so far as judicial deference is concerned'.⁸³ The Court further noted the need, even while adjudging the constitutional validity of an executive decision relating to economic matters, to grant a certain measure of freedom or 'play in the joints' to the executive, and therefore for the Court only to interfere if the policy decision is 'patently arbitrary, discriminatory or *mala fide*',⁸⁴ tests which are more commonly used in cases of challenges to statutes.⁸⁵

An interesting case that lies at the intersection of policy and subordinate legislation is *Secretary, Ministry of Chemicals & Fertilizers, Govt of India v CIPLA*.⁸⁶ The challenge in this case was to the inclusion of certain named drugs within the scope of price control under the Drugs (Price) Control Order 1995. One of the grounds of challenge was that the drugs in question did not fall within the Span of Control defined in the Drug Policy document published by the government. Although the Court held that non-conformity with policy would not invalidate the statutory order, it did indicate that wholesale departure from the published Policy would render the order *ultra vires* Article 14 on the ground of arbitrariness.⁸⁷ This judgment is also thus an example of great deference being shown to the policy decision of the executive, but a far greater degree of scrutiny being employed when that policy is sought to be applied in particular cases.

In apparent contrast to these cases is *Nandini Sundar v State of Chhattisgarh*,⁸⁸ where the Court passed a series of directions against the Union of India and the State of Chhattisgarh with regard to measures to deal with Left-wing extremism in the State. The first section of the Court's judgment contains an elaborate articulation of political and economic philosophy, which can be presumed to have informed the Court's ultimate decision. However, even in that case, the Court's operative Article 14 reasoning was principally fashioned in

traditional classification/equality terminology, perhaps revealing its inherent discomfort with a more substantive scope of review. The Court held that appointing tribal youth with little education as Special Police Officers engaged in counter-insurgency activities is violative of Article 14 and Article 21. It was violative of Article 14 as subjecting such youth to the same levels of dangers as members of the regular force with better educational backgrounds, training, and capacity to benefit from the training is 'irrational, arbitrary and capricious'.⁸⁹ It was violative of the Article 21 rights of others in society to have such ill-equipped youth engaged in counter-insurgency activities.⁹⁰ The Court also held that the practice of paying such youth an 'honorarium' and appointing them only for temporary periods were further violations of Article 14 and Article 21.⁹¹

An examination of the Court's judgments in the field of tenders is also instructive in this regard. While the authorities have been permitted a high degree of latitude in formulating qualifications, conditions of tender, etc (which are of general application), the Court has elaborately and minutely examined the decision to award a tender to a particular bidder and demanded strict compliance with tender conditions. In the former category, the Court would examine only the questions of *mala fides* and misuse of statutory powers. Referring to the principles laid down in *Tata Cellular*, the Court has held in *Michigan Rubber (India) Ltd v State of Karnataka*,⁹² that in fixation of the value of a tender, determination of tender conditions and award of a tender, the executive is entitled to great latitude, subject to proven arbitrariness, unreasonableness, malice, misuse of statutory powers, or prejudice to the public interest.

In *Association of Registration Plates v Union of India*⁹³ and *Shimit Utsch India Private Ltd v West Bengal Transport Infrastructure Development Corporation Ltd*,⁹⁴ the Court was concerned with tenders for the supply of high-security registration plates for vehicles. In the first decision, the Court dismissed a challenge to tender conditions on the ground that they favoured a party that had entered into a foreign collaboration, holding that the grounds of review are limited, and that the said decision was not vitiated by *mala fides*. However, some of the States subsequently changed these tender conditions, and a fresh challenge was mounted. Consistent with its restrictive approach, the Court held in the second decision that the authorities were free to cancel the tender and change the conditions, subject only to the test of *mala fides* and misuse of statutory power. The Court has expressly distinguished between the authority's duty to adhere to tender conditions and the power to cancel the tender process altogether in light of a new policy. The Court held that while the tendering authority is bound to give effect to essential conditions of eligibility in a tender document, it still has

administrative discretion to cancel the entire tender process to give effect to a new policy in public interest so long as such action is not brought about by ulterior motives or otherwise vitiated by arbitrariness or irrationality or by way of a violation of statutory law.⁹⁵

While authorities are given this latitude in formulating tender conditions, the Court has been consistent in requiring adherence to the conditions once framed, and has entered into fairly detailed scrutiny of such administrative decisions. In *Tata Cellular*⁹⁶ and *New Horizons Ltd v Union of India*,⁹⁷ for example, the Court entered into a substantive review of the administrative decision regarding qualification of a bidder. Similarly, in *West Bengal State Electricity Board v Patel Engineering*,⁹⁸ the Court upheld the decision of the authorities not to permit a bidder to rectify mistakes in its bid document, holding that permitting any relaxation of the tender conditions would ‘provide scope for discrimination, arbitrariness and favouritism which are totally opposed to the rule of law and our constitutional values’.⁹⁹ Even where power to relax or waive a rule or a condition exists under the applicable rules, the Court held that it has to be done strictly in compliance with those rules. Similarly, judgments in cases of allotment of land, petrol pumps, and other ‘government largesse’ reveal a detailed inquiry into the facts and the decisionmaking process, which contrasts with the delegated legislation/economic policy line of cases discussed above.¹⁰⁰

An important qualification to this general tendency has emerged in recent times with respect to ‘integrity cases’. Where the suspicions of the Court have been raised about the bona fides of governmental action or where the Court has considered it necessary to preserve institutional integrity, a far higher level of scrutiny has been undertaken. An example is *Centre for Public Interest Litigation v Union of India* (the 2G judgment).¹⁰¹ Although the challenge here was to the government policy to open bids for spectrum allocation on a ‘first-come-first-served’ basis, the Court exercised a level of scrutiny not normally associated with a policy decision or a tender procedure. This can perhaps be explained by the fact that the award of spectrum was also subject to criminal investigation.¹⁰² Another example is *Manohar Lal Sharma v Principal Secretary*,¹⁰³ where the Court set aside coal block allocations made over a period of almost twenty years by the Union government. In addition to finding that the procedure adopted in the allocation of coal blocks did not comply with mandatory provisions of the Mines and Minerals (Development and Regulation) Act 1957 and the Coal Mines (Nationalisation) Act 1973, the Court examined the decisionmaking process in light of the ‘public interest’ involved in the distribution of ‘national wealth’. The Court concluded in forceful language that

the Screening Committee (on whose recommendations the Union government acted in making coal block allocations) had ‘never been consistent’, ‘there [was] no proper application of mind’ and ‘there was no transparency and guidelines have seldom guided it’, ‘all resulting in unfair distribution of the national wealth’.¹⁰⁴

The peculiar position of ‘integrity institutions’ has been emphasised by the Court in *Centre for Public Interest Litigation v Union of India*.¹⁰⁵ While reviewing the legality of the appointment of the Central Vigilance Commissioner, the Court held that both eligibility criteria of the candidate as well as the decisionmaking process leading to the recommendation are relevant. The decision to recommend, in the Court’s view, has to be an informed decision, keeping in mind the important functions the Commissioner is required to perform. The Court noted that if a statutory body like the High-Powered Committee (HPC)¹⁰⁶ fails to consider the relevant material or takes into account irrelevant circumstances then its decision would stand vitiated on the ground of official arbitrariness. The HPC had to take into consideration what is good for the institution and not what is good for the candidate. And the touchstone, when institutional integrity is in question, is ‘public interest’ which has got to be taken into consideration by the HPC. Examples such as these demonstrate that the nature of the executive power in question is a very relevant (if not determinative) factor in the Court’s adjudication of administrative review cases under Article 14 of the Constitution.

V. CONCLUSION

Given the judicially acknowledged lack of precision in defining standards and parameters, administrative review under Article 14 appears to be better classified along the nature and forms of administrative action rather than the grounds of administrative review. Broadly speaking, the level of scrutiny attracted by a more generally applicable administrative act is lower than that of an instrument that affects relatively few persons. In performing administrative review, we have seen that the Court has articulated a set of principles to adjudicate diverse challenges and then struggled to fit different levels of scrutiny within a common framework of tests and parameters, leading to inconsistencies in the application of the tests. Where some minimal degree of clarity has been achieved (such as in the approach to delegated legislation), it is by express acknowledgement and conscious appreciation of the peculiar nature of the executive act being

considered. It would be in the interest of clarity and consistency to take this process further and lay down different standards of review applicable to different situations. Our analysis suggests that the body of case law already gives effect to these different standards. However, applying them within a common language of ‘irrationality’, ‘unreasonableness’, and ‘arbitrariness’ has led to inconsistencies in judicial pronouncements. A more transparent enunciation of the Court’s perspective would be entirely logical and follows from a conscious recognition of the diversity of challenges comprehended within Article 14. This would lend clarity to the law, and perhaps take us closer to realising the Court’s declaration, as far back as in 1967, that the scope of Article 14 requires no further elucidation.¹⁰⁷

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¹ *State of Andhra Pradesh v Nalla Raja Reddy* AIR 1967 SC 1458 [24].

² *Maneka Gandhi v Union of India* (1978) 1 SCC 248 [7].

³ *Maneka Gandhi* ([n 2](#)) [24].

⁴ *Subramanian Swamy v Director, Central Bureau of Investigation* (2014) 8 SCC 682.

⁵ (1996) 3 SCC 709.

⁶ *McDowell & Co* ([n 5](#)) [43].

⁷ *McDowell & Co* ([n 5](#)) [43].

⁸ It should be noted, however, that the applicability of proportionality as a test to examine the validity of any legislative restriction imposed upon a fundamental right was upheld even in this case. The fundamental rights guaranteed by Article 19(1) of the Constitution are subject to ‘reasonable restrictions’ under Articles 19(2) to 19(6). In this context, the *McDowell* judgment emphasises that adjudication of ‘reasonableness’ under Articles 19(2) to 19(6) would include examination under the doctrine of proportionality, whereas adjudication of ‘reasonableness’ in an Article 14 context would not.

⁹ *Ashoka Kumar Thakur v Union of India* (2008) 6 SCC 1 [219].

¹⁰ *KT Plantation (P) Ltd v State of Kerala* (2011) 9 SCC 1 [205].

¹¹ *Ajay Hasia v Khalid Mujib Sehravardi* (1981) 1 SCC 722.

¹² *Ajay Hasia* ([n 11](#)) [16].

¹³ (2004) 4 SCC 311.

¹⁴ *Mardia Chemicals* ([n 13](#)) [64]. The reasons for so holding, as enumerated in paragraph 64 of the judgment, clearly go beyond an examination of legislative competence, excessive delegation, or improper classification, as suggested in the *McDowell* line of cases: see nn 8–15.

¹⁵ (1998) 2 SCC 1.

¹⁶ (2004) 12 SCC 588.

¹⁷ *Virender Singh Hooda* ([n 16](#)) [68].

¹⁸ See *Bidhannagar (Salt Lake) Welfare Assn v Central Valuation Board* (2007) 6 SCC 668 [37]; *AP Dairy Development Corporation Federation v B Narasimha Reddy* (2011) 9 SCC 286 [29].

¹⁹ The test of ‘manifest arbitrariness’ has also been laid down in *Bombay Dyeing & Mfg Co Ltd v*

Bombay Environment Action Group (2006) 3 SCC 434 [205] as the appropriate test for Article 14 review of legislation, although the Court was there concerned with subordinate legislation.

²⁰ (2005) 2 SCC 317.

²¹ *Subramanian Swamy* ([n 20](#)) [6].

²² *Subramanian Swamy* ([n 4](#)) [49].

²³ *Subramanian Swamy* ([n 4](#)) [49].

²⁴ *Subramanian Swamy* ([n 4](#)) [49].

²⁵ (1974) 4 SCC 3.

²⁶ *EP Royappa* ([n 25](#)) [85].

²⁷ *Maneka Gandhi* ([n 2](#)) [7].

²⁸ (1979) 3 SCC 489.

²⁹ *Ramana Dayaram Shetty* ([n 28](#)) [21].

³⁰ (1991) 3 SCC 91.

³¹ *GB Mahajan* ([n 30](#)) [38].

³² 318 US 54 (1943) 69.

³³ *GB Mahajan* ([n 30](#)) [41] citing HWR Wade, *Administrative Law* (6th edn, Oxford University Press 1988) 407.

³⁴ (1994) 6 SCC 651.

³⁵ *Tata Cellular* ([n 34](#)) [77].

³⁶ *Tata Cellular* ([n 34](#)) [77]. The Court also recorded that further grounds could be added with time and referred to the ground of proportionality, which is discussed separately and more fully below.

³⁷ *Tata Cellular* ([n 34](#)) [94].

³⁸ *Shrilekha Vidyarthi v State of Uttar Pradesh* (1991) 1 SCC 212 [36].

³⁹ *McDowell & Co* ([n 5](#)) [43].

⁴⁰ (2010) 7 SCC 678.

⁴¹ (2012) 10 SCC 1.

⁴² *Special Reference No 1 of 2012* ([n 41](#)) [105].

⁴³ *Special Reference No 1 of 2012* ([n 41](#)) [106].

⁴⁴ *Special Reference No 1 of 2012* ([n 41](#)) [107].

⁴⁵ (2013) 11 SCC 187.

⁴⁶ (1987) 4 SCC 611.

⁴⁷ *Ranjit Thakur* ([n 46](#)) [25], [27]:

It [the decision] should not be vindictive or unduly harsh. It should not be so disproportionate to the offence as to shock the conscience and amount in itself to conclusive evidence of bias. The doctrine of proportionality, as part of the concept of judicial review, would ensure that ... if the decision of the court even as to sentence is an outrageous defiance of logic, then the sentence would not be immune from correction. Irrationality and perversity are recognised grounds of judicial review ... In the present case the punishment is so strikingly disproportionate as to call for and justify interference.

⁴⁸ *McDowell & Co* ([n 5](#)) [43].

⁴⁹ (1997) 7 SCC 463.

⁵⁰ The same view was also reiterated by Jagannadha Rao J in a later judgment: *Om Kumar v Union of*

India (2001) 2 SCC 386.

⁵¹ *G Ganayutham* ([n 49](#)) [31].

⁵² (2008) 3 SCC 273.

⁵³ *Hazarilal* ([n 52](#)) [11].

⁵⁴ (2010) 6 SCC 614.

⁵⁵ *K Shyam Kumar* ([n 54](#)) [30].

⁵⁶ *NOIDA Entrepreneurs Association v NOIDA* (2011) 6 SCC 508 [20], [27], [28], [30]; *Zenit Mataplast Private Ltd v State of Maharashtra* (2009) 10 SCC 388 [20], [39], [40], [42].

⁵⁷ (2012) 2 SCC 708 [67], [75], and [76].

⁵⁸ (2011) 7 SCC 1 [125], [127].

⁵⁹ (2004) 2 SCC 65 [24]–[25].

⁶⁰ (2003) 8 SCC 567.

⁶¹ *SP Gururaja* ([n 60](#)) [34].

⁶² *SP Gururaja* ([n 60](#)) [35].

⁶³ (1990) Supp SCC 440.

⁶⁴ *Narendra Kumar Maheshwari* ([n 63](#)) [79].

⁶⁸ *Motilal Padampat Sugar Mills Co Ltd* ([n 67](#)) [24].

⁶⁹ *Motilal Padampat Sugar Mills Co Ltd* ([n 67](#)) [24].

⁶⁵ *Union of India v Anglo Afghan Agencies* AIR 1968 SC 718.

⁶⁶ *Dai-Ichi Karkaria Ltd v Union of India* (2000) 4 SCC 57. See also *Kusumam Hotels (P) Ltd v Kerala SEB* (2008) 13 SCC 213; *Shree Sidhballi Steels Ltd v State of Uttar Pradesh* (2011) 3 SCC 193.

⁶⁷ (1979) 2 SCC 409.

⁷⁰ See *Kasinka Trading v Union of India* (1995) 1 SCC 274; *Shrijee Sales Corporation v Union of India* (1997) 3 SCC 398.

⁷¹ (2011) 3 SCC 193.

⁷² *Indian Express Newspapers* ([n 74](#)) [78].

⁷² (1987) 2 SCC 720.

⁷³ *Cynamide India Ltd* ([n 72](#)) [4], [7].

⁷⁴ (1985) 1 SCC 641.

⁷⁵ *Indian Express Newspapers* ([n 74](#)) [75].

⁷⁶ *Indian Express Newspapers* ([n 74](#)) [77].

⁷⁸ (2007) 13 SCC 673.

⁷⁹ (2002) 2 SCC 188.

⁸⁰ (2002) 2 SCC 333.

⁸¹ *BALCO Employees' Union* ([n 80](#)) [34].

⁸² (1986) 4 SCC 566.

⁸³ *Nandlal Jaiswal* ([n 82](#)) [34].

⁸⁴ *Nandlal Jaiswal* ([n 82](#)) [34].

⁸⁵ These precedents have been followed in the recent decision in *Arun Kumar Agrawal v Union of India* (2013) 7 SCC 1.

⁸⁶ (2003) 7 SCC 1.

⁸⁷ *CIPLA* ([n 86](#)) [4.1].

⁸⁸ (2011) 7 SCC 547.

⁸⁹ *Nandini Sundar* ([n 88](#)) [74].

⁹⁰ *Nandini Sundar* ([n 88](#)) [75].

⁹¹ *Nandini Sundar* ([n 88](#)) [79].

⁹² (2012) 8 SCC 216.

⁹³ (2005) 1 SCC 679.

⁹⁴ (2010) 6 SCC 303.

⁹⁵ *Shimit Utsch India Private Ltd* ([n 94](#)) [64].

⁹⁶ *Tata Cellular* ([n 34](#)) [129], [131], [154].

⁹⁷ *New Horizons Ltd v Union of India* (1995) 1 SCC 478 [40].

⁹⁸ (2001) 2 SCC 451 [24].

⁹⁹ *Patel Engineering* ([n 98](#)) [24].

¹⁰⁰ *Sriniketan Cooperative Group Housing Society Ltd v Vikas Vihar Cooperative Group Housing Society Ltd* (1989) 3 SCC 368; *Y Srinivasa Rao v J Veeraiah* (1992) 3 SCC 63; *Angarki Cooperative Housing Society Ltd v State of Maharashtra* (1997) 9 SCC 713.

¹⁰¹ (2012) 3 SCC 1.

¹⁰² It should be noted, however, that the order of the Court was not based on *mala fides* but on its reasoning that auction is the only permissible mode of disposal of natural resources, a finding which has been substantially diluted by the constitutional bench in *Special Reference No 1 of 2012* ([n 41](#)).

¹⁰³ (2014) 9 SCC 516.

¹⁰⁴ *Manohar Lal Sharma* ([n 103](#)) [163].

¹⁰⁵ (2011) 4 SCC 1.

¹⁰⁶ The High Powered Committee, under the Central Vigilance Commission Act 2003, s 4(1), which recommends the appointment of the CVC.

¹⁰⁷ *Nalla Raja Reddy* ([n 1](#)) [24].

PART V

FEDERALISM

CHAPTER 25

THE FEDERAL SCHEME

MAHENDRA PAL SINGH

I. INTRODUCTION

ONE way of classifying a constitution is whether it is unitary or federal. Broadly speaking, in a unitary constitution the totality of the powers of the State is vested in one government, while in a federal constitution it is divided between a government for the whole country and a number of governments for its different regions. After initial differences on whether the Constitution of India is unitary or federal,¹ it has finally been decided that it is federal and that federalism is one of its basic features, which cannot be changed even by an amendment of the Constitution.² The initial differences and the final conclusion indicate that finer issues are involved in the identification of a constitution. Every constitution responds to the background, surrounding conditions, and future projection of the country of its making. The Constitution of India is no exception to this rule. This chapter studies the Constitution's federal scheme. It first provides an overview of the basic framework and distribution of powers between the Centre and States. It then turns to three specific topics—the identity of States, legislative competence, and regional emergencies—to demonstrate the centralised character of Indian federalism. It concludes with some reflections on how we should understand and judge this federal arrangement.

II. THE FEDERAL FRAMEWORK

The commonly accepted features of a federal constitution are: (i) existence of two levels of government: a general government for the whole country and two or more regional governments for different regions within that country; (ii) distribution of competence or powers—legislative, executive, judicial, and financial—between the general and the regional governments; (3) supremacy of the constitution—that is, the foregoing arrangements are not only incorporated in the constitution but they are also beyond the reach of either government to the

extent that neither of them can unilaterally change nor breach them; (4) dispute resolution mechanism for determining the competence of the two governments for exercising any power or for performing any function. We may examine the federal scheme in the Constitution of India on the above parameters.

1. Central and Regional Governments

The Constitution designates the Union government as the Union of India and the regional governments as States, each one of the latter having a name. Initially they were divided into three categories—Part A, Part B, and Part C States—according to their historical antecedents. But with the reorganisation of the States in 1956 the entire territory of India was divided into States and the Union Territories. They are all named along with their territorial dimensions in Schedule I of the Constitution. Their number changes with the reorganisation of States from time to time. Presently, there are twenty-nine States and seven Union Territories. With the exception of the State of Jammu and Kashmir, which has a special status under the Constitution and has its own Constitution,³ the rest of the States are governed by the Constitution of India and have no separate constitutions of their own. However, in view of the special features of some of the States, the Constitution makes special provisions for them not applicable to other States.⁴ Such an approach may be termed as asymmetric federalism.⁵ As regards the Union Territories, though all of them are expected to be subject to the direct administration of the Union of India, the Constitution also makes special provisions for some of them.⁶ Special arrangements are also made separately for the Scheduled and Tribal Areas.⁷ While the provisions of the Fifth Schedule apply to the Scheduled Areas and Scheduled Tribes in any State, the provisions of the Sixth Schedule apply to the areas in the States of Assam, Meghalaya, Tripura, and Mizoram.

The fluctuation in the number of States raises the question of whether the States can be put out of existence, resulting in the absence of the first feature of a federal constitution from the Constitution of India. Although no possibility of that kind has ever been entertained in practice, it does not even seem to be a theoretical possibility. According to Article 1(1) of the Constitution, ‘India, that is Bharat, shall be a Union of States.’ So long as this Article stands as it is, India must have more than one State. The question of whether Article 1(1) may be deleted or amended to read ‘India, that is Bharat, shall be a Union’ or ‘unitary State’ stands answered by the basic structure doctrine. Well before *Kesavananda Bharati v State of Kerala*,⁸ which laid down the basic structure limit on amendments, Conrad cited Article 1(1) to argue that the basic structure of the Constitution was unamendable and the Court cited him among others to arrive at its conclusion.⁹ Subsequent decisions have confirmed that federalism is part of

the basic structure of the Constitution and is therefore beyond the power of amendment.¹⁰ While federalism is a part of the basic structure, two features of the Constitution—Parliament's power to alter State boundaries and the representation of the States in Parliament—show the centralisation feature of Indian federalism. This will be subsequently examined.

A third level of governments at the village and municipal levels has also been introduced into the Constitution by way of the Seventy-third and Seventy-fourth Amendments. This level was already envisaged in one of the Directive Principles of State Policy,¹¹ and was within the jurisdiction of the States under Entry 5 of List II of Schedule VII to the Constitution. While these Amendments had hoped to strengthen local government in India, strictly speaking, local government bodies remain within the competence of the States for devolution of powers and functions.¹² For this reason they have not yet been able to develop an effective third tier of government and are, therefore, not of much interest from the point of view of the federal scheme.¹³

2. Distribution of Powers

The totality of the powers of the State is divided into legislative, executive, judicial, and financial. In a federal constitution, such powers are shared between the central and the regional governments. No universal rule or general principle for sharing these powers exists, and it is often hard to separate matters of common concern from those involving local needs. Quite often matters of local interest become matters of general interest or of interest to more than one region and, therefore, such matters may be placed in a third category over which both the central and the regional governments may exercise powers as the occasion demands. Another recommended general rule is that while the Union government should have enumerated powers the rest may be left to the regional governments. But it is easier said than practised, for some powers need to be within the jurisdiction of both. Moreover, over time, matters may emerge which are incapable of being handled by the regional governments. In that case they must be handled by the Union government. In view of such reasons no hard-and-fast rule of universal application can be prescribed for the distribution of powers between the central and the regional governments. In this subsection, we will focus on how the Indian Constitution distributes powers between the Union and the States.

a. Legislative Powers

The distribution of legislative powers is primarily given in [Chapter 1](#) of Part XI of the Constitution. Exceptionally, it may also be found in other provisions.¹⁴ The first provision of this Part—Article 245—prescribes the territorial jurisdiction of the Union Parliament and the State legislatures: the former can make laws for the whole of India or any part of it, while the latter can make laws for the territory of that State or any part of it.¹⁵ Though the laws of Parliament cannot be invalidated on grounds of their extraterritorial operation, Parliament cannot make extraterritorial laws.¹⁶ State laws may also have extraterritorial operation if a nexus may be established between the subject matter of law and the legislating State.¹⁷ The legislative subjects are quite exhaustively enumerated in three lists: List I—Union List; List II—State List; and List III—Concurrent List. No tax entry is, however, included in List III. They consist of ninety-seven,

sixty-six, and forty-seven items, respectively. The total existing number of items varies in each list because of amendments. Article 246 of the Constitution lays down the law for the exercise of power over these subjects. Briefly, Parliament has the exclusive power to make laws on any subject included in List I, overriding the powers of the State legislatures to make law on any subject included in List II or List III—that is, if a subject can possibly be read in List I as well as in any of the other two lists it is deemed to be included only in List I and not in any of the other two lists. Secondly, if a subject is included in List III, Parliament has the power to make law on that subject without regard to its inclusion in List II. Thirdly, the State legislatures have the power to make law on any subject included in List II, subject to the condition that that subject or any part of it is not included in List I or List III. Thus the legislative powers assigned to the Union have primacy over the powers assigned to the States. Finally, Parliament has the exclusive power to make law on any subject for any territory not included in the territory of any State. The legislative subjects including taxes not listed in any of the three lists—that is, the residuary subjects—have been assigned exclusively to Parliament.

In the foregoing arrangement, Parliament clearly emerges in a dominating position as against the State legislatures. The legislative items included within List I are much more numerous—ninety-seven compared to sixty-six in List II. They are also much more important than the ones in the other two lists. In case of conflict, items in List I override items in Lists II and III and items in List III override those in List II. Thus List II becomes the least important. Finally, any residuary subject also has precedence over the powers of the State legislatures in Lists II and III.¹⁸ For items in List III, if the State law conflicts with the law of Parliament the latter prevails over the former, though with the prior approval of the President, State law may also prevail over the law of Parliament.¹⁹ Parliament's powerful place in comparison with the States will be explored further in a later section. For now, it is important to note that in certain cases Parliament may override the foregoing distribution of legislative powers between the Union and the States. For example, during an emergency arising from war, external aggression, or armed rebellion Parliament may make laws on any item in List II;²⁰ Parliament may make law on any subject 'for implementing any treaty, agreement or convention with any country or countries or any decision made at any international conference, association or other body';²¹ if the President of India is satisfied that the government of any State cannot be exercised in accordance with the provisions of the Constitution, he may assume all the powers of the State and authorise Parliament to make laws for that

State;²² and so forth.²³ In view of these exceptions, doubts are sometimes expressed over whether the distribution of legislative powers between the Union and the States has any meaning. The working of the Constitution so far, however, establishes that the primary distribution of legislative powers is the norm and the exceptions have been invoked only in limited cases.

b. *Executive Powers*

The executive power of the Union and States vests respectively in the President of India and the Governor of every State and is exercised by them either directly or through officers subordinate to them in accordance with the Constitution.²⁴ While the President is elected by an electoral college comprising elected members of Parliament and elected members of State Legislative Assemblies, the Governor of a State is appointed by the President and though his term of office is five years, he holds his office during the pleasure of the President.²⁵ With some exceptions, the executive power is divided between the Union and the States on the same lines as the legislative powers. Accordingly, the executive power of the Union extends to all those matters on which Parliament has the power to make laws, as well as to matters on which it may exercise such power by virtue of any treaty or agreement. However, the executive power of the Union does not extend to matters included in List III unless otherwise provided in the Constitution or any law of Parliament.²⁶ Correspondingly, the executive power of the States extends to matters on which State legislatures have the power to make laws, subject to the condition that on matters in List III it is subject to the Union's power, as mentioned above.²⁷

Some of the exceptions that the Constitution makes to this distribution of powers include the following: the exercise of State executive power must ensure compliance with the laws of Parliament and existing laws applicable in the concerned State, and for this purpose the Union has the executive power to give such directions to any State as it considers necessary;²⁸ in the exercise of its executive power the Union may also give directions to any State for the construction and maintenance of means of communication of national or military importance as well as for the protection of railways within the State;²⁹ and so forth.³⁰

c. Judicial Power

Unlike the legislative and executive powers, the Constitution does not divide judicial power between the Union and the States, although in the textual arrangement of constitutional provisions it places the Union and State judiciary separately. The former includes the Supreme Court, while the latter includes the High Courts and the subordinate courts.³¹ It also authorises Parliament to establish additional courts for the better administration of Union laws and for the creation of an all-India judicial service.³² Except for the appointment of judges of the Supreme Court and the High Courts, which is made by the President of India, appointment of administrative staff and the budget of the Supreme Court are within the jurisdiction of the Union and of the High Courts and subordinate courts within the jurisdiction of the States. But the same courts administer the laws of the Union as well as of the States.³³ In the allocation of legislative powers to the Union and the States, the Supreme Court for all purposes and the High Courts with some exceptions are placed within the exclusive power of the Union,³⁴ while the administration of justice, constitution, and organisation of all courts other than the Supreme Court and the High Courts are placed within the concurrent jurisdiction of both the Union and the States.³⁵ The officers of the courts and procedure in rent and revenue courts as well as court fee in all courts except the Supreme Court are placed within the jurisdiction of the States.³⁶ With respect to the judiciary the paramount consideration of the Constitution makers was its independence from the other two wings of the State as well as from local influence. Therefore, the judiciary was envisaged and arranged as unitary rather than federal to exclude the possibility of local influence.³⁷

d. Financial Powers

Although the imposition and collection of any tax is a legislative function,³⁸ which is assigned to Parliament and State legislatures in Article 246 read with the relevant entries in Lists I and II, finance is covered separately in Part XII of the Constitution. Major taxes such as income tax, excise duty, corporate tax, wealth tax, estate duty, service tax, and any residuary tax are assigned exclusively to Parliament while taxes such as land revenue, tax on agricultural income, estate duty on agricultural land, excise duty on alcoholic and intoxicating drugs, tax on entry of goods, sales tax, passenger, goods, and

vehicle tax are assigned exclusively to the States. As the revenue from State taxes is expected to be inadequate to discharge their constitutional obligations, Part XII makes provision for the distribution of revenue from taxes between the Union and States. Both the Union and the States are required to maintain consolidated and contingency funds for receiving and depositing any revenues from any source.³⁹ For the distribution of revenues between the Union and the States some taxes are levied by Parliament but collected and appropriated by the States,⁴⁰ service tax is levied and collected by the Union but appropriated both by the Union and the States,⁴¹ some taxes are levied and collected by the Union but are assigned to the States,⁴² some taxes are levied by the Union and are distributed between the Union and the States.⁴³ The Union is also required to make some grants to the States.⁴⁴ Provisions are also made for the Union and the States to borrow money.⁴⁵

The other notable provision on financial relations is the provision for the Finance Commission, which the President appoints at the end of every five years for recommending distribution of revenues between the Union and the States, principles for grants-in-aid, measures for augmenting the consolidated fund of States for supplementing the resources of Panchayats, and on any other matter referred to it. The recommendations of the Commission are placed before Parliament and are invariably implemented. Thus the Commission performs an important role in establishing the balance between the responsibilities of the governments and the revenues available for discharging them, something that is often a contentious and delicate matter in federal constitutions.

3. Supremacy of the Constitution

Unlike some other constitutions, the Constitution of India does not have a supremacy clause. However, neither its makers, nor the courts, nor the governments at any level have entertained any doubt at any stage that it is the highest law of the land binding on all organs of the State. Therefore, soon after the commencement of the Constitution, laws of different legislatures, including laws of Parliament and the executive actions of the State, were challenged in the High Courts and the Supreme Court and these courts entertained such challenges without either of the parties raising any concerns over whether the Constitution must be complied with. In India, the supremacy of the original Constitution has been established not only to the extent that all actions of different organs created under it must comply with it but also that the amending body must exercise its amending power subject to the condition that the basic structure of the Constitution is not undermined.^{[46](#)}

4. Dispute Resolution Mechanism

For resolving disputes with respect to the constitutional position or powers of the Union and the States or States inter se, the Constitution provides access to courts. Unlike some constitutions, which provide a separate court for deciding constitutional questions, our Constitution entrusts this function to the same courts which decide all other matters. For a legal dispute between the Union and the States, the Supreme Court may be approached directly by filing a suit in its original jurisdiction.⁴⁷ Since the commencement of the Constitution, only a few occasions have arisen for availing this remedy. In other disputes of a collateral nature in which only one of the parties is the Union or any of the States, the matter may be raised in any court having the territorial or pecuniary jurisdiction. However, as a matter of practice as well as convenience all such questions are initiated in the High Court having the territorial jurisdiction in the matter because the subordinate courts have no power to invalidate laws made either by Parliament or by a State legislature or to issue writs.⁴⁸ The mechanism of courts for dispute resolution between the Union and States has worked well and no special complaints have ever been made about it besides general complaints about the judicial process.

III. THE CENTRALISED CHARACTER OF INDIAN FEDERALISM

The above discussion lays out the formal division of powers between the Union and the States. As is clear from many of the provisions mentioned, the Constitution tilts heavily in favour of the Union. In this section, we pay closer attention to particular themes and constitutional developments over the past six decades to show that the working of Indian federalism conforms to the image of centralisation.

1. The Identity of States

An important matter to consider in the context of any federal polity is the weight it grants to the identity of States. In this Indian context, the weakness of this identity is revealed by examining how the Constitution treats the territorial integrity of States and how it provides for their representation in Parliament.

a. *State Boundaries and New States*

Article 3 of the Constitution makes serious inroads into the position of States insofar as it authorises Parliament to form a new State by separating any territory from a State or by uniting two or more States or any part of them, or by uniting any territory to a part of any State. It may also increase or diminish the area of any State or alter the name of any State, subject to the condition that the diminished territory should remain part of the territory of India and not be transferred to any other country. The power to transfer any territory to any other country is not included in Article 3 because such transfer requires an amendment of the Constitution through Article 368.⁴⁹ The only safeguard available to the concerned State in Article 3 is that its views are sought by the President on the proposed law within the specified time. But Parliament is not obliged either to consider these views or to modify the law. By this law Parliament may make all the consequential changes in any of the provisions of the Constitution without the need to observe the procedure for amending the Constitution.⁵⁰

In *Babulal Parate v State of Bombay*,⁵¹ the Court first considered the scope of Article 3. The appellant argued that the formation of the State of Bombay under the States Reorganisation Act as a single unit instead of the three units proposed in the original Bill was in contravention of Article 3, since the legislature of Bombay State had no opportunity to express its views on the amendments made in Parliament to the Bill. The Court held that (i) State legislatures have a right under Article 3 only to express their views, not to make modifications; (ii) 'Bill' in the proviso to Article 3 does not include amendments of any of the clauses of the Bill. In *Pradeep Chaudhary v Union of India*,⁵² the constitutionality of Section 3 of the Uttar Pradesh Reorganisation Act 2000, which included Haridwar District in the State of Uttarakhand (then Uttaranchal), was at issue. The original Bill placed before the State legislature only mentioned the city of

Haridwar as being part of the territory of Uttaranchal, but the amended version passed by Parliament included the whole district of Haridwar. Citing *Babulal Parate* with approval, the Court reiterated that, while ascertaining the views of the State legislature under the proviso to Article 3 was mandatory, Parliament was in no way bound by these views.

The interpretation of parliamentary supremacy was extended to Article 4 in *Mangal Singh v Union of India*.⁵³ The appellants contended that the Punjab Reorganisation Act 1966 violated the mandatory provisions of Article 170(1) by departing from the minimum prescribed membership of the State Legislative Assembly. The Court, however, held that the power to reduce the total number of members of the assembly below the number prescribed by Article 170(1) was 'implicit in the authority to make laws under Article 4'.⁵⁴ According to the Court, the scope of the phrase 'supplemental, incidental, or consequential' in Article 4 was not just restricted to the amendment of the First and Fourth Schedules, but also to the 'admission, establishment or formation of a State' to 'conform to the democratic pattern envisaged by the Constitution'.⁵⁵ Thus, post-*Mangal Singh*, we can see that the only requirement is that the new State must have effective legislative, executive, and judicial organs, as the Constitution requires this for every State.

An important recent decision is *Mullaperiyar Environmental Protection Forum v Union of India*.⁵⁶ One of the questions in this case was the constitutionality of Section 108 of the States Reorganisation Act 1956, which provided for the continuance of agreements between the Central and State Governments. The petitioner contended that it encroached upon the legislative competence of the State legislature under Entry 17 of List II. The Court opined that 'the lawmaking power under Articles 3 and 4 is paramount and is not subjected to or fettered by Article 246 and Lists II and III of the Seventh Schedule'.⁵⁷ Indeed, 'the constitutional validity of law made under Articles 3 and 4 cannot be questioned on the ground of lack of legislative competence with reference to the Lists of the Seventh Schedule'.⁵⁸ It is to be noted that a still more recent decision, *State of Himachal Pradesh v Union of India*,⁵⁹ appears to be at odds with the decision in *Mullaperiyar*. In a dispute over the sharing of electricity generated by the Bhakra-Nangal and Beas hydroelectric projects, the State of Himachal Pradesh claimed a 12 per cent share of the power generated by the projects for free, since it was the 'home State' of the projects.⁶⁰ In response, the defendants contended that since no such right was granted to the State under the Punjab Reorganisation Act 1966 (made under Article 3), it did not have any

‘pre-existing or natural rights over its land and water’.⁶¹ The Court, instead, opined that ‘under Article 3, Parliament cannot take away the powers of the State executive or the State legislature in respect of matters enumerated in List II of the Seventh Schedule to the Constitution’.⁶² In reaching this conclusion, the Court did not, however, cite the *Mullaperiyar* judgment.

b. *State Representation in Parliament*

Section 3 of the Representation of the People Act 1951 originally provided that the qualification for being chosen as a representative of a State in the Council of States in India’s Parliament (the Rajya Sabha) was that the candidate be ‘an elector for a Parliamentary constituency in that State or territory’. Crucially, this provision was amended in 2003 by substituting ‘in that State or territory’ with ‘in India’. The amendment was challenged by a writ petition under Article 32 in *Kuldip Nayar v Union of India*.⁶³

The petitioners argued that the change ‘[violated] the principle of federalism, the basic feature of the Constitution’.⁶⁴ The Rajya Sabha, it was argued, was constituted to provide representation to the people of the various constituent States of the Indian Union and a representative with no domicile in a State cannot effectively represent the people of that State. In other words, the representative must have an ‘identifiable nexus’ with the State.⁶⁵ It was further argued that the amendment had the effect of ‘equating’ the membership qualification of the Rajya Sabha with that of the Lok Sabha; it obliterated the distinction between the two houses of Parliament. The intent of the constitutional scheme was instead for members of the Lok Sabha to represent their constituency and members of the Rajya Sabha to represent their State. The amendment effectively rendered the Rajya Sabha redundant. The petitioners also claimed that a person elected to the Rajya Sabha under the amended qualification would not amount to a representative of the State as required by Article 80, but would only be a representative of the State Assembly. Article 84 requires Parliament to prescribe by legislation ‘some connection’ between the representative and his State, which was now absent.⁶⁶ Developing this argument, it was suggested that by failing to prescribe an alternative qualification to the one it had repealed, Parliament had in effect ‘abdicated’ its responsibility under Article 84(c).⁶⁷ It was now left entirely to the ‘subjective determination of each State Assembly, to elect any one’ to be their representative in the Rajya Sabha.⁶⁸

This was an interesting inversion of traditional federalism arguments by the petitioners: in essence, they were contending that State assemblies were not competent to decide who was qualified to represent them in Parliament.

Sabharwal CJ, speaking for the Court, was unconvinced by these arguments. In rejecting them, he made a number of interesting observations about the nature of Indian federalism. To begin with, he declared that ‘The nature of federalism in the Indian Constitution is no longer *res integra* ... There can be no quarrel with the proposition that the Indian model is broadly based on federal form of governance.’⁶⁹ He pointed to Ambedkar’s criterion for federalism from the Constituent Assembly debates: ‘The chief mark of federalism as I said lies in the partition of the legislative and executive authority between the Centre and the Units by the Constitution.’⁷⁰

To pinpoint the precise nature of Indian federalism, he cited a number of judgments of the Court, including *State of West Bengal v Union of India*⁷¹ and *SR Bommai v Union of India*,⁷² to reach the conclusion that while ‘the federal principle is dominant in our Constitution and that principle is one of its basic features ... it is also equally true that federalism under the Indian Constitution leans in favour of a strong Centre’.⁷³ In addition to judicial precedent, he cited the disproportionate legislative powers of Parliament in Part XI, the existence of solely national and not State citizenship, and ‘perhaps most important ...’, the power of Parliament under Article 3 to create new States and alter existing ones.⁷⁴ This last power, according to him, was the answer to the argument about the need for an ‘identifiable nexus’ between the representative and his State: ‘in the context of India, the principle of federalism is not territory related’.⁷⁵ The Chief Justice then proceeded to compare India with other constitutions that provided for bicameral central legislatures: the United States and Canada. He pointed to the fact that both countries, in marked contrast to the Indian Constitution, had residence requirements specified in their respective constitutions for membership in the senate. This allowed him to conclude that ‘residence, in the matter of qualifications, becomes a constitutional requirement only if it is so expressly stated in the Constitution’.⁷⁶

2. Legislative Competence

The Constitution, as we have noted, contains an elaborate division of legislative power between the Union and the States as laid down in the three lists in Schedule VII. How have conflicts between these lists been interpreted? Does the resolution of such conflicts buttress the claim that the federal model is greatly centralised?

An illustrative case for the judicial understanding of the federal scheme is *State of West Bengal v Union of India*.⁷⁷ This dealt with the Coal Bearing Areas (Acquisition and Development) Act 1957, a statute that authorised the Union government to acquire land vested in any State. The plaintiff argued that the State of West Bengal was a sovereign authority, and the power of Parliament did not extend to depriving the State of the property vested in it as a sovereign authority. The Court held that ‘even if the States are regarded *qua* the Union as Sovereign’, ‘the power of the Union to legislate in respect of property situate in the States ... remains unrestricted ...’⁷⁸ In the process, the Court undertook a detailed review of the federal scheme and concluded that it weighed clearly in favour of parliamentary supremacy: to assume the absolute sovereignty of individual States was ‘to envisage a Constitutional scheme which does not exist in law or in practice’.⁷⁹

Decisions on the doctrine of harmonious construction, applied in the case of an overlap between the language of entries in different legislative lists, also illustrate this mindset. In *Gujarat University v Krishna Ranganath Mudholkar*,⁸⁰ the Gujarat University Act 1949 prescribed the medium of education for all of the State’s universities. Entry 11 of List II empowered the State legislature here, but it overlapped with Entry 66 of List I. While holding that both entries had to be harmoniously construed, the Court nevertheless insisted that ‘to the extent of overlapping, the power conferred by Item 66 List I must prevail over the power of the State under Item 11 of List II’.⁸¹ This was followed in *DAV College, Bhatinda v State of Punjab*.⁸²

The same might be said about the understanding of residuary powers. In *Union of India v Harbhajan Singh Dhillon*,⁸³ the definition of ‘net wealth’ in the Wealth Tax Act 1952 was amended to include agricultural land. The relevant entry in List I (entry 86) expressly excluded agricultural land, and it was therefore argued that the law fell within the scope of Entry 49 of List II. Sikri CJ’s majority opinion found that the entirety of the Act fell within Entry 97, and

not Entry 86. However, he also held that even if the Act fell within Entry 86, there was ‘nothing in the Constitution to prevent Parliament from combining its powers under Entry 86, List I with its powers under Entry 97, List I’.⁸⁴ In any case, any doubt on the interpretation of Entry 97 was ‘removed by the wide terms of Article 248’.⁸⁵ This was reiterated in *Sat Pal & Co v Lt Governor of Delhi*.⁸⁶

In *Kartar Singh v State of Punjab*,⁸⁷ the constitutionality of the Terrorist and Disruptive Activities (Prevention) Act 1987, among others, was in question. One of the grounds of challenge was that Parliament lacked the legislative competence to enact the legislation, and it would instead fall squarely within the scope of Entry 1 of List II—‘public order’. The Court rejected this contention, and held that Parliament was competent to enact it, given the presence of Article 248 and Entry 97 in List I. Indeed, it ‘[was] not necessary to consider whether it falls under any of the entries in List I or List III’.⁸⁸ Similar reasoning was used in *Naga People’s Movement of Human Rights v Union of India*,⁸⁹ to uphold the legislative competence of Parliament to enact the Armed Forces (Special Powers) Act 1958. In this case, even though the Court found specific entries in List I to support Parliament’s legislative competence, it reiterated that in the absence of a specific entry in List II, Parliament would always have legislative competence to pass a law with its residuary powers, even in the absence of a specific entry in Lists I and III.

A final example that might be offered is repugnancy. In *Zaverbhai Amaldas v State of Bombay*,⁹⁰ the State of Bombay had enacted its own legislation to enhance the maximum punishment under the central Essential Supplies (Temporary Powers) Act 1946. The relevant section in the central Act of 1946 was replaced by an amendment in 1950. The appellant contended that he had been wrongly tried by a magistrate, instead of a Sessions Court, as the Bombay Act required. The State countered that the central amendment in 1950 had rendered the relevant section in the Bombay Act inoperative, even though it did not have an explicit reference to the Bombay Act. The Court thus had to consider whether the later amendment by the Centre would amount to an implied repeal of the Bombay Act as it was ‘law with respect to the same matter’ under the proviso to Article 254(2). The Court found that the wording of Article 254(2) allowed Parliament to not only expressly repeal a State law, but also to render it void by implication if it ‘[conflicted] with a later “law with respect to the same matter” that may be enacted by Parliament’.⁹¹ Comparing the subject matter of the Bombay Act and the 1950 amendment, the Court found that the Bombay Act

could not prevail against the later central Act. In *T Barai v Henry Ah Hoe*,⁹² an offence under the Prevention of Food Adulteration Act 1954 had been amended by the West Bengal State Legislature in 1973 to enhance the maximum punishment from six years to life imprisonment. A subsequent parliamentary amendment reduced the maximum punishment from six to three years. The Court cited *Zaverbhai Amaldas* with approval and not only allowed the implied repeal of the West Bengal amendment, but also gave the accused retrospective benefit of the reduced punishment.

3. Regional Emergencies

We might think that one example which resists the description of Indian federalism as heavily centralised is the Supreme Court's decision in *SR Bommai*.⁹³ Here a nine-judge bench of the Court heard a number of cases together relating to the imposition of 'President's Rule' under Article 356. Although the Court could not grant any relief to the petitioners, since elections had already taken place in most of the affected States, it was asked instead to formulate guidelines for the exercise of power under Article 356. Six different opinions were given by the Court, and some of them have particular relevance for a discussion of federalism in the Indian Constitution.

While *SR Bommai* is often cited as precedent for the proposition that federalism is a part of the basic structure of the Constitution, and some opinions did say so, a close reading of the opinions shows that federalism was peripheral to the final outcome of the case. Instead, the idea of democracy and the principle of separation of powers were far more central to the judges' reasoning on the judicial review of the Proclamation under Article 356. Five of the six opinions delivered discussed federalism (Verma and Dayal JJ's opinion is the exception), and three opinions (Ahmadi, Ramaswamy, and Reddy and Agrawal JJ's) held that federalism was part of the basic structure of the Constitution. But significantly, none of the opinions traced the power of judicial review to the federal nature of the Constitution. Instead, the opinions cited concerns about democracy and preserving the separation of powers.

Sawant and Singh JJ's opinion (with which Pandian J concurred) cited HM Seervai to note that the 'federal principle is dominant in our Constitution', but soon after asserted that 'it is really not necessary to determine whether ... our Constitution is federal, quasi-federal or unitary in nature'.⁹⁴ The real question was 'whether the powers under Article 356(1) can be exercised by the President arbitrarily and unmindful of its consequences to the governance in the State concerned'.⁹⁵ Noting that 'Decentralisation of power ... is an essential part of democracy' and 'in democracy, people are sovereign and all power belongs primarily to the people', Sawant J held that interference through Article 356 had to 'both be rare and demonstrably compelling'.⁹⁶ Further, frequent elections because of the overuse of Article 356 risked 'negating the ... democratic principle' by making elections 'the exclusive preserve of the affluent'.⁹⁷

Ramaswamy J discussed federalism briefly, but only to find that India was

‘quasi-federal’.⁹⁸ He traced judicial review of Article 356 to the constitutional duty of the Supreme Court: the Court could not ‘merely be an onlooker and a helpless spectator to exercise of the power under Article 356. It owes duty and responsibility to defend the democracy.’⁹⁹ As the ‘ultimate interpreter of the Constitution’, the Court’s duty was to ‘determine what powers the Constitution has conferred on each branch of the Government and whether the actions of that branch transgress such limitations’.¹⁰⁰ The opinion of Reddy and Agrawal JJ was similarly cursory in dealing with federalism, and when it came to judicial review, simply stated that ‘The power under Article 356(1) is a conditional power. In exercise of the power of judicial review, the Court is entitled to examine whether the condition has been satisfied or not.’¹⁰¹

IV. CONCLUSION

The Constitution’s federal scheme has been a matter of debate since its founding. KC Wheare famously characterised the scheme as ‘quasi-federal’¹⁰² and others like CH Alexandrowicz raised the question of whether India should in fact be called a federation at all.¹⁰³ Such notions of federalism, largely focused on autonomous units coming together, became outdated, however, after World War II. There emerged a far more diverse understanding of how regional units might be granted a degree of autonomy. The Indian federal model emerged out of, and has been sustained by, an understanding that only a strong Union can keep the country together and is necessary in the conditions in which the Constitution is operating. There has also been a belief that the way in which regional autonomy is provided under the Indian scheme affords a certain flexibility, and is able to thereby avoid the rigidity to which federal models are often vulnerable.

From time to time, but particularly since the end of one-party rule in the country in 1967, demands for re-examining the federal arrangements have been made. Generally, the States ruled by regional parties have demanded greater autonomy and a larger share in revenues so that they can pursue their policies uninfluenced by the Centre and without depending on it for funds.¹⁰⁴ In response to persistent demands from the States, the Union appointed a commission headed by Justice RS Sarkaria to ‘examine and review the working of the existing arrangements between the Union and States in regard to powers, functions and responsibilities in all spheres’ and to ‘recommend such changes or other

measures as may be appropriate'.¹⁰⁵ In the performance of its job and making recommendations, the Commission was asked to keep 'in view the social and economic developments that have taken place over the years' and to have 'due regard to the scheme and framework of the Constitution which the Founding Fathers have so sedulously designed to protect the independence and ensure the unity and integrity of the country which is of paramount importance for promoting the welfare of the people'.¹⁰⁶ After prolonged research, deliberations, and consultations with the Union, States, and several experts and stakeholders, the Commission found the existing constitutional arrangements suitable while emphasising greater participation of the States in decision making. Two of the major recommendations in this regard, for example, were on the appointment and role of the Governor and the application of Article 356 in the States. To facilitate smoother functional relations between the Union and the States, the Commission suggested only a few minor amendments in a few provisions of the Constitution. Like the Administrative Reforms Commission of 1966–70,¹⁰⁷ which had considered the administrative aspects of the Union–State relationship, the Sarkaria Commission mostly suggested adjustments in the administrative or functional relations between the Union and the States so as to ensure maximum efficiency and effectiveness in the working of the two levels of the government and the system set in the Constitution.

The Sarkaria Commission Report led to several developments. An InterState Council was established to better coordinate Union–State relations; a third tier of government was introduced; it highlighted the abuse of regional emergency powers and was relied upon by the Supreme Court in *SR Bommai*; and so forth. Yet, in substance, it affirmed the framework and division of powers outlined in the Constitution. In 2007, a second commission was constituted under Justice MM Punchhi to reconsider India's federal scheme in light of political and economic developments since the Sarkaria Commission Report. Its report, submitted in 2010, offered several recommendations, on topics ranging from law and order to corruption, but did not propose any radical reformulation of the federal scheme.¹⁰⁸ These efforts at reviewing India's federal framework confirm that while there are several important steps to be taken for the better functioning of the federal scheme, there is acceptance of the broad terms of the scheme and the centralised vision it embodies.

¹ See eg, *State of West Bengal v Union of India* AIR 1963 SC 1241; *State of Rajasthan v Union of India* (1977) 3 SCC 592; *State of Karnataka v Union of India* (1977) 4 SCC 608.

- ² *SR Bommai v Union of India* (1994) 3 SCC 1; *Kuldip Nayar v Union of India* (2006) 7 SCC 1.
- ³ Constitution of India 1950, art 370.
- ⁴ Constitution of India 1950, arts 371, 371-A–J.
- ⁵ Madhav Khosla, *The Indian Constitution* (Oxford University Press 2012) 75.
- ⁶ Constitution of India 1950, Part VIII, arts 239–42. For special provisions, see eg, art 239-AA for Delhi and art 239-B for Puducherry.
- ⁷ Constitution of India 1950, Part X, arts 244, 244-A and Fifth and Sixth Schedules.
- ⁸ (1973) 4 SCC 225.
- ⁹ Dieter Conrad, ‘Limitation of Amendment Procedures and the Constituent Power’ (1970) 15–16 *Indian Yearbook of International Affairs* 375.
- ¹⁰ *SR Bommai* ([n 2](#)); *Kuldip Nayar* ([n 2](#)).
- ¹¹ Constitution of India 1950, art 40.
- ¹² Constitution of India 1950, Eleventh and Twelfth Schedules.
- ¹³ For the same view, see Khosla ([n 5](#)) 72.
- ¹⁴ See eg, arts 119, 209. See also Mahendra P Singh, ‘Legislative Power in India: Some Clarifications’ (1975–76) 4 & 5 *Delhi Law Review* 73.
- ¹⁵ A discussion on whether the opening words of art 245(1), ‘Subject to the provisions of the Constitution’ constitute a general limitation on the power of Parliament and State legislatures or only limit their territorial jurisdiction, is not necessary here. But see Khosla ([n 5](#)) 51.
- ¹⁶ *GVK Industries Ltd v Income Tax Officer* (2011) 4 SCC 36.
- ¹⁷ *State of Bombay v RMD Chamarbaugwala* AIR 1957 SC 699.
- ¹⁸ Constitution of India 1950, Entry 97 of List I.
- ¹⁹ Constitution of India 1950, art 254.
- ²⁰ Constitution of India 1950, art 250.
- ²¹ Constitution of India 1950, art 253.
- ²² Constitution of India 1950, art 356.
- ²³ Constitution of India 1950, arts 200, 201, 249, 252, 288(2), 304.
- ²⁴ Constitution of India 1950, arts 53, 154.
- ²⁵ Constitution of India 1950, arts 54, 155, 156.
- ²⁶ Constitution of India 1950, art 73.
- ²⁷ Constitution of India 1950, art 162.
- ²⁸ Constitution of India 1950, art 256.
- ²⁹ Constitution of India 1950, arts 257(2), 257(3).
- ³⁰ Constitution of India 1950, arts 257(1), 258(1), 258(2), 258A, 353(a), 356(1)(a), 360. See also *Jayantilal Amratlal Shodhan v FN Rana* AIR 1964 SC 648; *Samsher Singh v State of Punjab* (1974) 2 SCC 831.
- ³¹ Constitution of India 1950, Chapter IV of Part V, Chapter V of Part VI.
- ³² Constitution of India 1950, arts 247, 312.
- ³³ Constitution of India 1950, arts 146, 229.
- ³⁴ Constitution of India 1950, Entries 77 to 79, List I, Seventh Schedule.
- ³⁵ Entry 11-A, List III, Seventh Schedule.
- ³⁶ Entry 3, List II, Seventh Schedule.
- ³⁷ Granville Austin, *The Indian Constitution* (Oxford University Press 1966) 164; Mahendra P Singh, *Securing the Independence of the Judiciary—The Indian Experience* (2000) 10 *Indiana International and Comparative Law Review* 245.
- ³⁸ See Constitution of India 1950, art 265, which requires levy and collection of taxes only by authority of law.

- ³⁹ Constitution of India 1950, arts 266, 267.
- ⁴⁰ Constitution of India 1950, art 268.
- ⁴¹ Constitution of India 1950, art 268-A.
- ⁴² Constitution of India 1950, art 269.
- ⁴³ Constitution of India 1950, art 269.
- ⁴⁴ Constitution of India 1950, arts 273, 275.
- ⁴⁵ Constitution of India 1950, arts 292, 293.
- ⁴⁶ *Kesavananda Bharati* ([n 8](#)).
- ⁴⁷ Constitution of India 1950, art 131.
- ⁴⁸ Code of Civil Procedure 1908, s 113, Code of Criminal Procedure 1973, s 395. See also Mahendra P Singh, ‘Situating the Constitution in the District Courts’ (2012) 8 Delhi Judicial Academy Journal 47.
- ⁴⁹ *Special Reference No 1 of 1959* AIR 1960 SC 845; *Ram Kishore Sen v Union of India* AIR 1966 SC 644. The Court also held that no territory of a Union Territory can be transferred to a foreign country except by an amendment of the Constitution.
- ⁵⁰ Constitution of India 1950, art 4.
- ⁵¹ AIR 1960 SC 51
- ⁵² (2009) 12 SCC 248.
- ⁵³ AIR 1967 SC 944.
- ⁵⁴ *Mangal Singh* ([n 53](#)) [7].
- ⁵⁵ *Mangal Singh* ([n 53](#)) [8].
- ⁵⁶ (2006) 3 SCC 643.
- ⁵⁷ *Mullaperiyar Environmental Protection Forum* ([n 56](#)) [21].
- ⁵⁸ *Mullaperiyar Environmental Protection Forum* ([n 56](#)) [21].
- ⁵⁹ (2011) 13 SCC 344.
- ⁶⁰ *State of Himachal Pradesh* ([n 59](#)) [89].
- ⁶¹ *State of Himachal Pradesh* ([n 59](#)) [92].
- ⁶² *State of Himachal Pradesh* ([n 59](#)) [93].
- ⁶³ *Kuldip Nayar* ([n 2](#)).
- ⁶⁴ *Kuldip Nayar* ([n 2](#)) [30].
- ⁶⁵ *Kuldip Nayar* ([n 2](#)) [70].
- ⁶⁶ *Kuldip Nayar* ([n 2](#)) [155].
- ⁶⁷ *Kuldip Nayar* ([n 2](#)) [288].
- ⁶⁸ *Kuldip Nayar* ([n 2](#)) [287].
- ⁶⁹ *Kuldip Nayar* ([n 2](#)) [50]–[51].
- ⁷⁰ *Constituent Assembly Debates*, vol 11 (Lok Sabha Secretariat 1986) 976–77, 25 November 1949.
- ⁷¹ *State of West Bengal* ([n 1](#)).
- ⁷² *SR Bommai* ([n 2](#)).
- ⁷³ *Kuldip Nayar* ([n 2](#)) [63].
- ⁷⁴ *Kuldip Nayar* ([n 2](#)) [63].
- ⁷⁵ *Kuldip Nayar* ([n 2](#)) [71].
- ⁷⁶ *Kuldip Nayar* ([n 2](#)) [88].
- ⁷⁷ *State of West Bengal* ([n 1](#)). See also *State of Karnataka* ([n 1](#)).

- ⁷⁸ *State of West Bengal* ([n 1](#)) [46].
- ⁷⁹ *State of West Bengal* ([n 1](#)) [36].
- ⁸⁰ AIR 1963 SC 703.
- ⁸¹ *Gujarat University* ([n 80](#)) [22].
- ⁸² (1971) 2 SCC 261.
- ⁸³ (1971) 2 SCC 779.
- ⁸⁴ *Harbhajan Singh Dhillon* ([n 83](#)) [87].
- ⁸⁵ *Harbhajan Singh Dhillon* ([n 83](#)) [21].
- ⁸⁶ (1979) 4 SCC 232.
- ⁸⁷ (1994) 3 SCC 569.
- ⁸⁸ *Kartar Singh* ([n 87](#)) [73].
- ⁸⁹ (1988) 2 SCC 109.
- ⁹⁰ AIR 1954 SC 752.
- ⁹¹ *Zaverbhai Amaidas* ([n 90](#)) [7].
- ⁹² (1983) 1 SCC 177.
- ⁹³ *SR Bommai* ([n 2](#)).
- ⁹⁴ *SR Bommai* ([n 2](#)) [100].
- ⁹⁵ *SR Bommai* ([n 2](#)) [100].
- ⁹⁶ *SR Bommai* ([n 2](#)) [102].
- ⁹⁷ *SR Bommai* ([n 2](#)) [101].
- ⁹⁸ *SR Bommai* ([n 2](#)) [169].
- ⁹⁹ *SR Bommai* ([n 2](#)) [227].
- ¹⁰⁰ *SR Bommai* ([n 2](#)) [257].
- ¹⁰¹ *SR Bommai* ([n 2](#)) [330].
- ¹⁰² KC Wheare, *Federal Government* (2nd edn, Oxford University Press 1951) 33.
- ¹⁰³ CH Alexandrowicz, 'Is India a Federation?' (1954) 3 International and Comparative Law Quarterly 393.
- ¹⁰⁴ Notable in this regard is the State of Tamil Nadu Report of the Centre–State Relations Enquiry Committee 1971 (The Rajamannar Committee Report).
- ¹⁰⁵ Ministry of Home Affairs Notification No IV/11017/1/83-CSR dated 9 June 1983.
- ¹⁰⁶ Ministry of Home Affairs Notification ([n 105](#)).
- ¹⁰⁷ Administrative Reforms Commission, *Report of the Study Team on Centre–State Relationships* (Manager of Publications 1968).
- ¹⁰⁸ 'Report of the Commission on Centre–State Relations' <http://interstatecouncil.nic.in/ccsr_report.html>, accessed October 2015.

CHAPTER 26

LEGISLATIVE COMPETENCE

the Union and the States

V NIRANJAN*

I. INTRODUCTION

ON 14 November 1946, the Judicial Committee of the Privy Council convened to hear oral argument in a case that would prove to be one of the last Indian appeals of significance to come before that august body: *Prafulla Kumar Mukherjee v Bank of Commerce Ltd, Khulna*.¹ The Board's advice in that case, alongside three other important judgments² given during this period, should have definitively settled the Indian law of legislative competence. Yet, a cursory glance at the law reports reveals that this topic—perhaps more than any other part of Indian constitutional law—continues to defy rationalisation. The thesis of this chapter is that this is because of a failure in subsequent cases to distinguish between two distinct concepts that are at the heart of Part XI of the Constitution of India: the *existence* of legislative power ('competence') and the *exercise* of legislative power ('repugnance').

These topics—competence and repugnance—encapsulate the legislative relationship between the States and the Union and are the main concern of this chapter. Section II provides a brief overview of the framework of legislative relations under the Indian Constitution and its legislative history. Section III considers the nature of legislative power under the Indian Constitution and explains that the failure to separate competence and repugnance is responsible for the mysterious emergence of new 'doctrines' in India (notably the aspect theory) which, on closer examination, are actually indistinguishable from pith and substance. Section IV distinguishes repugnance from competence, and revisits a longstanding controversy in Indian law about the applicability of Article 254(1) to legislation outside the Concurrent List. Section V draws the threads together and concludes.

II. LEGISLATIVE COMPETENCE IN THE INDIAN CONSTITUTION: AN OVERVIEW

Much of Indian law has English roots.³ Constitutional law is no exception. A striking difference, however, is that Indian Parliament, unlike (at least in theory) its British counterpart, is not sovereign,⁴ and this proposition must be the starting point of any analysis of its legislative competence: Parliament's power to legislate is located in, and limited by, the provisions of the Constitution. These provisions, principally Articles 245, 246, and 254, are themselves derived from sections 100 and 107 of the Government of India Act 1935 ('the 1935 Act'), and it is to that legislation that one must turn in order to understand why the Constitution adopts this model.

1. Constitutional Framework and Legislative History: An Outline

When it was decided in the early 1930s that British India would become a Federation, legislative competence was naturally a subject that occupied the minds of the legislators. In 1932, the British Government presented a White Paper to Parliament entitled 'Proposals for Indian Constitutional Reform' ('the White Paper').⁵ The proposals made in the White Paper were examined by a Joint Select Committee ('JSC'), which submitted a report in 1934 ('the JSC Report').⁶ In these documents lie the seeds of what is today Part XI of the Constitution of India.

The framework adopted by the JSC—and later by the 1935 Act and the Constitution—was in some respects unprecedented because it did not precisely correspond with either of the two models of legislative distribution that were popular at the time. Common to both models was the allocation of a specific list of enumerated powers to one legislature and the residue to the other: in the Australian model, the residuary power was with the Provincial legislature and in the Canadian, with the Federal legislature.⁷ Although the JSC Report was closer to the Canadian than to the Australian model, it was perhaps the first attempt to enumerate legislative fields as *exhaustively* as possible,⁸ which the Canadian Constitution (the BNA Act 1867) did not do. Thus, the 1935 Act—as does the Constitution—divided the fields of legislation into three Lists, with essentially local subjects in Lists II and III, and pan-Indian subjects in List I.

This model was adopted in the belief that it would avert some of the

contentious litigation about legislative competence and residuary power that had already come before the Canadian and Australian courts. Not everyone agreed it would do this: during the debate in the House of Commons, Eric Bailey, a Conservative MP, cuttingly observed that the House ‘shall, at any rate, be doing a wonderful thing for the legal profession’.⁹ As this chapter shows, Bailey has been proved right. Whether that is because of the model itself or its use by the courts is a matter I leave for the reader to judge.

III. COMPETENCE: POWER AND REPUGNANCE DISTINGUISHED

A central argument of this chapter is that the courts have, with respect, fallen into error in repeatedly conflating the question ‘Does this legislature have the *power* to enact this law?’ with ‘Does this *law* conflict with a law enacted by the other legislature?’: in short, not distinguishing between questions of *vires* and questions of repugnance. As the following subsection explains, the use of the expression ‘with respect to’ in Article 246 shows that this distinction is at the heart of Part XI.

1. Questions of *Vires*—The Expression ‘With Respect to’

Article 246 gives each legislature the power (either exclusively or otherwise) to make laws ‘with respect to’ ‘matters enumerated’ in the respective Lists. It is this expression that marks a clear divide between competence and repugnance, because it shows that the test of *vires* is to be applied to the legislation as a whole, and not to *individual* provisions in it. The significance of this is that a law which ‘as a whole’ is ‘with respect to’ a matter in the appropriate List does not become *ultra vires* simply because it contains provisions which may also be validly enacted by the other legislature.

One may ask what happens if an *intra vires* Central law contains a provision which is inconsistent with an *intra vires* State law. The answer is that the inconsistency does not affect the *competence* of either legislature but is resolved by applying the provisions of the Constitution that deal with *repugnance*. Indeed, this is the answer the courts gave in the early years although, as we shall see, these insights have been obscured by a series of later Supreme Court decisions.

a. *The Early Skirmishes in the Moneylending Litigation*

The moneylending litigation is the best illustration of the proposition that the same *provision* may be validly enacted by two different legislatures under different legislative entries. The 1935 Act had placed ‘moneylending and moneylenders’ in the Provincial List and ‘promissory notes’ and ‘banking’ in the Federal List.¹⁰ If the argument advanced here about the meaning of ‘with respect to’ is correct, it should follow that the same provision (eg, regulating the rate of interest payable on a promissory note) can be validly enacted by *both* legislatures, in the case of the Union as part of legislation dealing with promissory notes which happen to involve agriculturists, and in the case of the States as part of legislation dealing with agricultural loans which happen to be secured by promissory notes.

Both laws—including the provision about interest rates—would be *intra vires* because both (as a whole) are ‘with respect to’ the appropriate legislative entry. If *individual* provisions are inconsistent (eg, if one law prescribes a higher rate of interest than the other), that is a matter for Article 254, not Article 246. But it would be different if the interest rate provision were to be found in a State legislation dealing *only* with promissory notes or in a Union legislation dealing *only* with agricultural debt because, on that hypothesis, neither legislation is ‘with respect to’ the appropriate field of legislation.

This is the view that prevailed in the litigation that was to eventually culminate in the widely cited but misunderstood case of *Prafulla Kumar Mukherjee*.¹¹ One of the earliest cases on the point was a decision of a full bench of the Madras High Court in *Nagaratnam v Seshayya* (‘Nagaratnam’).¹² The Madras Agriculturist Debt Relief Act 1938 (‘the Madras Act’) provided that a court could ‘scale down’ a debt owed to a moneylender by an agriculturist whether the debt had ripened into a decree before the commencement of the Act or not. The moneylenders argued that this law was *ultra vires* the Provincial legislature and alternatively repugnant to sections 32 and 79 of the Negotiable Instruments Act 1881, which provided that an acceptor of a negotiable instrument was liable to pay the amount on maturity according to the apparent tenor of the instrument at the specified rate of interest. I say no more at this stage about the repugnance point than that it is *different* from the ‘*ultra vires*’ point—indeed, it arises only if the *ultra vires* (ie, competence) point fails. As to competence, Sir Lionel Leach CJ held, correctly, that the Madras Act was *intra vires*, deriving from the Privy Council’s jurisprudence the proposition that the same provision can be validly enacted by more than one legislature, provided

each does so as part of a legislation that it is (overall) competent to enact.

As Lord Hope of Craighead has recently observed, a number of phrases have been coined to describe the principle that Sir Lionel Leach CJ applied, depending upon the fashion of the time: in India, ‘the doctrine of pith and substance’ is undoubtedly the most popular, but ‘true nature and character’, ‘respectation doctrine’, and other phrases used in other federal or devolved jurisdictions embody exactly the same principle.¹³

The Madras view was not uncontroversial. Meredith J rejected it in *Sagarmal Marwari* (‘Sagarmal’),¹⁴ a case that came before the Patna High Court two years later, reasoning that the doctrine of pith and substance applied by the Judicial Committee in the Canadian appeals could not coexist with the State’s legislative power being expressly made ‘subject to’ the Union’s. This conflict between the Patna¹⁵ and the Madras views was resolved in favour of the latter in two momentous cases which, even today, remain the most important judicial contributions to the topic of legislative competence in Indian constitutional law: *Subramanyam Chettiar v Muttuswami Goundan* (‘Goundan’)¹⁶ and *Prafulla Kumar Mukherjee* (‘Prafulla Kumar Mukherjee’).¹⁷ Both cases must be closely analysed.

Goundan was effectively a challenge in the Federal Court to Sir Lionel Leach CJ’s judgment in *Nagaratnam*: as in that case, the moneylender had obtained a decree on a promissory note which the court, at the request of the agriculturist, had ‘scaled down’. A crucial feature of the case is that the promissory note had matured into a decree in November 1934, four years *before* the commencement of the Madras Act. In the Federal Court, Sir Maurice Gwyer CJ and Varadachariar J were in the majority, and Sulaiman J dissented on a different point. However, the Court was unanimous in rejecting the Patna view: the Canadian doctrine of pith and substance ‘evolved by the Judicial Committee ... is *equally applicable* to the Indian Constitution Act’.¹⁸ Sulaiman J’s judgment contains the best explanation of *why* the doctrine applies in India: because, said the learned judge, section 100 uses (as does Article 246) the expression ‘*with respect to*’, which mandates an inquiry into the true nature and character (or pith and substance) of the law as a whole:

On a very strict interpretation of s. 100, it would necessarily follow that from all matters in List II which are exclusively assigned to Provincial Legislatures, all portions which fall in List I or List III must be excluded. Similarly, from all matters falling in List III, all portions which fall in List I must be excluded ... *But the rigour of the literal interpretation is relaxed by the use of the words ‘with respect to’ which as already pointed out only signify ‘pith and substance’, and do not forbid a mere incidental encroachment.*¹⁹

In other words, although the same provision—the rate of interest payable by an agriculturist on a promissory note—was in the 1881 and Madras Acts, both were *intra vires* because the provision in the one case was enacted as part of the regulation of promissory notes and in the other as part of the regulation of agricultural debt. This, it is submitted, is correct. But what about the actual conflict between the (*intra vires*) Madras Act and the (*intra vires*) Negotiable Instruments Act? Gwyer CJ held that this was in principle governed by section 107 of the 1935 Act (Article 254 of the Constitution) but that it was unnecessary to decide it because the creditor's cause of action was, on the facts of that case, not the promissory note but the *decree*, which was unaffected by the 1881 Act. Varadachariar J agreed. This course was open to Gwyer CJ only because the promissory note had matured into a decree *before* the commencement of the Act: if it had not, it would have become necessary to decide whether the Madras Act was repugnant to the 1881 Act, but the answer would not have affected the *competence* of either legislature. Sulaiman J thought that the time of crystallisation was irrelevant because the underlying debt was on a promissory note: thus, for him, it became necessary to apply section 107. This chapter considers his analysis of repugnance in more detail subsequently but it suffices at this stage to point out that *none* of the judges thought that legislative competence depended upon the terms of the 1881 Act (the analysis would have been the same even if the 1881 Act had never been enacted) or that the *conflict* was to be resolved by applying the doctrine of pith and substance: for the Federal Court, repugnance and competence were watertight and mutually exclusive compartments.²⁰

b. *The Argument of Sir Walter Monckton KC and the Advice of Lord Porter*

This was the state of the law when the *Prafulla Kumar Mukherjee* litigation commenced. This too was a challenge to the Bengal Act, but this time the decree had been obtained by the bank *after* the commencement of the Act: so the repugnance question Gwyer CJ had been able to leave open in *Goundan* would now have to be decided. The Calcutta High Court correctly held that this feature of the case made no difference to *competence*, because the Bengal Act was still in pith and substance about moneylending, although it gave rise to a repugnance issue, unlike in *Goundan*.²¹ But how could competence be assailed? In the Federal Court, counsel for the Bank did it by boldly challenging the proposition

—as Sir Herbert Cunliffe KC²² was to do in the Privy Council—that an incidental encroachment does not affect the *vires* of a legislation and invited the Court to endorse the Patna view in preference to the Madras view that *Goundan* had accepted. Spens CJ²³ declined this invitation and followed Lord Atkin’s observations in *Gallagher v Lynn*.²⁴ He also observed, correctly, that encroachment is *intra vires* only if the legislation as a whole is ‘with respect to’ a matter in List II: ‘in such cases a provincial legislation can, if at all, encroach on List I subjects, *only incidentally*’.²⁵ However, Spens CJ—perhaps because of a misunderstanding of certain observations of Viscount Maugham²⁶—erroneously held that the question whether an encroachment by a State legislature is incidental depends on how far it transgresses into *List I*—that is, a ‘substantial’ transgression is *ultra vires*.

Applying this test of ‘substantiality’, the Bengal Act was *ultra vires* (not repugnant) because it ‘substantially affected’ sections 32 and 79 of the 1881 Act by altering the rule there prescribed that an acceptor of a negotiable instrument is liable to pay the amount on maturity according to the apparent tenor of the instrument. This, with respect, is exactly the danger of conflating competence and repugnance: Spens CJ’s test cannot possibly have had anything to do with *ultra vires* because it involved comparing the State legislation with a Federal *legislation*, rather than a legislative *entry*. The State law does not cease to be a law about moneylending simply because it is inconsistent with sections 32 and 79 of the 1881 Act. The ‘substantial effect’ test, on the other hand, is obviously material if the question is whether the Bengal Act is *repugnant* to the 1881 Act because there the *purpose* of the State law is irrelevant: what matters is whether its provisions actually conflict with the provisions of the Central law.

In a powerful argument in the Privy Council that repays study, Sir Walter Monckton KC made exactly this point about this passage from Spens CJ’s judgment:

That suggested distinction which is drawn between an Act which affects promissory notes to a substantial extent and one which affects them to a less extent is unsound, and based on a misunderstanding of what was said²⁷... There is, however, nothing in the earlier of those two cases to suggest that the *antithesis in the mind of the Board* was ‘substantial’ or ‘not substantial’; the distinction they made was between pith and substance and incidental or ancillary. They were not measuring the degree of interference. What really vitiates the decision of the Federal Court in this case was that they assumed that that was the test—substantial or not—and applied it *mutatis mutandis* to the impugned Act. It is submitted that, applying what is found in the two last cited cases, if the impugned Act is in pith and substance a money lending Act, and the Federal Court have so held, and if the provincial legislature had power to deal with promissory notes, then no objection can be taken on the ground that the provincial legislature has dealt with them substantially.²⁸

As every Indian lawyer knows, Lord Porter accepted this argument, once again declining Sir Herbert Cunliffe KC's invitation²⁹ to endorse the Patna view about the inapplicability of pith and substance to the Indian Constitution. Lord Porter said:

[T]he extent of the invasion by the provinces into subjects enumerated in the Federal List has to be considered. No doubt it is an important matter, *not, as their Lordships think, because the validity of an Act can be determined by discriminating between degrees of invasion*, but for the purpose of determining what is the pith and substance of the impugned Act. Its provisions may advance so far into Federal territory as to show that its true nature is not concerned with Provincial matters, *but the question is not, has it trespassed more or less, but is the trespass, whatever it be, such as to show that the pith and substance* of the impugned Act is not money lending but promissory notes or banking? Once that question is determined the Act falls on one or the other side of the line and can be seen as valid or invalid according to its true content.³⁰

One may be forgiven for thinking that the clarity—and high authority—of this exposition should have settled this issue for good. Indeed, the Supreme Court of India has endorsed Lord Porter's views—including this very passage³¹—on innumerable occasions.³² However, the proposition the Supreme Court has actually accepted in recent years is the 'repugnance fallacy' that prevailed with Spens CJ, not its rejection by Lord Porter.

This fallacy contains two limbs: first, that the *vires* (or competence) of a legislation depends upon the *degree* of invasion of the other List ('the first limb'); and second, that the *repugnance* of a legislation depends upon its *pith and substance* ('the second limb'). Of these, the second limb is the more serious because it has led the courts astray and produced the wrong outcome in a number of prominent cases.³³

The seeds of the first limb which Lord Porter had so firmly rejected were sown in *Mudholkar*.³⁴ The question there was whether the State of Gujarat was competent to prescribe Gujarati or Hindi as, subject to certain exceptions, an exclusive medium of instruction. Under Entry 11, List II (as it then was), the State Legislature was entitled to make laws about 'education ... subject to the provisions of Entry ... 66 of List I'. Entry 66 of List I entitled Parliament to make laws about the 'coordination and determination of standards in institutions for higher education'. Shah J, who gave the majority judgment, found that the medium of instruction was part of Entry 66 as well as Entry 11. This may seem a surprising conclusion given that Entry 11 is expressly subject to Entry 66.³⁵ However, assuming it is correct, it should follow from the argument made in this chapter that a State law about education may incidentally prescribe the medium of instruction while a Union law about the coordination and determination of

standards may incidentally prescribe the medium of instruction. Both laws would be *intra vires* and the conflict, if any, would be resolved by Article 254, not Article 246. As there was in fact no Union law prescribing a medium of instruction, the question of repugnance could not have arisen. Shah J recognised the difference between repugnance and competence but held that the State law is *ultra vires* if it ‘prejudicially affects coordination and determination of standards ...’,³⁶ whether or not a conflicting Union law actually exists: in other words, if Spens CJ’s ‘substantial effect’ test is satisfied. It appears that Shah J was influenced by the submission of counsel that the doctrine of pith and substance is irrelevant to a ‘subject to’ entry. However, as Subba Rao J correctly pointed out in his dissenting judgment, a ‘subject to’ entry is different only because its scope (unlike an entry which is not expressly subject to a List I entry) can be limited by the existence of another entry: this is a matter of construction. Once the point of construction is resolved one way or the other, the doctrine of pith and substance applies in the usual way, and the *degree* of interference is irrelevant except insofar as it goes to show what the pith and substance of the impugned legislation really is.

To summarise, it is respectfully submitted that the correct position on legislative competence under Part XI can be formulated in the form of the following five propositions:

- (1) Before applying the doctrine of pith and substance, it is necessary to decide what the words of the relevant legislative entry mean. This is a process of construction³⁷ and entirely independent of the impugned legislation.
- (2) Once the meaning of an entry has been ascertained, the doctrine of pith and substance helps the court ascertain whether the impugned legislation is attributable to that entry, so construed. Again, the existence of competing legislation is entirely irrelevant: the impugned legislation is either in the appropriate List, or not, whatever the other legislature may have done.
- (3) The fact that the impugned legislation contains individual provisions which fall within an entry in a competing List is also irrelevant unless the nature and context of those provisions show that the legislation is in fact in pith and substance *not* attributable to the appropriate List. Similarly, whether an entry in the competing List has been ‘substantially’ or ‘peripherally’ invaded is immaterial except as an index of pith and substance.
- (4) If, by applying (1) to (3) above, both legislation are essentially about

matters in the appropriate List, both are *intra vires* even if they regulate the same activity or transaction. If common provisions in these legislation factually conflict, Article 254, not Article 246, is the answer. If the provisions do not conflict, or if one of the legislation is not in force, the question of repugnance simply does not arise.

(5) The Supreme Court's failure to accept (3) and (4) above has produced what I call the two limbs of the repugnance fallacy: (i) that '*vires*' depends on the 'effect' of one legislation on the other legislature's field; and (ii) that 'repugnance' depends on the 'purpose' or 'pith and substance' of the impugned legislation. The first limb of the fallacy is exemplified by the judgments of Spens CJ and Shah J in *Kunja Behari* and *Gujarat University*, respectively. The second limb has had more serious consequences, as Section III explains.

2. The So-called 'Aspect Theory'

The failure to articulate the nature of the doctrine of pith and substance is also responsible for the considerable confusion surrounding the supposed existence of the 'aspect theory'. It is respectfully submitted, for the reasons that follow, that there is no such doctrine in Indian constitutional law and that the repeated references to it are founded on a misunderstanding of certain observations in Canadian and English cases. Once this is appreciated, it becomes apparent that what is termed the 'aspect theory' is in fact indistinguishable from pith and substance.³⁸

a. *The Birth of the 'Aspect Theory' in Indian Law: The Federation Case*

The aspect theory emerged as a 'separate' rule of legislative competence in the *Federation* case ('Federation').³⁹ The Federation challenged the *vires* of the Expenditure Tax Act 1987, a Central legislation that levied a 10 per cent tax on expenditure incurred in a hotel in which the room tariff exceeded Rs 400 per day. The State of Gujarat⁴⁰ had enacted the Tax on Luxuries (Hotels and Lodging Houses) Act 1977 imposing a tax on 'luxuries' provided by a hotel.

The case was argued by eminent counsel. Palkhivala, who appeared for the

petitioners, had two strings to his bow: the Central levy, he argued, was not an ‘expenditure tax’ because it was imposed on specific items of expenditure rather than on expenditure generally. The Supreme Court rejected this contention—it is submitted correctly—on the ground that there was no reason to limit legislative competence to impose a particular tax to the economist’s definition of it.⁴¹ The second argument was that the 1987 Act, in pith and substance, was a luxury tax under Entry 62, List II. In response, the Attorney General, Parasaran, invoked Canadian and Privy Council authority to suggest that one subject matter may have more than one ‘aspect’, that is, sums expended at hotels may be taxed in their ‘expenditure aspect’ by the Union and in their ‘luxury aspect’ by the States. This contention prevailed.

Unfortunately, this has given rise to the belief that the ‘aspect theory’ is some special rule of Canadian law imported into India by *Federation*, which it is not.⁴²

b. *The So-called ‘Aspect Theory’ is Indistinguishable from ‘Pith and Substance’*

There are at least three indications that the ‘double aspect theory’ is nothing but pith and substance by a rather more exotic name.

First, a closer analysis of the two judgments in *Federation* confirms that the Supreme Court, in accepting Parasaran’s argument, was simply applying the rule that Sir Lionel Leach CJ had applied in *Nagaratnam*—what was the ‘true nature and character’ of the 1987 Act? In other words, what was its pith and substance? For example:

31. Indeed, the law ‘with respect to’ a subject might *incidentally ‘affect’ another subject in some way*; but that is not the same thing as the law being on the latter subject. There might be overlapping; but the overlapping must be in law. The same transaction may involve two or more taxable events in its different aspects. But the fact that there is an overlapping does not detract from the distinctiveness of the aspects.

This passage is making the point that the ‘true nature and character’ (or ‘pith and substance’) of the 1987 Act was a tax on the *act* of incurring expenditure, which happened to include a luxury, not a tax on luxuries themselves.

Secondly, the authorities from which *Federation* is said to have derived a ‘freestanding’ aspect theory actually demonstrate the opposite: that it is the same rule as pith and substance. The leading authority is generally considered to be *Hodge v The Queen*,⁴³ which is cited in the work of Lefroy, to which the

Supreme Court referred in *Federation*. In that case, the appellant, who was licensed to run a tavern in Toronto, challenged the *vires* of the Liquor License Act 1877, enacted by the State of Ontario. The Act authorised the imposition of penalties for contravention of the terms of the licence. Hodge said that this was exclusively within the Dominion's competence by virtue of section 91 of the BNA Act ('Regulation of Trade and Commerce'). In support of this contention, Kerr QC, who appeared for Hodge, relied on *Russell v The Queen*,⁴⁴ where the Privy Council had upheld the Dominion's competence to enact the Canada Temperance Act 1878, observing that it was not, *in pith and substance*, within section 92 ('Property and civil rights'): its true nature and character was the maintenance of public order and it contained provisions about liquor only incidentally. Their Lordships in *Hodge* then said this:

It appears to their Lordships that *Russell v. the Queen*, when properly understood, is not an authority in support of the Appellant's contention, and their Lordships do not intend to vary or depart from the reasons expressed for their judgment in that case. The principle which that case and the case of the Citizens Insurance Company illustrate is, that subjects *which in one aspect and for one purpose fall within Sect. 92, may in another aspect and for another purpose fall within Sect. 91*.⁴⁵

Again, this is indistinguishable from pith and substance, though the language of 'aspect' is used. Subsequent Canadian cases⁴⁶ purporting to apply the 'double aspect' theory can be analysed in exactly the same way and illustrate the truth of Lord Hope of Craighead's comment⁴⁷ that the same principle is in play in all these jurisdictions, although the nomenclature differs.

Thirdly, it is exactly this passage from *Hodge* that was cited by the High Courts and Federal Court in the moneylending litigation in support of the proposition that the doctrine of *pith and substance* is part of Indian law.⁴⁸

In sum, it is to be hoped that the Supreme Court will take the next opportunity to clarify that aspect should not be treated as a 'separate' rule to be applied *after* making a determination about the pith and substance of the impugned legislation.

IV. REPUGNANCE: CONFLICTING INTRA VIRES LEGISLATION

Having established that *vires* depends solely on the construction of the legislative entry and the impugned (but not the competing) legislation, I can now turn to the obvious question that arises if this contention is accepted: what if the 'incidental encroachment' is inconsistent with a law passed by the other

legislature?

The answer is nominally in Article 254 of the Constitution, but this provision has given rise to a number of difficult questions.⁴⁹ Two of the most important, in the light of recent developments, are: (i) is ‘actual conflict’ between a State and Central law necessary or can a State law be ousted by the *possibility* of conflict? and (ii) does Article 254(1) only apply to conflicting legislation within the Concurrent List or also to conflicting legislation across the Lists? It will be argued that the answers are, respectively, that actual conflict is needed and that Article 254 applies across the Lists. As we will see, the Supreme Court has, with respect, erroneously given the opposite answer to both questions.

1. *Mar Appraem Kuri* and Actual Conflict

If the argument advanced in this chapter is correct, one would expect to find that questions of repugnance can arise only if both laws are *intra vires* and *actually* conflict. If, for example, a State legislature incidentally encroaches on Federal territory in the course of enacting *intra vires* State legislation, and the Federal legislature has not enacted a law covering that field, though it *could* have done so, the question of repugnance cannot arise. This was indeed the law in India between 1935 and 2012, when a constitutional bench decided *State of Kerala v Mar Appraem Kuri*.⁵⁰ To make good the submission that *Mar Appraem Kuri* is wrongly decided, it is necessary to briefly explain how this analysis of repugnance came to be as well established as it was before 2012.

The predecessor to Article 254 was section 107 of the 1935 Act. That Act, as Section II has explained, gave effect to the JSC Report. Section 107 of the Government of India Bill was debated in the House of Commons on 27 March, 1935. In response to a question about its scope, the Attorney General said this:

My hon. Friend asks what ‘repugnancy’ means—does it mean that on every subject upon which a provincial legislature legislates there will be repugnancy with the Federal legislation? *That is not in the least possible.* The provincial legislature *will be dealing with some matters for which provision is not made in Federal legislation*, but *if there is conflict*, a means is provided, so far as the concurrent field is concerned, in Subsection (2) of the Clause.⁵¹

In other words, section 107 only applies in the event of *actual* conflict: if the Federal legislature has either not legislated in the same field or has done so consistently with the Provincial legislation, the Provincial legislation is not rendered repugnant merely because of the *possibility* of conflict.

The courts had nearly unanimously accepted this proposition until 2012. One of the earliest cases, *Amulya Krishna Basu*, contains a particularly clear exposition of the point. In 1955, a constitutional bench in *Tika Ramji*⁵² unequivocally held that repugnance cannot arise in the absence of actual conflict. The petitioners in that case challenged the UP Sugarcane (Regulation of Supply and Purchase) Act 1953 on the ground of *vires* and alternatively repugnance. The Act made it compulsory for certain sugar factories to purchase sugar cane from the Cane Growers Cooperative Society. The Central law—section 18-G of the Industries (Development and Regulation) Act 1951—gave the Centre the power to regulate the supply and distribution of products of scheduled industries, which included sugar. But no order had in fact been made by the Centre under section 18-G in relation to sugar. The petitioners in *Tika Ramji* said that the 1953 UP Act was nevertheless repugnant to section 18-G. The Supreme Court correctly rejected this contention:

Even assuming that sugarcane was an article or class of articles relatable to the sugar industry within the meaning of Section 18-G of Act 65 of 1951, it is to be noted that *no order was issued by the Central Government* in exercise of the powers vested in it under that section and no question of repugnancy could ever arise because, as has been noted above, repugnancy must exist in fact and not depend merely on a possibility. The possibility of an order under Section 18-G being issued by the Central Government would not be enough. *The existence of such an order would be the essential prerequisite* before any repugnancy could ever arise.⁵³

This has since been uniformly followed.⁵⁴

How was the Supreme Court in *Mar Appraem Kuri* able to reach the contrary conclusion in the light of this overwhelming authority? It may be helpful to first briefly describe the facts. The State of Kerala enacted the Kerala Chitties Act 1975 ('the Kerala Act'), which regulated chit funds in the State of Kerala. Parliament had enacted the Chit Funds Act 1982 ('the Central Act') but this Act had not been extended to the State of Kerala and was not in force there. The case, therefore, was on all fours with *Tika Ramji* and *SIEL*: a Central legislation that *could have been* but *was not* in force in the State whose law was impugned. Yet, Kapadia CJ distinguished *Tika Ramji* by relying on certain observations in *MA Tulloch* which in fact dealt not with repugnance but with the scope of Entry 54, List II—a matter that goes to *competence*. His Lordship then held that the Kerala Act was repugnant to the Central Act because Article 254 uses the words 'law *made* by Parliament' and not '*commencement* of a law made by Parliament'.⁵⁵ Because Parliament had 'made' the 1982 Act, although it was not 'in force', Article 254 applied.

With great respect, it must be said that Kapadia CJ's reasoning is not only

inconsistent with the authorities described above but fundamentally flawed as a matter of principle, for it fails to distinguish between competence and repugnance. To say that a State law is *ultra vires* on the ground that the law, in pith and substance, is in List I even though Parliament has not itself legislated in that field is understandable: that is a *vires* question and whether Parliament has actually legislated or not is irrelevant. But to say that a State law is repugnant to a Central law *that is not in force* is, with respect, to confuse conflict with powers (or repugnance with *vires*).

2. Article 254(1), the Concurrent List, and *VK Sharma*

There has been a longstanding—and perhaps not yet definitively resolved—debate about whether Article 254(1) applies only to a law made under the Concurrent List or also to a law made under Lists I and II. The view preferred here, although not the one that has found favour with the Supreme Court, is that Article 254(1) *does* apply across the Lists. I take this view for principally three reasons: (i) the language of Article 254; (ii) perhaps most importantly, its legislative history, which the Supreme Court did not consider in *VK Sharma* or any other case; and (iii) the case law before *VK Sharma*.

a. *The Language of Article 254(1)*

There is no doubt that the exception in Article 254(2) is confined to legislation in the Concurrent List. As the next subsection shows, there is a good reason for this. But does it follow, as the Supreme Court has held, that the *general rule* in Article 254(1) is also limited in this way? Consider once again the language of that sub-clause, which can be divided into two branches.

The expression ‘law made by the Legislature of a State’ is common to both. The first branch (‘Branch 1’) deals with repugnance between such a law and a ‘law made by Parliament which Parliament is competent to enact ...’, while the second branch (‘Branch 2’) deals with its repugnance with ‘existing⁵⁶ law’. The expression ‘with respect to one of the matters enumerated in the Concurrent List’ (‘the CL Qualification’) is found in Branch 2. Branches 1 and 2 are separated by a comma, which is placed after the word ‘enact’ (the last word of Branch 1). It follows from the rules of English grammar that the Qualifying expression in

Branch 2 does not qualify Branch 1. It would have been different (at least on a purely linguistic analysis) if the comma had been placed after the words ‘existing law’, that is, *after* rather than before Branch 2. It follows that Branch 1 deals with any law which Parliament is ‘competent to enact’ (ie, under List III or List I) and Branch 2 with pre-1950 legislation referable to matters now enumerated in the Concurrent List. Another textual indication that the CL Qualification does not qualify Branch 1 is that the words ‘competent to enact’ in Branch 1 would otherwise be otiose: that clause could as well have said ‘law made by Parliament ... with respect to a matter in the Concurrent List’.

This linguistic analysis is not, of course, conclusive: one must still identify the rationale for making Article 254(1) applicable across the Lists. But it shows that there can be no textual *objection* to the view preferred in this chapter: if anything, the language militates against the contrary view.

b. *The Legislative History of Article 254(1)*

It is unfortunate that the Supreme Court did not consider the legislative history of Article 254(1) because that makes it quite clear that it was intended to apply across the Lists. Section 107 of the 1935 Act, Article 254’s predecessor, *originally did not contain the CL Qualification*: it was inserted during the debate about the Bill in the House of Commons simply to cater for pre-1935 legislation. Nor did the *draft* constitution of 1948 contain the CL Qualification: how it came to be inserted is a matter of some obscurity, but the very fact that it was not originally a part of what is now Article 254(1) shows that Branch 1 was intended to apply across the Lists.

If the formulation in the Government of India Bill had found its way into the Act and then the Constitution, the *VK Sharma* position would have been unarguable because the CL Qualification would not have existed. Why was the CL Qualification inserted into section 107? It was at the behest of the Attorney General, Sir Thomas Inskip, who said this in the House of Commons on 27 March 1935:

I beg to move, in page 64, line 21, after ‘enact’, to insert: ‘*or to any provision of an existing Indian law with respect to one of the matters enumerated in the Concurrent Legislative List*’. The provisions of this Clause are directed to the question of repugnancy in connection with laws which the Federal Legislature is competent to enact. It has been noticed that *no provision is made for repugnancy in the existing law*, and this is the first of four Amendments dealing with the same problem, *really drafting Amendments*, to effect that which, I think, everybody will agree is necessary, namely, to provide that repugnancy in connection with an existing Indian law shall *be dealt with in the same way as*

*repugnancy in connection with a Federal law which may be passed.*⁵⁷

It is submitted that Sir Thomas Inskip's explanation of why it was felt necessary to insert the CL Qualification shows beyond doubt that the drafters thought that the Qualification had the effect of making the general rule applicable to pre-1935 legislation; not that the Qualification *altered* the general rule. The view of commentators on the Government of India Act 1935, largely accords with this: section 107, they wrote, applies to a conflict between a Provincial law and a Federal law in any list, or to a *pre-1935* Federal law with respect to a matter in the Concurrent List.⁵⁸

c. The Case Law Before VK Sharma

Between 1935 and 1990 (when *VK Sharma* was decided), it had not been firmly established that Article 254 applied to Lists I and II but this was the dominant view. In analysing these judgments, it is important to ascertain whether the particular case was governed by Branch 1 or Branch 2, that is, whether the competing Central legislation was pre-1935/1950 or post-constitutional. Branch 2, as we have seen, applies only to a law under List III, but these cases have sometimes been wrongly treated as authorities about the interpretation of Branch 1. Naturally, as the 1935 Act had just come into force, many of the pre-1950 cases⁵⁹ dealing with repugnance, notably *Das*⁶⁰ and *Megh Raj*,⁶¹ were Branch 2 cases and are accordingly of little relevance to the construction of Branch 1.

Many Supreme Court decisions in which the statement was made that Article 254 only applies to Concurrent List legislation are similarly distinguishable: they were either Branch 2 cases,⁶² or expressly left the Branch 1 point open,⁶³ or found on the facts that there was no repugnance⁶⁴ or happened to deal with what was clearly a List III law anyway.⁶⁵ None of these cases can therefore be cited as authority in favour of *VK Sharma*. On the other hand, when the point did arise, although it was not clearly established, the courts appeared to favour the view that *Branch 1* did apply to both List I and List II.⁶⁶ Notable among these is also Varadachariar J's judgment in *Goundan*.

The first case in which the erroneous proposition was accepted as part of the ratio is probably *Bar Council*.⁶⁷ A UP legislation prescribing that Rs 250 shall be payable as stamp duty on the issue of a certificate of enrolment to an advocate was challenged as repugnant to the Advocates Act 1961, which was a *post-*

Constitutional Central legislation and therefore governed by *Branch 1*. It was also under List I. AN Grover J, relying on *Prem Nath Kaul* (a *Branch 2* case), held that Article 254 was inapplicable because the 1961 Act was under List I, not List III, and distinguished the *Farooqi* case unconvincingly. Soon, the Supreme Court began to treat this proposition as settled law,⁶⁸ notably in *Karunanidhi*⁶⁹ and *Hoechst*.⁷⁰ But it was definitively established in *VK Sharma*,⁷¹ to which I now turn.

d. *VK Sharma and the Second Limb of the Repugnance Fallacy*

The Karnataka Contract Carriages (Acquisition) Act 1976 ('the 1976 Act'), enacted under Entry 42, List III, nationalised contract carriage in the State and prohibited the issue or renewal of licences to private operators. The Motor Vehicles Act 1988 ('the 1988 Act'), enacted by Parliament under Entry 35, List III, provided that a licence should ordinarily not be refused to a private operator. There was no doubt that both Acts were *intra vires* and that the 1976 Act had incidentally encroached into Entry 35. It was a classic case for applying Article 254. Sawant J, however, held that Article 254(1) does not apply unless both legislations are enacted under the *same entry* in the Concurrent List. Sawant J also held that one must apply the doctrine of *pith and substance* to resolve a repugnance issue under Article 254. Three passages in the judgment call for close scrutiny:

37. It was then contended that when there is a repugnancy between the legislations under Article 254 of the Constitution, the doctrine of pith and substance does not apply ...

39. ... I am of the view that not to apply the theory of pith and substance when the repugnancy between the two statutes is to be considered under Article 254 of the Constitution, *would be illogical when the same doctrine is applied* while considering whether there is an encroachment by the Union or the State legislature on a subject exclusively reserved for the other ... *[T]here is no reason why the repugnancy between the provisions of the two legislations under different entries in the same list, viz. the Concurrent List should not be resolved by scrutinizing the same by the same touchstone.* What is to be ascertained in each case is whether the legislations are on the same subject matter or not. In both cases the cause of conflict is the apparent identity of the subject matters. The tests for resolving it therefore cannot be different.

53. The aforesaid review of the authorities makes it clear that whenever repugnancy between the State and Central legislation is alleged, what has to be first examined is whether the two legislations cover or relate to the same subject matter. *The test for determining the same is the usual one, namely, to find out the dominant intention of the two legislations.* If the dominant intention, *i.e.* the pith and substance of the two legislations is different, they cover different subject matters.⁷²

It is respectfully submitted that Sawant J's analysis is wrong: indeed, it is the

second limb of the repugnance fallacy described in Section II above. It is difficult to understand how the learned judge reached the conclusion that *repugnance* is to be determined by the ‘dominant *intention*’ of the two legislatures: suppose the Bengal Moneylenders Act had provided that the interest rate shall not exceed 5 per cent, and the Negotiable Instruments Act that the contractual rate of interest shall prevail, the intention of the legislature in each case is plain, but does that assist in deciding which provision should give way? Secondly, if neither provision is to give way, Sawant J’s views mean that two contradictory laws can coexist, provided the ‘object’ of the two legislatures (as will usually be the case) is different. Yet, it was precisely to avert this circumstance that Article 254 was inserted. Notwithstanding these criticisms, VK Sharma has generally been followed in the past two decades,⁷³ although there are some curious cases⁷⁴ that (inconsistently) adopt the correct principle.

In sum, it seems clear that Sawant J’s analysis—alongside the first limb of the repugnance fallacy and *Mar Appraem Kuri*—effectively turns *Part XI of the Constitution on its head*: now *competence* is to be determined by a test of ‘substantial interference’ (*Gujarat University*), *repugnance* by the doctrine of ‘pith and substance’ (VK Sharma), and a law can be repugnant to a law that is not in force (*Mar Appraem Kuri*). With respect, this proposition needs only to be stated to be shown to be false: it is unfortunate that it nevertheless represents the law of India today. One hopes that the Supreme Court takes the next opportunity to overturn it.

e. *Three Objections to the Argument that VK Sharma is Wrong*

One can make a reasonable argument in favour of the *result* in VK Sharma without subscribing to its reasoning. In particular, there are three main objections to the argument advanced in this chapter. This section explains why these are important but ultimately not persuasive.

(I) WHAT IS THE RATIONALE FOR BRANCH 2?

It must be conceded that it is difficult to find a convincing reason why the drafters chose to limit Branch 2 to pre-1950 *Concurrent List* legislation: what if a post-1950 State legislation had been repugnant to the Companies Act 1913, the Negotiable Instruments Act 1881, or any other pre-1950 *List I* legislation? Sir Thomas Inskip’s speech on 27 March 1935 suggests that the drafters perhaps thought that repugnance with a pre-1935/1950 List I law was only a remote

possibility and therefore did not provide for it. This was the explanation favoured by Varadachariar J in *Goundan*.

Whatever the reason for the omission, what is the position when a post-1950 State legislation is repugnant to a pre-1950 Central legislation that is not referable to List III? It would be a mistake to think that this problem is academic now that 64 years have passed since the Constitution was adopted, because some of the most important Central legislation currently in force is ‘existing law’ as defined in Article 366(28): the Contract Act (1872), the Penal Code (1860), the Evidence Act (1872), and the Code of Civil Procedure (1908), to name but four. The problem was considered at some length by Sulaiman J in his judgment in *Goundan*. It will be recalled that Sulaiman J thought that it was necessary to decide the repugnance point on the ground that the Madras Act, properly construed, dealt with ‘promissory notes’ whether the note had matured into a decree before the commencement of the Act or not. The learned judge asked if Parliament could really have intended that the States could not override Central legislation in the *Concurrent* List but could do so in the *Union* List? Sulaiman J thought this inconceivable and his solution was to borrow the doctrine of ‘occupied field’—a most misleading and imprecisely used expression in Indian law—from Canadian law. By ‘occupied field’, Sulaiman J meant that incidental encroachment is permitted provided the area of encroachment is not occupied by the legislature *primarily authorised* to make laws in that field.

It is unnecessary for the purposes of the argument made in this chapter to take a view on this controversy: it is enough to suggest that there is something to be said for Sulaiman J’s solution, although that should not lead one to think that it is the ‘subject to’ clause in Article 246 that allows the court to reach this result—to Sulaiman J, it is an *implied* limitation. There is some inelegance, no doubt, in applying this implied limitation to a pre-1950 but not to post-1950 legislation, but it is probably the best that can be done given the obscurity surrounding the reasons for not extending Article 254(1), Branch 2, to pre-1950 List I legislation as well.

(II) DOES IT RENDER THE NON-OBSTANTE CLAUSE IN ARTICLE 246 REDUNDANT?

The second major objection to the view that *VK Sharma* is wrong is that the words ‘notwithstanding’ and ‘subject to’ in sub-clauses (1) and (3) of Article 246 are rendered redundant. If *VK Sharma* is good law, on the other hand, it is those phrases that result in the invalidation of a State legislation that is inconsistent with a Central legislation under List I to the extent of its incidental encroachment.⁷⁵

It is submitted for four reasons that this objection, although an important one, is misconceived. First, there is Privy Council authority for the proposition that the reason for the insertion of ‘notwithstanding’ and ‘subject to’ in Articles 246(1) and (3) was to ensure that legislative *entries* in Lists I and III—not *legislation*—override entries in List II.⁷⁶ It is true that this must now be read in the light of the Supreme Court decisions⁷⁷ purporting to apply the non-obstante clause to repugnancy, but that view is itself a result of *VK Sharma* and the need to find a constitutional mechanism to resolve a conflict to which Article 254 does not apply.

Secondly, it is submitted that the Privy Council’s view is preferable in principle, because what the ‘subject to’ clause in Article 246(3) qualifies is the State legislature’s *power* to enact laws and not the *exercise* of that power. This must mean that the State lacks competence to enact a law if the ‘subject to’ clause is attracted, and yet it is clear that the law is *intra vires except* to the extent of the incidental encroachment. It is not easy to see how Article 246 can achieve this ‘partial’ *intra vires*, although Article 254 can.

Thirdly, as a matter of drafting technique, it is difficult to understand why the drafters would have wished to deal with a List I–II conflict in Article 246 but with a List III conflict in Article 254.

Finally, it may simply be that the words were inserted *ex abundanti cautela*, particularly because the contrary view cannot explain the legislative history set out above: if it is correct, there was no constitutional mechanism to deal with conflicting List III legislation *before* Sir Thomas Inskip’s amendment on 27 March 1937, but it is clear that this was not the intention of the framers of the 1935 Act.

(III) WHAT IS THE RATIONALE FOR CONFINING ARTICLE 254(2) TO THE CONCURRENT LIST?

The last, and it is submitted the least persuasive, objection to the criticism of *VK Sharma* is that there is no reason why the Presidential assent exception in Article 254(2) should be confined to the Concurrent List if the main rule in Article 254(1) applies across the Lists. On the contrary, the White Paper and the JSC Report explain that the Concurrent List was created to allow Parliament to legislate on what are *essentially local subjects*, if it felt that uniformity is required, for example, in dealing with such matters as civil and criminal procedure.⁷⁸ But it was thought that the States could be denuded of much legislative power by an ‘active Centre’ if the Act simply conferred concurrent powers and left it at that. The solution devised was to allow *individual* States to override Central legislation by obtaining Presidential consent, and the reason this

option is given with respect to List III but not List I is that *only List III deals with ‘essentially provincial subjects’*.⁷⁹

V. CONCLUSION

It is fairly clear, even from this chapter’s relatively abridged account of this important branch of the law, that something has gone wrong in the analysis of legislative competence in the Indian courts. This chapter has suggested that it is the failure to articulate two underlying principles that form the bedrock of Part XI: competence, which is governed only by Article 246 and the Lists, and repugnance, which is governed by Article 254 but not by Article 246. None of this can be set right below the level of a constitutional bench of the Supreme Court which, it is to be hoped, will begin afresh when the point next arises.

I conclude this chapter with a summary, in the form of six propositions, of what it is respectfully submitted is the correct position of law:

1. Unlike British Parliament, Indian Parliament and the State legislatures *derive* their power to legislate from the Constitution. The Constitution provides two mechanisms to address the inevitable inconsistencies that arise from giving legislative power to two legislatures: first, it attempts to define (as exhaustively as possible) the fields of legislation committed exclusively to each and the fields committed concurrently to both; secondly, it provides a simple rule to identify which *legislation* (not legislature) has priority should two *intra vires* legislation containing inconsistent provisions collide. This chapter has referred to the former mechanism as ‘competence’ and to the latter as ‘repugnance’.
2. The first question that a court must ask itself is whether the legislation is attributable to the appropriate List. This follows from the use of the expression ‘with respect to’, which is found in all three sub-clauses of Article 246. As Sulaiman J and Lord Porter explained, the question is therefore whether the legislation *as a whole* (and not individual provisions in it) is ‘with respect to’ the legislative entry in question. The existence of competing legislation is entirely irrelevant at this stage: if a State law is challenged as *ultra vires*, the position is exactly the same whether Parliament has enacted legislation on that subject or not. This is essentially a process of *construction*: is this *legislation*, properly construed, ‘with respect to’ this legislative *entry*, properly construed?

3. The principle the courts have devised for this process of construction has been given various names in the common law world. The most popular one in India is ‘the doctrine of pith and substance’. The result of applying it is that individual provisions referable to the wrong List can be upheld in a legislation that is (as a whole) ‘with respect to’ the correct List. The *degree* to which the individual provision invades the wrong List is irrelevant except, as Lord Porter and Sir Walter Monckton explained, to the extent it transforms the character of the legislation as a whole; if it does, the legislation is no longer ‘with respect to’ the correct List and therefore wholly void.

4. Once Principles (1)–(3) have been applied, the impugned legislation will be found to be either within or outside the *competence* of the legislature. If the latter, the inquiry ends and the law is void. If the former, the next question is whether the legislation *actually conflicts* with another legislation (also competently enacted, in accordance with (1) to (3) above). That is governed by Article 254(1). For this inquiry, the *purpose* of the impugned or the competing legislation and the doctrine of pith and substance are irrelevant: if there is no factual repugnance, both legislation are valid. It is a failure to appreciate this that led the Supreme Court astray in *Mar Appraem Kuri*: competence deals with power, and repugnance with actual conflict and not its possibility.

5. Article 254(1) applies across Lists I, II, and III. *VK Sharma* is wrongly decided and should be overruled. It is wrong for two principal reasons. First, it too holds that repugnance falls to be decided by applying the doctrine of pith and substance, which this chapter has shown is not accurate. Secondly, it did not consider the legislative history of section 107 of the Government of India Act 1935, and notably the debate in the House of Commons on 27 March 1935, which clearly demonstrates that the ‘Concurrent List Qualification’ was inserted by way of *amendment* to ensure that the basic rule applies to the Qualification, undermining the opposite inference which *VK Sharma* drew.

6. If Points (1) to (5) above are accepted, it would also follow that there is no room for a ‘freestanding’ aspect theory. What is thought to be a distinct aspect theory is in fact indistinguishable from pith and substance, for the reasons given in Section II of this chapter.

* I am grateful to the editors of this volume for inviting me to present this paper at a stimulating conference in Delhi, and to them and the participants for the many useful comments that I received. I am

also grateful to the librarians at the Bodleian Law Library for providing me with invaluable historical material relating to the Government of India Act 1935, and to Divyanshu Agrawal for research assistance in relation to the doctrine of occupied field.

¹ *Prafulla Kumar Mukherjee v Bank of Commerce Ltd, Khulna* (1946–47) 74 IA 23.

² *Nagaratnam v Seshayya* (1939) 49 LW 257 (Mad High Court (FB)); *ALSPPL Subrahmanyam Chettiar v Muttuswami Goundan* [1940] FCR 188; and *Bank of Commerce Ltd v Amulya Krishna Basu* [1944] FCR 126.

³ This is quite apparent in private law—indeed, some provisions of current Indian legislation are exact reproductions of observations made in the leading English cases of the day: eg, compare section 70 of the Indian Contract Act, 1872 with *Lampleigh v Brathwait* (1615) Hobart 105, 80 ER 255, and section 73 with *Hadley v Baxendale* (1854) 9 Exch 341, 359 (Alderson B). For a brilliant exposition of the (similar) origins of the Indian law of evidence, see JD Heydon, ‘The Origins of the Indian Evidence Act’ (2010) 9 OUC LJ 1, and on the influence of the common law and equity on early Indian private law generally, see VK John, ‘Principles of Equity and their Application to Indian Law’ (1928) 28 LW (JS) 29.

⁴ See eg, *Special Reference No 1 of 1964* AIR 1965 SC 745 (Gajendragadkar CJ) and *Raja Ram Pal v Speaker, Lok Sabha* (2007) 3 SCC 184 [21]–[22] (Sabharwal CJ).

⁵ Foreign Office, *Proposals for Indian Constitutional Reform* (Cmd 4268, 1933).

⁶ Joint Select Committee on Indian Constitutional Reform, *Report of Proceedings Vol I* (1934) (JSC Report).

⁷ See generally, JP Eddy and FH Lawton, *India’s New Constitution: A Survey of the Government of India Act, 1935* (2nd edn, Macmillan and Co 1938) and the JSC Report ([n 6](#)).

⁸ M Ramaswamy, *The Law of the Indian Constitution: A Legal Interpretation of the Government of India Act, 1935* (Longmans, Green & Co 1938) 217.

⁹ HC Deb 27 March 1935, vol 299, col 1965.

¹⁰ *Goundan* ([n 2](#)) 218 (Sulaiman J).

¹¹ In the Constitution, these correspond to Entry 30, List II (moneylending) and Entries 45 and 46, List I (banking and promissory notes, respectively).

¹² *Prafulla Kumar Mukherjee* ([n 1](#)).

¹³ *Nagaratnam* ([n 2](#)).

¹⁴ *Martin v Most* [2010] UKSC 10 [13] (Lord Hope). This is why, as explained below, the so-called aspect theory is not a distinct rule at all.

¹⁵ *Marwari v Ram* AIR 1941 Pat 99 (Patna High Court).

¹⁶ Other High Courts had taken this view as well: Patna is chosen here simply as a representative example.

¹⁷ *Goundan* ([n 2](#)).

¹⁸ *Prafulla Kumar Mukherjee* ([n 1](#)).

¹⁹ *Goundan* ([n 2](#)) 201 (Sir Maurice Gwyer CJ).

²⁰ See also *Amulya Krishna Basu* ([n 2](#)).

²¹ *Prafulla Kumar Mukherjee* ([n 1](#)) 29 (emphasis added).

²² *Prafulla Kumar Mukherjee* ([n 1](#)) 43, 44 (Lord Porter) (emphasis added).

²³ *Bank of Commerce Ltd v Kar* (1944) 48 CWN 403 (Calcutta High Court).

²⁴ *Prafulla Kumar Mukherjee* ([n 1](#)) 32.

²⁵ *Bank of Commerce Ltd, Khulna v Kunja Behari Kar* [1944] 6 FCR 370, 382 (Spens CJ).

²⁶ [1937] AC 863.

²⁵ *Kunja Behari* ([n 23](#)) 382 (Spens CJ).

²⁶ *A-G for Alberta v A-G for Canada* [1943] UKPC 5.

²⁷ By Viscount Maugham.

²⁹ *Prafulla Kumar Mukherjee* ([n 1](#)) 32.

³¹ See eg, *Kannan Devan Hills Produce v State of Kerala* (1972) 2 SCC 218 [28] (Sikri CJ).

³² See eg, *State of Bombay v FN Balsara* AIR 1951 SC 318 [16] (Fazl Ali J); *DN Banerjee v PR Mukherjee* AIR 1953 SC 58 [4] (Chandrasekhara Aiyar J); *AS Krishna v State of Madras* AIR 1957 SC 297 [4] (Venkatarama Aiyar J) and *State of AP v McDowell & Co* (1996) 3 SCC 709 [20] (Jeevan Reddy J).

³³ See Section III below.

³⁴ *Gujarat University v Shri Krishna Ranganath Mudholkar* AIR 1963 SC 703.

³⁵ Unlike other ‘overriding’ entries in List I (eg, 52 and 54), Entry 66 does not need to be triggered by a ‘declaration’ by Parliament. One might think, therefore, that to the extent a field of legislation is found in both Entry 66 and a State List entry, the former prevails so that the State Legislature has no competence at all with respect to that field (leaving incidental encroachment aside). Since the Supreme Court did not take this view of the point of construction, it became necessary to analyse competence and repugnance.

³⁶ *Gujarat University* ([n 34](#)) [23] (Shah J).

³⁷ Space does not permit a detailed account of this to be given in this chapter. However, see Seervai’s illuminating analysis of the main rules of construction, that is, broad construction, ancillary powers, harmonious construction and *nomen juris*: HM Seervai, *Constitutional Law of India: A Critical Commentary*, vol 3 (4th edn, Universal Book Traders 2002) 2.93.

³⁸ This section has greatly benefited from numerous discussions I have had over the years with Arvind Datar, Senior Advocate, about the aspect theory, although our views differ.

³⁹ *Federation of Hotel & Restaurant Association of India v Union of India* (1989) 3 SCC 634.

⁴⁰ Several States had enacted similar legislation. Gujarat is chosen as a representative example.

⁴¹ *Federation* ([n 39](#)) [76] (Ranganathan J).

⁴² See eg, *Bharti Telemedia Ltd v Govt of NCT of Delhi* [2011] 182 DLT 665 (Delhi High Court).

⁴⁵ *Hodge* ([n 43](#)) 67–68 (Sir Barnes Peacock).

⁴³ *Hodge v The Queen* [1883] UKPC 59.

⁴⁴ *Russell v The Queen* [1882] UKPC 33.

⁴⁶ See eg, *Multiple Access Ltd v Mccutcheon* [1982] 2 SCR 161 (Canada Supreme Court); *Rio Hotel v New Brunswick* [1987] 2 SCR 59 (Canada Supreme Court); *DFS Ventures Inc v Manitoba* [2003] 8 WWR 200 (Manitoba CA).

⁴⁷ *Martin* ([n 13](#)).

⁴⁸ See eg, *Nagaratnam* ([n 2](#)).

⁴⁹ This chapter cannot explore all of them. Of those it does not discuss, perhaps the most important is the ‘test’ of repugnance. The—with respect, somewhat dubious—view that a State law may be repugnant to a Central law simply because Parliament ‘intended to occupy the field’ has prevailed: see, for some of the leading cases on this, *Tika Ramji v State of Uttar Pradesh* AIR 1956 SC 676 [26] (NH Bhagwati J); *Deep Chand v State of Uttar Pradesh* AIR 1959 SC 648 [28] (Subba Rao J); *M Karunanidhi v Union of India* (1979) 3 SCC 431 [24], [35] (Fazal Ali J); *S Satyapal Reddy v Govt of Andhra Pradesh* (1994) 4 SCC 391 [7] (Ramaswamy and Venkatachala JJ).

⁵³ *Tika Ramji* ([n 49](#)) [32] (NH Bhagwati J) (emphasis added); *SIEL Ltd v Union of India* (1998) 7 SCC 26 [21] (Sujata Manohar J).

⁵⁰ (2012) 7 SCC 106.

⁵¹ HC Deb 27 March 1935, vol 299, col 1966 (emphasis added).

⁵² *Tika Ramji* ([n 49](#)).

⁵⁴ See eg, *ITC Ltd v Agricultural Produce Market Committee* (2002) 9 SCC 232 [96] (Ruma Pal J); see also *Punjab Dairy Development Board v Cepham Milk Specialties Ltd* (2004) 8 SCC 621 [12] (Variava J) and *State of Maharashtra v Bharat Shanti Lal Shah* (2008) 13 SCC 5 [48] (Sharma J).

⁵⁵ *Mar Appraem Kuri* ([n 50](#)) [42] (Kapadia CJ).

⁵⁶ Defined in art 366(10) of the Constitution as (essentially) a law made before the commencement of the Constitution. This, surprisingly, was overlooked in *MP Shikshak Congress v RPF Commissioner* (1999) 1 SCC 396 [11].

⁵⁷ HC Deb 27 March 1935, vol 299, col 1962 (emphasis added).

⁵⁸ See eg, SM Bose, *The Working Constitution in India: A Commentary on the Government of India Act, 1935* (1939) 224; Ramaswamy ([n 8](#)) 225.

⁵⁹ See eg, *Goundan* ([n 2](#)) (Sulaiman J).

⁶⁰ *Lakhi Narayan Das v Province of Bihar* 1950 MWN (Cri) 46 (2), 48 (Mukherjea J). The Central law in question was the Code of Criminal Procedure 1869, a Branch 2 law.

⁶¹ *Megh Raj v Allah Rakhia* [1942] FCR 53 and *Raj v Rakhia* [1947] UKPC 5. The Central legislation were the Contract Act 1872 and the Code of Civil Procedure, both (as the Privy Council expressly recognised) Branch 2 legislation.

⁶² *Das* ([n 60](#)) 48 (Mukherjea J); *Saverbhai Amaldas v State of Bombay* AIR 1954 SC 752 [8] (Venkatarama Aiyar J) (not just because there was a Branch 2 law—the appellant was refused leave to take the repugnance point); *AS Krishna* ([n 32](#)) [4] (Venkatarama Aiyar J); *Prem Nath Kaul v State of Jammu and Kashmir* AIR 1959 SC 749 [43] (Gajendragadkar J); *Bhagwat Singh Bahadur v State of Rajasthan* AIR 1964 SC 444 [14] (Shah J) (dealt with art 254(2), not (1)); *State of Assam v Labanya Probha Devi* AIR 1967 SC 1575 [7] (Subba Rao CJ).

⁶³ *Tika Ramji* ([n 49](#)) [26] (NH Bhagwati J); *RMDC (Mysore) Pvt Ltd v State of Mysore* AIR 1962 SC 594 [13] (Kapur J).

⁶⁴ *State of Orissa v Bhupendra Kumar Bose* AIR 1962 945 [16] (Gajendragadkar J); *Ukha Kolhe v State of Maharashtra* AIR 1963 SC 1531 [18] (Shah J) (it was in addition a Branch 2 law).

⁶⁵ *Tansukh Raj Jain v Neel Ratan Prasad Shaw* AIR 1966 SC 1780 [4] (Dayal J); *State of Assam v Horizon Union* AIR 1967 SC 442 [9] (Bachawat J); *Ahmedabad Mill Owners' Assn v IG Thakore* AIR 1967 SC 1091 [11] (Bhargava J); *Gram Panchayat v Malwinder Singh* (1985) 3 SCC 661 [11] (Chandrachud CJ); *Dr. AK Sabhapathy v State of Kerala* (1992) Supp (3) SCC 147 [8] (Agrawal J); *Kanaka Gruha Nirmana Sahakara Sangha v Narayanamma* (2003) 1 SCC 228 [10]–[12] (Shah J).

⁶⁶ *Bhawani Cotton Mills Ltd v State of Punjab* AIR 1967 SC 1616 [18] (Vaidialingam J) (Central Sales Tax Act, not a Branch 2 law); *State of Jammu and Kashmir v MS Farooqi* (1972) 1 SCC 82 [19]–[20] (Sikri CJ); *ITC Ltd v State of Karnataka* (1985) Supp SCC 476 [68] (Varadarajan J) overruled on a different point in *ITC v AMPC* ([n 54](#)).

⁶⁷ *Bar Council of Uttar Pradesh v State of Uttar Pradesh* (1973) 1 SCC 261 [15] (Grover J).

⁶⁸ See eg, *Kerala State Electricity Board v Indian Aluminium Co Ltd* (1976) 1 SCC 466 [3] (Alagiriswami J, who said that counsel who argued the contrary was ‘confused’).

⁶⁹ *M Karunanidhi* ([n 49](#)) [8] (Fazal Ali J).

⁷⁰ *Hoechst Pharmaceuticals Ltd v State of Bihar* (1983) 4 SCC 45 [67] (Sen J).

⁷¹ *Vijay Kumar Sharma v State of Karnataka* (1990) 2 SCC 562.

⁷² *VK Sharma* ([n 71](#)) [37], [39], [53] (emphasis added).

⁷³ See eg, *Southern Petrochemicals Industries Co Ltd v Electricity Inspector* (2007) 5 SCC 447 [60]–[61] (Sinha J) and *Bharat Shanti Lal Shah* ([n 54](#)) [48] (Sharma J).

⁷⁴ See eg, *Kulwant Kaur v Gurdial Singh Mann* (2001) 4 SCC 262 [18] (Banerjee J) and *Maa Vaishno Devi Mahila Mahavidyalaya v State of Uttar Pradesh* (2013) 2 SCC 617 [66] (Swatanter Kumar J). It is impossible to reconcile these cases with *VK Sharma*.

⁷⁵ *ITC v AMPC* ([n 54](#)).

⁷⁶ *Governor-General in Council v Province of Madras* [1945] UKPC 4 (Lord Simonds).

⁷⁷ See eg, *Hoechst Pharmaceuticals Ltd* ([n 70](#)) [38] (Sen J); *VK Sharma* ([n 71](#)) [99] (Ramaswamy J); *ITC v AMPC* ([n 54](#)) [93] (Ruma Pal J) and *Govt of Andhra Pradesh v JB Educational Society* (2005) 3 SCC 212 [12] (Balakrishnan J).

⁷⁸ *Foreign Office* ([n 5](#)) [114].

⁷⁹ *JSC Report* ([n 6](#)) [233]. See also Bose ([n 58](#)) 215.

CHAPTER 27

INTERSTATE TRADE, COMMERCE, AND INTERCOURSE

ARVIND P DATAR

I. INTRODUCTION

PART XIII of the Indian Constitution comprises Articles 301 to 305 and deals with 'Trade, Commerce and Intercourse within the territory of India'. This Part, more than any other, is fundamental to the federal structure envisaged by the Constitution. It is often forgotten that the elimination of interState trade barriers is essential to the economic unity of the country. The main focus of this chapter is to highlight the contentious topic of compensatory taxes, which, as matters currently stand, has been referred to a bench of the Supreme Court that is likely to comprise nine or eleven judges.

The legislative history of Part XIII has been set out in some detail in the minority judgment of Sinha CJ in the *Atiabari* case.¹ Similarly, one may also refer to the majority judgment of Gajendragadkar J.² Briefly, the object was to eliminate trade barriers between different States that would form independent India. Past experience showed that a large number of native Indian States, which claimed sovereign rights within the limits of paramount power, imposed levies that created customs barriers and this led to Section 297 of the Government of India Act 1935, which read as follows:

Prohibition of certain restrictions on internal trade—(1) No Provincial Legislature or Government shall—

- (a) by virtue of the entry in the Provincial Legislative List relating to trade and commerce within the Province, or the entry in that list relating to the production, supply and distribution of commodities, have power to pass any law or take any execution action prohibiting or restricting the entry into, or export from, the Province of goods of any class or description; or
 - (b) by virtue of anything in this Act have power to impose any tax, cess, toll or due which, as between goods manufactured or produced in the Province and similar goods not so manufactured or produced, discriminates in favour of the former, or which, in the cases of goods manufactured or produced outside that Province, discriminates between goods manufactured or produced in one locality and similar goods manufactured or produced in another locality.
- (2) Any law passed in contravention of this section shall, to the extent of the contravention, be invalid.

In the Constituent Assembly, Sir BN Rau prepared the first draft of what would eventually become Article 301:

Subject to regulation by the law of the Union, trade, commerce and intercourse among the units, whether by means of internal carriage or by ocean navigation, shall be free:

Provided that any unit may by law impose reasonable restrictions thereon in the interest of public order, morality or health.³

Rau adapted this clause from Article 92 of the Australian Constitution and his draft report was filed on 3 April 1947. On 27 October 1947, Rau presented a more elaborate draft to the Drafting Committee:

Subject to the provisions of any Federal law, trade, commerce and intercourse among the units shall, if between the citizens of the Federation, be free:

Provided that nothing in this section shall prevent any unit from imposing on goods imported from other units, any tax to which similar goods manufactured or produced in that unit are subject, so, however, as not to discriminate between goods so imported and goods so manufactured or produced:

Provided further that no preference shall be given by any regulation of trade, commerce or revenue to one unit over another:

Provided also that nothing in this section shall preclude the Federal Parliament from imposing by Act, restrictions on the freedom of trade, commerce and intercourse among the units in the interest of public order, morality or health or in case of emergency.⁴

In the end, Articles 301 to 305 were incorporated in our Constitution and, as the text reveals, they were far more detailed than these previous draft provisions. Part XIII evolves an integrated policy and the Founders seem to have kept three main considerations in mind. First, in the larger interest of India there must be free flow of trade, commerce, and intercourse, both interState and intraState; secondly, regional interests must not be altogether ignored; and thirdly, the Union must have the power to intervene in case a crisis arises in any part of India.⁵ According to the Supreme Court, ‘the declaration contained in Part XIII of the Constitution is against creation of economic barriers and/or pockets which would stand against the free flow of trade, commerce, and intercourse’.⁶ Article 301, read in its proper context and subject to the limitations prescribed by other relevant articles in Part XIII, must be regarded as imposing a constitutional limitation on the legislative powers of Parliament and the State Legislatures. Article 301 applies not only to interState trade and intercourse but also to intraState trade, commerce, and intercourse. The freedom of trade guaranteed by Article 301 is ‘freedom from all restrictions except those which are provided by the other articles in Part XIII’.⁷

It is worth noting that the freedom of interState and intraState trade is not a

fundamental right and cannot be enforced under Article 32.⁸ Most cases under Articles 301 and 304 deal with the impact of tax laws and regulatory measures on interState trade and commerce. These laws will be struck down if they ‘directly and immediately restrict or impede the free flow or movement of trade’.⁹ The Supreme Court has held that sales tax is not a compensatory tax or regulatory measure, and if the levy of sales tax discriminates between goods of one State and goods of another, it will offend Article 301 and will be valid only to cases within the terms of Article 304(a).¹⁰ A number of cases have struck down levies that discriminate between products made in one State and another.¹¹ At the same time, granting special exemption from sales tax in favour of new units for a specified period has been held not to violate Articles 301 and 304.¹² Keeping these aspects of the overall legal position in mind, this chapter will focus on the controversial topic of compensatory taxes—a topic that has defined the Indian constitutional experience on interState trade, commerce, and intercourse.

II. THE COMPARISON WITH AUSTRALIAN LAW

Before we move to an examination of the Indian constitutional position, it is important to compare the Indian framework with the Australian one. Indian judges and lawyers frequently resort to the comparison with Australia, and so it is necessary to consider its usefulness. The language of Article 301 is based on Section 92 of the Commonwealth of Australia Constitution Act 1900, although the latter, as reproduced below, is more elaborate than its Indian counterpart:

Trade within the Commonwealth to be Free—On the imposition of uniform duties of customs, trade, commerce and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free.

But notwithstanding anything in this Constitution, goods imported before the imposition of uniform duties of customs into any State, or into any Colony which, whilst the goods remain therein, becomes a State, shall, on thence passing into another State within two years after the imposition of such duties, be liable to any duty chargeable on the importation of such goods into the Commonwealth, less any duty paid in respect of the goods on their importation.

The scope of Section 92 has been the subject of intense contestation in Australian courts. Indeed, one Chief Justice of the High Court of Australia bemoaned that when he died, Section 92 would be found written on his heart.¹³ Did the word ‘intercourse’ include non-commercial intercourse? Was banking

outside the ambit of the expression ‘trade, commerce and intercourse’? Did Section 92 apply only to the buying and selling of goods? These are only some of the controversies that have plagued Australian courts.

While Article 301 is based on Section 92, the similarity ends there. Section 92 is not followed by a number of provisions that are similar to Articles 301 to 305. Further, the powers of legislation of the individual States of Australia are far less than the powers of legislation given to the States in India under Lists II and III of the Seventh Schedule to the Indian Constitution. Given that the textual structure of Part XIII is substantially different from Section 92 of the Australian Constitution, it would be inappropriate to interpret the provisions of our Constitution based on the judgments of the High Court of Australia or the Supreme Courts of various Australian States.

Further, the word ‘intercourse’ in Australia has been held to include non-commercial intercourse and the question arises as to whether such a view can be adopted in India.¹⁴ On a plain reading of Article 301, it is seen that the word ‘intercourse’ follows the words ‘trade’ and ‘commerce’. If the Article was intended to grant freedom only to trade and commerce, what was the necessity of using the word ‘intercourse’ as well? It will be incorrect to limit the word ‘intercourse’ only to commercial activity because the intention of Part XIII is to ensure free trade, commerce, and intercourse within the territory of India. Indeed, Subba Rao J made a passing observation that Article 301 would include non-commercial intercourse.¹⁵ It is significant that the word ‘intercourse’ was used in 1901. What was its meaning at that time? What do we mean by the phrase ‘uniform duties of customs’ used in Section 92?

The dissenting view of Hidayatullah J in the *Automobile Transport* case contains an excellent account of the history of Section 92. One common thread in all the decisions of the Supreme Court has been that although Article 301 of our Constitution has borrowed the language of Section 92 of the Australian Constitution, the overall constitutional framework in India and Australia is very different. As Hidayatullah J put it, ‘Indeed, they differ in so many respects that nothing is more dangerous than to suppose that the Indian Constitution wished to secure freedom of trade, commerce and intercourse in the same way as did the Australian Commonwealth.’¹⁶

Hidayatullah J also pointed out that the situation in India was the ‘converse’ of that in Australia. While ‘several independent units joined together in Australia to form a federation to evolve a Union government, in India the transition was from a highly centralized Government to a federation of States which were made autonomous units’.¹⁷ There was a ‘classification of subjects between the Centre

and the Provinces, and the topics of legislation, taxation and administration were separated to distinguish the different spheres'.¹⁸ These provisions were made in Section 45A of the 1915 Act, which also provided for the Devolution Rules and Schedules, which were the 'precursors of the Lists under the Government of India Act, 1935 and the present Constitution'.¹⁹ 'The only difference' was the absence of a Concurrent List, but this was unnecessary as all residual power was with the Centre.²⁰ Hidayatullah J also noted that the reforms of 1919, which introduced a system of local government, resulted not in decentralisation but in 'de-concentration' as known in France.²¹

The importance of caution in relying upon foreign decisions, especially within the domain of federalism, was emphasised by Sir Maurice Gwyer of the Federal Court. He believed that:

[T]here are few subjects on which the decisions of other Courts require to be treated with greater caution than that of federal and provincial powers, for in the last analysis the decision must depend upon the words of the Constitution which the Court is interpreting; and since no two Constitutions are in identical terms, it is extremely unsafe to assume that a decision on one of them can be applied without qualification to another.²²

Venkatarama Aiyar J, of the Indian Supreme Court, expressed a similar sentiment some years later, referring specifically to the care with which comparisons between Section 92 of the Commonwealth of Australia Constitution Act and Article 301 of the Indian Constitution must be made.²³ As the Privy Council observed, the words 'absolutely free' used in Section 92 were limited:

As a matter of actual language, freedom in section 92 must be somehow limited, and the only limitation which emerges from the context and which can logically and realistically be applied is freedom at what is the crucial point in interState trade, that is at the State barrier.²⁴

The expression 'trade and commerce' used in Section 92 simply covers 'all commercial arrangements of which transport was the direct and necessary result'.²⁵ Upon reviewing the applicability of Section 92 the Privy Council emphasised two general conclusions, which have been cited with approval by the Indian Supreme Court:

(i) that regulation of trade, commerce and intercourse among the States is compatible with its absolute freedom, and (ii) that Section 92 of the Australian Constitution is violated only when a legislative or executive act operates to restrict such trade, commerce and intercourse directly and immediately as distinct from creating some indirect or inconsequential impediment which may fairly be regarded as remote.²⁶

These confirm the limited guidance it can provide for interpreting the trade,

commerce, and intercourse clauses in the Indian Constitution.

III. THE ‘COMPENSATORY TAX’ CONTROVERSY

The major legal controversy in India with regard to Articles 301 to 304 is around the concept of ‘compensatory tax’. In 1961, a five-judge bench of the Supreme Court in *Atiabari* dealt with the scope of Articles 301 and 304.²⁷ Within six months the correctness of this decision was referred to a larger bench of seven judges, which delivered the judgment in *Automobile Transport*.²⁸ The former bench introduced, for the first time, the concept of ‘compensatory tax’ and this spawned further concepts like proportionality, equivalence, and so on. The concept of compensatory tax was not only erroneous but also unnecessary. Unfortunately, no commentary on the Constitution of India has considered the two High Court judgments from Assam and Rajasthan that eventually led to the decisions by the five-and seven-judge benches. The Supreme Court, in both *Atiabari* and *Automobile Transport*, failed to ask the right questions. The concept of compensatory tax led to a series of errors and gave State Legislatures almost unbridled power to levy taxes and justify them on the ground of being compensatory. Over the years, decisions of the Supreme Court on this topic have muddied the waters, and no clear principle has emerged. Accordingly, in 2008, a division bench of the Supreme Court referred the controversy surrounding compensatory taxes for hearing by another constitutional bench.²⁹ The bench of five judges in turn referred the matter to an even larger bench, and it is now likely that the case will be heard by a bench of nine or eleven judges.³⁰ This bench, whenever it is constituted, will face a range of issues that are examined in detail below.

In 2010, a Supreme Court bench of five judges in *Jindal*³¹ took the view that the Court should ‘revisit’ the tests propounded in *Atiabari* and *Automobile Transport* because in the earlier decisions some key matters were ignored, and the Court applied the rulings of *Keshav Mills*³² and *Central Board of Dawoodi Bohra Community*.³³ The Court noted that ten questions had been referred to a constitutional bench in 2008,³⁴ and, without specifically stating that further questions need to be referred, the Supreme Court set out the aspects that required reconsideration by a larger bench. While these questions touch upon a wide range of matters, they fail to ask the two most important questions: (i) whether the concept of ‘compensatory tax’ has legal basis; and (ii) whether such a

concept, even if legal, is necessary.

It is submitted that the concept of 'compensatory tax' has no place in Indian constitutional law. Articles 301 to 305 have been well drafted and the validity of any levy or regulatory measures can and should be decided on the basis of a literal reading of these provisions. As we shall see, the Assam and Rajasthan levies were not found to cause any impediment to trade or commerce before the respective High Courts, and they should have been upheld on that ground alone.

IV. THE *ATIABARI* RULING

The controversy over compensatory taxes began with Section 3 of the Assam Taxation (On Goods Carried by Roads or Inland Waterways) Act 1954, which read as follows:

Subject to the provisions of this Act and with effect from such date as the Government may, by notification appoint, being not earlier than thirty days from the date of the said notification, (a) manufactured tea in chests carried by motor vehicle, cart, trolley, boat animal and human agency or other means except railways and airways shall be liable to a tax of one pice per pound of such tea and this tax shall be realized from the producer; (b) jute carried in bales by motor vehicles, cart, trolley, boat animal and human agency or any other means except railways and airways, shall be liable to a tax of eight annas per maund of such jute which shall be realized from the dealer.

Apart from Section 3, Sections 4 and 5 provided for charging tax on the net weight, which had to be determined in a prescribed manner. Thus, the tax at the rate of 1 paise (or pice) per pound of tea and 8 annas per maund of jute was payable on the net weight. The number of kilometres or miles over which tea or jute was transported was not relevant. This tax was challenged before the Assam High Court, and the case was heard by a special bench of three judges (the law reports use the expression 'special bench' rather than 'full bench').³⁵ It was argued that the levy was *ultra vires* of Article 301, as it had the effect of interfering with the freedom of trade, commerce, and intercourse—the tax interfered with the transportation of tea from Assam to Calcutta. Further, tea, being a controlled industry, came within Entry 52 of List I of Schedule VII. The Union government alone could regulate the manufacture, production, supply, and distribution or transportation of tea and also fix the price of tea. A reference was made to the Tea Act 1953 and it was urged that the status of the tea industry was within the control of the Union. It was also contended that the tax on the carriage of goods by road/inland waterways was, in reality, an excise duty which was within the exclusive domain of the Union government under Entry 84 of the

Union List; that the Act was violative of Article 14 as it taxed only tea and jute but no other commodities (further, it taxed only manufactured tea in chests and not manufactured tea in other containers); and that the impugned tax was not within the ambit of Entry 56 of List II of Schedule VII. The law was, thus, a colourable piece of legislation as it sought to levy a tax on trade and commerce which was not distinguishable from excise duty; under the guise of legislating under Entry 56, excise duty, a central levy, was being imposed. It was urged that the levy would not fall under Entry 56 because: (a) it taxed only goods and not goods and passengers; (b) the incidence of tax further fell on the producer and not on the carrier as intended by the entry—the tax, in substance, was an excise duty or tax even before the first stage; (c) it was not a tax for the use of the roads, as the levy was on the basis of the net weight and regardless of the distance traversed; (d) there was a conflict between the preamble and the title on the one side and the charging section on the other. The two final contentions before the Court were that the Act infringed Article 19(1)(g); and that Article 301 was subject only to Part XIII and to no other part of the Constitution. Consequently, the imposition of tax necessarily interfered with the freedom of trade, commerce, and intercourse as mentioned in Article 301.³⁶

It is clear from these submissions that there was no argument on behalf of the State that the tax would be justified, as it was a regulatory or compensatory measure. There was no plea that the Act required the consent of the President under Article 304(b). Significantly, no material was placed before the court to show how this levy was excessive or in any manner interfered with trade and commerce in tea or jute.

The special bench of the Assam High Court observed that cases under Section 92 of the Australian Constitution would not apply because Article 301 did not have overriding attributes. The Chief Justice further observed that the imposition of a tax covered by Entry 56 of List II did not interfere with the freedom of trade, commerce, or intercourse. If this argument was accepted, he held, many taxes that the State Legislature was authorised to levy would have to be declared as unauthorised on the ground of interference with trade or commerce, and sales tax would be a permanent casualty. The Chief Justice held that Part XIII may not be subject to the other parts of the Constitution, but that did not necessarily mean that the other parts, must, therefore, be subject to Part XIII of the Constitution. The Constitution was in the nature of an organic whole and one must interpret it in a manner so as to harmonise its various parts and not to make them conflict with each other.

The separate judgment of Ram Labhaya J was more detailed. It carefully considered the scope of Section 3 and the nature of the tax that was levied. It

also considered the challenge under Article 301 of the Constitution. With reference to the commerce clause in Article 1 of Section 8(3) of the US Constitution as well as Section 92 of the Commonwealth of Australia Constitution Act, Labhaya J held that the expression ‘commerce’, as understood in the US and Australia, could be followed in the context of Article 301 without any difficulty. Thereafter, the learned judge has discussed the impact of Articles 302, 304, and certain entries of the legislative Lists. Finally, Ram Labhaya J stated that ‘the crux’ was the issue whether the tax imposed on the carriage of goods (tea and jute) was a restriction on the freedom of trade or commerce within the meaning of Article 301. The question was to determine what it was that the ‘trade, commerce, or intercourse’ was to be *free from*. Is the freedom partial or total? Does it include freedom from taxation, which may indirectly affect the freedom of trade and commerce by reason of the financial burden it necessarily imposes?

After discussing the scope of Articles 246, 265, 276, 286, 287, and 288 as well as Section 92 of the Australian Constitution, Labhaya J observed that a tax or a pecuniary burden could restrict the freedom of trade and, in fact, could be the most effective method of restricting the freedom of trade and commerce without saying so. Therefore, if a tax had the effect of indirectly restricting or prohibiting trade or commerce, it would be colourable. Taxing entries were not designed to restrict or prohibit trade or commerce and if the power of taxation was utilised to achieve something that could not be achieved directly, it may be hit by Article 301. Therefore, taxation was not free from the mischief of Article 301. However, taxation per se would not abridge or curtail the freedom under Article 301. It was only when taxation had the effect of curtailing freedom of trade and commerce that it would be hit by the provisions of Article 301. It was also observed that there was no plea that any appreciable value of trade had been affected injuriously by the operation of the Act.

The decision of the Assam High Court was appealed against and heard by a bench of five judges in the historic *Atiabari* case.³⁷ Speaking for the majority, Gajendragadkar J held that:

It is hardly necessary to emphasise that in dealing with constitutional questions courts should be slow to embark upon an unnecessarily wide or general enquiry and should confine their decision as far as may be reasonably practicable within the narrow limits of the controversy arising between the parties in the particular case.³⁸

Remarkably, Gajendragadkar J proceeded to ignore his own warning. The five judges embarked on an unnecessarily wide and general inquiry, instead of confining their decision to merely deciding whether the Assam levy violated

Article 301. Significantly, it was not the case of the petitioners that the levy was excessive or had the direct or immediate effect of impeding trade. The *Atiabari* case, as pointed out later in *Automobile Transport*, revealed three views, which could be categorised as the wide view, the narrow view, and the middle ground. The judgment of Shah J represented the wide view, whereby it would have been virtually impossible to levy tax or impose reasonable restrictions and was rightly rejected by the seven judges.³⁹ The narrow interpretation led to the view that taxing laws were governed by Part XII of the Constitution and except Article 304(a), none of the other provisions of Part XIII extended to taxing laws. This view was also rejected by holding that taxing provisions were not excluded from Part XIII.⁴⁰ It would be incorrect to hold that Part XIII applies only to legislation in respect of entries relating to trade and commerce. However, the Supreme Court observed that regulatory measures and compensatory taxes were excluded from the purview of Part XIII of the Constitution. In view of the subsequent decision in *Automobile Transport*, it is not necessary to discuss the *Atiabari* case in detail. However, it is interesting to note that Mathew J held that *Automobile Transport* ‘practically overruled’ the decision in *Atiabari*, insofar as it held that if a State Legislature wanted to impose taxes to raise monies to build roads, it would only be done after obtaining the sanction of the President under Article 304(b).⁴¹ This would virtually put the State Legislature at the mercy of the executive at the Centre.

In the end, by a margin of 4:1, the Supreme Court in *Atiabari* held that the levy was invalid because the assent of the President had not been taken under Article 304(b). This was a ground that was never urged before the Assam High Court. Similarly, the observations regarding regulatory and compensatory taxes were unnecessary and have, over the years, resulted in a huge loss of judicial time. Despite this, the per se test laid down by the Supreme Court in *Atiabari* appears correct.

V. AUTOMOBILE TRANSPORT AND THE RAJASTHAN LEVY

Section 4 of the Rajasthan Motor Vehicles Taxation Act 1951 imposed taxes at different rates on different kinds of vehicles and, effectively, no vehicle could be owned or used in Rajasthan without paying the appropriate tax. Section 11 provided for penalties for non-compliance with the provisions of the Act. These two sections were challenged on the ground that they infringed the freedom of trade, commerce, and intercourse granted under Article 301 of the Constitution.

The levy was also challenged on three further grounds: that the Act had not obtained the previous sanction of the President under the proviso to Article 304(b); that this defect had not been remedied by obtaining subsequent assent under Article 255; and that, on the basis of the decisions under Section 92 of the Australian Constitution, the levy of the tax was also *ultra vires* of Article 301 because this Article was based on Section 92. The State of Rajasthan responded to these arguments by contending that if the tax was levied under the powers of the State Legislature under Article 245 of the Constitution, the levy would not offend Article 265. The State further argued that a law imposing a tax cannot be declared to be invalid on the ground that it offends Article 301.

As in the High Court of Assam, this case was also heard by a full bench.⁴² The High Court proceeded to decide the case on the impact of the tax on motor vehicles on individuals and non-individuals. As far as individuals were concerned, it was pointed out that the right to move freely was conferred under Article 19(1)(d) and right to carry on business was given by Article 19(1)(g). Both rights were subject to reasonable restrictions under Articles 19(5) and 19(6), and assuming that the tax amounted to a restriction, if it was reasonable, it would not be fettered by Article 304. While Article 19 referred to individuals, Article 301 would be affected only if there was a direct and immediate restriction on the movement of goods. It was held that a tax could be considered as an impediment only if it was so high that it would 'kill trade and commerce'.⁴³ The High Court then examined the rates of tax prescribed by Section 4 read with relevant Schedules. It compared the total collection of tax on motor vehicles with expenditure on new roads and maintenance of old roads and found that this tax approximately met 50 per cent of such expenditure and, consequently, the levy of taxation did not amount to imposing unreasonable restrictions on the freedom guaranteed under Articles 19(1)(d) and 19(1)(g). For example, the tax for a car with a five-person seating capacity came to Rs 60 per year, and this would not be violative of Article 301 as any impact on trade and commerce was only indirect. Thus, the full bench held that taxes could affect Article 301 only if they were exorbitant. Although the phrase used was 'kill trade and commerce', it does seem that even if taxes do not meet this standard they would certainly be struck down if they caused serious impediment to the free movement of goods.

This case was then taken up to the Supreme Court. At that time, doubts were raised on certain observations in the *Atiabari* case and the appeal from Rajasthan was heard by a bench of seven judges.⁴⁴ We can see that the concept of compensatory tax was never considered by the High Court. This expression was

first coined in the *Atiabari* case and further explained by the Supreme Court in the *Automobile Transport* case. Das J held that a compensatory tax, in reality, facilitates trade and commerce and does not constitute a 'restriction'; 'compensatory taxes are no hindrance to anybody's freedom as long as they are reasonable ...'⁴⁵ He also pointed out that Article 301 would not affect regulatory measures such as licensing regulations for vehicles. Das J went on to state that compensatory taxes should not be patently more than the facilities that are provided.⁴⁶ In other words, it was contemplated that compensatory taxes must have a correlation with the improvement or increase in trade. If the tax levied was disproportionate to the benefit, it would violate Article 301 as it was not compensatory. Indeed, Das J propounded a working test to decide whether a tax was compensatory:

[A] working test for deciding whether a tax is compensatory or not is to enquire whether the trades people are having the use of certain facilities for the better conduct of their business and paying not patently much more than what is required for providing the facilities.⁴⁷

This test, however, appears unworkable. It raises a range of questions. For instance, who decides what facilities are meant for 'better conduct' of business? What is meant by not paying 'patently more' than the amount required to provide the facilities? Suppose the taxes are collected for improving facilities over a five-year period, does one have to wait until the facilities are in place and then decide whether they have indeed resulted in better conduct of business? Further, the theory of compensatory tax is fundamentally flawed. A tax is a compulsory exaction and there is no obligation on the part of the State to explain what specific activity it is meant for. Taxes have to be applied for a public purpose under Article 282. The very nature of a tax is that it is not correlated to a particular activity. This was recognised by Chinnappa Reddy J, who observed that a tax under Entry 56 will be compensatory, but such tax need not satisfy the principle of proportionality because that would render a compensatory tax indistinguishable from a fee.⁴⁸ This once again leads to a paradox. The compensatory tax, according to Reddy J, does not have to be proportionate to the facility. But this is contradictory to the requirement in the *Automobile Transport* case, where the payment should not be patently much more than that required for the facilities.

From 1962 to 2006, most of the cases concerned entry tax and motor vehicles tax. The case law has been discussed at length by Kapadia J in the *Jindal* case.⁴⁹ In *Bhagathram Rajeevkumar*, the Supreme Court had noted that the theory of compensatory tax was widened, and eventually it was held that if the taxes had

‘even some link’ between the tax and the facilities extended to dealers ‘directly or indirectly’, the tax could not be challenged.⁵⁰ Soon after, *Bihar Chamber of Commerce* held that even if there was ‘some connection’ between the tax and the trade facilities that were extended to the dealers directly or indirectly, the tax could be characterised as a compensatory tax. There was no burden on the State to furnish the details of facilities provided to traders.⁵¹ These decisions were characteristic of the extreme reluctance of the Supreme Court and High Courts to declare even patently unconstitutional provisions of tax laws as invalid. This reluctance is clearly discernible after 1978. Eventually, Kapadia J in *Jindal*, speaking for the bench, held that the views held in *Bhagathram Rajeevkumar* and *Bihar Chamber of Commerce* were erroneous and were thus overruled. According to Kapadia J, the ‘some connection’ test laid down in *Bhagathram Rajeevkumar* was ‘not only contrary to the working test propounded in *Automobile Transport* case but it [obliterated] the very basis of compensatory tax’. This was because ‘when a tax is imposed ... as a part of regulatory measure the controlling factor of the levy shifts from burden to reimbursement/recompense’.⁵² The bench, however, further compounded the confusion by introducing the ‘principle of equivalence’.⁵³ Strangely, this principle was said to be the converse of the ‘principle of ability to pay’.⁵⁴ The Supreme Court has consistently tried to point out the difference between ‘fees’ and ‘compensatory tax’ whilst holding that both had to be proportionate to the facilities provided.⁵⁵ Such judicial reasoning makes little sense.

Kapadia J held that a statute must ‘facially or patently’ indicate the ‘quantifiable data’ on the basis of which compensatory tax is levied.⁵⁶ If the Act does not have such indication, the burden is on the State to place adequate materials before the court. But typically no statute can indicate the quantifiable data, and it is only when the State Government is called upon to file its affidavit before the Court that these details will become available. Therefore, the burden will invariably be upon the State Government to place adequate material before the High Court or the Supreme Court.

VI. UNRESOLVED QUESTIONS

As noted above, the Supreme Court has now referred twelve questions to be answered by a larger bench of nine or eleven judges. Incredibly, neither *Atiabari* nor *Automobile Transport*, nor any subsequent case, has paused to consider what

the original dispute before the Assam and Rajasthan High Courts was about. The questions have now been framed to clear the unnecessary controversy created by the Supreme Court itself. The following are the major issues involved in the questions that are now pending before the Court.

1. Article 304(a) and (b)

One major question is whether State enactments relating to levy of entry tax have to be tested with reference to both clauses (a) and (b) of Article 304 of the Constitution for determining their validity, and whether clause (a) of Article 304 is conjunctive with or separate from clause (b) of Article 304. (Entry tax is a tax on the movement of goods. If goods are manufactured in a State in a local area and therein consumed, they are unlikely to go outside the local area. Therefore, entry tax is levied only when there is a movement of goods *into* that local area. Under the Constitution, there cannot be any bar to the entry of goods in any State; this will immediately fall foul of Article 301 unless such bar satisfies the requirements of Article 304(b).)

Clearly, State enactments levying entry tax will have to satisfy the requirements of Article 304(a). If the tax on goods within a State directly impedes trade, it will be saved only under Article 304(a). However, if the tax is levied on goods that are imported and not on goods manufactured or produced in the State, the protection of Article 304(a) will not be available; it will not be saved by any other article. If the entry tax that is levied on goods manufactured within the State is lower than the tax applicable to goods imported from other States, it would directly violate Article 304(a). The words 'any tax' used in clause (a) must apply to entry tax as well. Thus, the levy of entry tax has to be non-discriminatory to satisfy Article 304(a).

At the same time, even if entry tax is non-discriminatory but is so excessive as to amount to an unreasonable restriction on the freedom of trade, it would be violative of Article 301. Importantly, the levy of an entry tax that is not excessive will not be a restriction on the freedom of trade, commerce, or intercourse, just as the levy of a sales tax or purchase tax does not impose such a restriction. The power of taxation given to the State legislature can always be exercised and will be independent of Article 304(b).

Article 304(b), however, should be understood as having no application to the levy of taxes. The expression 'reasonable restriction' does not apply to the power of the State Government to levy tax in exercise of the legislative powers

under the relevant entries in List II. Therefore, any Bill or amendment connected with tax will not come within the meaning of Article 304(b). In other words, Article 304 can be bifurcated into two components: taxes which are of the type mentioned in clause (a); and other restrictions, unrelated to tax, that fall under clause (b). If this interpretation is not accepted, the taxing powers of the State legislature will be subject to the previous sanction of the President. If the President withholds the sanction, the tax cannot be levied or increased. It will be an intolerable burden for a State Government to seek previous sanction of the President for amendments to its taxing statute.

Articles 304(a) and 304(b) are *conjunctive* in the sense that they enable State legislatures to enact two types of laws that are exempt from Article 301 or 303. As mentioned above, first, they confer on State Governments the power to levy non-discriminatory taxes even if these result in restriction or hindrance to the free movement of goods. The second power is to impose other reasonable restrictions that are required in public interest. At the same time, the fields covered by these two clauses of Article 304 are completely different. The former applies to taxes and the latter to regulatory and other measures.⁵⁷

The interpretation given to Articles 301 to 304 in the *Atiabari* and *Automobile* cases will apply to entry tax only to a limited extent. The observation in the *Atiabari* case, that the imposition of tax on carriage requires the sanction of the President under Article 304(b), is not correct. Since a tax law that is valid under Article 304(a) need not satisfy 304(b), *Atiabari* is to this extent clearly erroneous. As mentioned above, Article 304(b) does not apply to taxes but only to regulatory measures. If a tax on vehicles is discriminatory, it will be violative of Article 304(a) provided that discrimination is between vehicles manufactured in one State and those imported from other States. Similarly, if the levy of entry tax is highly excessive, it will violate Article 301.

2. Entry 52, List II, and Article 301

A second major question is whether the imposition of entry tax levied under Entry 52, List II, is violative of Article 301. If this is so, the question arises whether such levy can be permitted if the entry tax is compensatory in character and, if this is in turn so, what tests must apply to determine the compensatory character of the entry tax.

The imposition of entry tax under Entry 52 of List II of the Seventh Schedule would violate Article 301 only if it is non-discriminatory and so excessive as to

result in serious hindrance to interState or intraState trade. Even if entry tax is levied in a particular local area, the rates cannot be so excessive as to result in the destruction or serious erosion of trade and commerce. Further, even if a tax is 'compensatory', it cannot be so excessive as to destroy trade. For example, entry tax on the entry of diesel for consumption within a local area cannot be fixed at Rs 200 per litre and then justified on the ground that the resources are going to be used for laying super-highways or to provide sophisticated trade facilities within that local area. It has been submitted that the concept of compensatory tax is erroneous. However, even assuming it to be correct, the amount that is levied for provision of any facility must not only be proportionate or satisfy the principle of equivalence, but also the tax cannot be so exorbitant or excessive as to annihilate trade or commerce.

Does the entry tax collected have to be spent within the local area in which it is collected even though the collection of the entry tax has been credited to the Consolidated Fund of the State? There is no reason why we should suppose a requirement that the tax levied and collected under any of the entries in List II must be spent in a particular manner. There is nothing to compel a State to spend taxes only in those local areas where it is collected. For instance, a few local areas within a State may be highly prosperous and there is no bar on that State Government from levying entry tax in these prosperous areas (where, in all probability, there is a higher amount of trade and commerce) and then using the tax collected for the development of other economically backward local areas. Once the tax is compensatory, it is sufficient if facilities or services are provided within any local area. Entry tax, being a tax, need not satisfy the principle of equivalence. It is submitted that the legislative power to levy taxes must be harmoniously construed with Part XIII. Taxes, if they are reasonable, will not be violative of Article 301 if they incidentally affect trade and commerce.

Another issue to note is that, while under Entry 52 tax can be levied on the entry of goods into a local area, this does not mean that the tax must be levied only at the border of the local area. If the goods have entered the local area to be temporarily stored in a warehouse for subsequent removal, entry tax cannot be levied. The mandatory requirement is that the goods must have come into the local area either for consumption, use, or sale in that local area. Therefore, once the goods have come in and are unlikely to be removed out of that area, entry tax can be levied. However, it is open to the State Governments to levy entry tax at the border and then refund it if the goods are merely in transit or have been removed subsequently. It is equally permissible to levy entry tax only at the time of their consumption, use, or sale in that local area.

VII. CONCLUSION

Articles 301 to 304 are clear and must be interpreted on a plain reading of the language used in Part XIII. It is advisable not to refer to foreign decisions, such as decisions under Australian law, as the codified provisions therein are quite different. Further, there is no ambiguity in Articles 301 to 304—the proper test will be to examine any impugned tax or regulatory measure and determine whether it impedes the free flow of goods or services. If it is a law imposing any tax, it must stand up to the scrutiny of Article 304(a). If the law imposes any other restriction, it must satisfy the requirements of Article 304(b) read with the proviso thereto. Thus, it may not even be necessary to answer the twelve questions that have been referred to the larger bench of the Supreme Court. Indeed, every case from *Atiabari* onwards can be decided without recourse to the concepts of compensatory taxes or regulatory measures. The entire controversy can be put at rest by simply following the plain language of Part XIII and determining, in individual cases, whether the impugned provisions are valid or not. In the end, it is hoped that the controversy that began with *Atiabari* is finally laid to rest, and the concept of compensatory tax is buried forever.

¹ *Atiabari Tea Co Ltd v State of Assam* AIR 1961 SC 232 [9]–[11].

² *Atiabari* ([n 1](#)) [32]–[34].

³ B Shiva Rao, *The Framing of India's Constitution: A Study* (Indian Institute of Public Administration 1968) 699.

⁴ Rao ([n 3](#)) 701.

⁵ *Jindal Stainless Ltd (2) v State of Haryana* (2006) 7 SCC 241 [6].

⁶ *India Cement v State of Andhra Pradesh* (1988) 1 SCC 743 [11].

⁷ *Atiabari* ([n 1](#)) [42]. See also *State of Bihar v Harihar Prasad Debuka* (1989) 2 SCC 192 [13].

⁸ *Ram Chandra Palai v State of Orissa* AIR 1956 SC 298.

⁹ *Atiabari* ([n 1](#)) [50]. See also *Amrit Banaspati Co Ltd v Union of India* (1995) 3 SCC 335 [8]; *State of Bihar v Bihar Chamber of Commerce* (1996) 9 SCC 136 [11]; *Geo Miller & Co (P) Ltd v State of Madhya Pradesh* (2004) 5 SCC 209 [6].

¹⁰ *Firm ATB Mehtab Majid and Co v State of Madras* AIR 1963 SC 928.

¹¹ *H Anraj v Government of Tamil Nadu* (1986) 1 SCC 414; *India Cement* ([n 6](#)); *Weston Electronics v State of Gujarat* (1988) 2 SCC 568; *West Bengal Hosiery Association v State of Bihar* (1988) 4 SCC 134.

¹² *Video Electronics (P) Ltd v State of Punjab* (1990) 3 SCC 87. See also Arvind P Datar, *Commentary on the Constitution of India* (2nd edn, LexisNexis 2007) 1677–80, 1691.

²² *Re Central Provinces and Berar Sales of Motor Spirit and Lubricants Taxation Act 1938* (1939) 1 FCR 18, 38. See also *Province of Madras v Messrs Baddu Paidanna and Sons* (1942) 4 FCR 90.

²⁴ *James v Commonwealth of Australia* [1936] UKPC 52, 70.

²⁶ *Automobile Transport (n 13)* [10], citing *Commonwealth of Australia v Bank of New South Wales* [1949] UKPC 37.

¹³ *Automobile Transport (Rajasthan) Ltd v State of Rajasthan* AIR 1962 SC 1406 [61]. By the same analogy, art 226 would perhaps be written on the hearts of most of our High Court judges.

¹⁴ *Australian National Airways Pty Ltd v Commonwealth* (1945) 71 CLR 29.

¹⁵ *Automobile Transport (n 13)* [31].

¹⁶ *Automobile Transport (n 13)* [62].

¹⁷ *Automobile Transport (n 13)* [80].

¹⁸ *Automobile Transport (n 13)* [84].

¹⁹ *Automobile Transport (n 13)* [84].

²⁰ *Automobile Transport (n 13)* [84].

²¹ *Automobile Transport (n 13)* [82].

²³ *MPV Sundararamier & Co v State of Andhra Pradesh* AIR 1958 SC 468.

²⁵ *W & A McArthur Ltd v State of Queensland* (1920) 28 CLR 530, 546–47.

²⁷ *Atiabari (n 1)*.

²⁸ *Automobile Transport (n 13)*.

²⁹ *Jaiprakash Associates Ltd v State of Madhya Pradesh* (2009) 7 SCC 339.

³⁰ *Jindal Stainless Ltd v State of Haryana* (2010) 4 SCC 595.

³¹ *Jindal Stainless Ltd (n 30)* [10].

³² *Keshav Mills Co Ltd v Commissioner of Income Tax* AIR 1965 SC 1636.

³³ *Central Board of Dawoodi Bohra Community v State of Maharashtra* (2005) 2 SCC 673.

³⁴ *Jaiprakash Associates Ltd (n 29)*.

³⁸ *Atiabari (n 1)* [42].

³⁵ *HP Barua v State of Assam* AIR 1955 Gau 249 (FB).

³⁶ Except the last two points which are set out in the judgment of Sarjoo Prasad CJ, the remaining points have been set out in the judgment of Ram Labhaya J.

³⁷ *Atiabari (n 1)*.

³⁹ *Automobile Transport (n 13)* [11].

⁴⁰ *Automobile Transport (n 13)* [14].

⁴¹ *GK Krishnan v State of Tamil Nadu* (1975) 1 SCC 375 [13].

⁴⁷ *Automobile Transport (n 13)* [19].

⁴² *Automobile Transport (Rajasthan) Ltd v State of Rajasthan* AIR 1958 Raj 114 (FB).

⁴³ *Automobile Transport (Rajasthan) Ltd (n 42)* [36].

⁴⁴ *Automobile Transport (n 13)*.

⁴⁵ *Automobile Transport (n 13)* [10].

⁴⁶ *Automobile Transport (n 13)* [19].

⁴⁸ *International Tourist Corporation v State of Haryana* (1981) 2 SCC 318 [8].

⁴⁹ *Jindal Stainless Ltd (2) (n 5)*.

⁵⁰ *Bhagathram Rajeevkumar v Commissioner of Sales Tax* (1995) Supp (1) SCC 673 [8].

⁵¹ *Bihar Chamber of Commerce* ([n 9](#)) [12].

⁵² *Jindal Stainless Ltd (2)* ([n 5](#)) [50].

⁵³ *Jindal Stainless Ltd (2)* ([n 5](#)) [41].

⁵⁴ *Jindal Stainless Ltd (2)* ([n 5](#)) [41].

⁵⁵ *Jindal Stainless Ltd (2)* ([n 5](#)) [42]:

Compensatory taxes, like fees, are always proportional to benefits. They are based on the principle of equivalence. However, a compensatory tax is levied on an individual as a member of a class, whereas a fee is levied on an individual as such. If one keeps in mind the ‘principle of ability’ *vis-à-vis* the ‘principle of equivalence’, then the difference between a tax on one hand and a fee or a compensatory tax on the other hand can be easily spelt out.

⁵⁶ *Jindal Stainless Ltd (2)* ([n 5](#)) [46].

⁵⁷ *Jindal Stainless Ltd (2)* ([n 5](#)) [34].

CHAPTER 28

INTERSTATE RIVER WATER DISPUTES

HARISH SALVE

I. INTRODUCTION

INDIA has twenty-five major river basins running through the nation, with as many as 103 sub-basins. Many of these rivers traverse more than one State, leading to conflicts between States regarding the use and distribution of water, for industrial and agrarian uses and for consumption. The resolution of interState river water disputes, consequently, is vital to the functioning of India as a federal State. For the same reason, the resolution of interState river water disputes, and the processes and institutions that guide such resolution, are the site of continued and intense conflict and contestation. This conflict plays out in politics, and the contestation manifests itself in extensive judicial debate. This is, in part, due to a complex set of constitutional provisions that lay competing claims on how and where interState river water disputes are resolved.

In this chapter, the constitutional framework for the resolution of interState river water disputes sets up the framing of several key questions. Are water disputes best resolved by political negotiation or through adjudication? If by political negotiation, how can political agreements be enforced and implemented? If by adjudication, how are these disputes tackled substantively and procedurally? In answering these questions, I examine, specifically, the InterState River Water Disputes Act 1956 (the 'IRWDA') enacted by Parliament, and how the bar on the Supreme Court's jurisdiction on such river disputes has been implemented.

Section II outlines the constitutional framework and asks key questions that come with constitutional design: which authority decides such disputes and why. Section III examines Parliament's intervention through the IRWDA, and the procedural and substantive issues that have arisen since the IRWDA was enacted in 1956. Section IV describes some of the major constitutional and legal debates that have surrounded interState river water disputes in India. Section V concludes with a careful reading and a critique of the Supreme Court's most recent river water dispute judgment, the *Mullaperiyar Dam* case, and contains some comments and recommendations in conclusion.

II. WATER DISPUTES AND THE CONSTITUTIONAL FRAMEWORK

1. Article 262 and the Vesting of Power in Parliament

In recent times, scholarly opinion on the value of a judicial settlement over a political settlement for interState river water disputes has been fraught. India's leading constitutional law scholar, HM Seervai, in 1991 attempted an evaluation by comparing the period of time required for political negotiations to the period of time for adjudications by tribunals.¹ Finding no significant difference, he concluded that 'the popular belief that the political settlement of a river water dispute would be more satisfactorily reached is demonstrably incorrect ...'² Per contra, Professor Ramaswamy Iyer, while recognising the force of such arguments, has suggested that 'Adjudication is an unsatisfactory way of dealing with such disputes; a negotiated settlement is infinitely superior; adjudication is divisive and leads to exaggerated claims by both sides ...'³

The resolution of federal disputes—that is, disputes between States, or between States and the Union—is constitutionally conducted through the judiciary. Article 131 of the Constitution vests the Supreme Court with such jurisdiction 'in so far as the dispute involves any question (whether of law or fact) on which the existence or extent of a legal right depends'. An exclusion, however, was carved out for interState river water disputes, allowing Parliament to decide the forum and manner of resolution. Consequently, Article 262 today provides:

262. *Adjudication of disputes relating to waters of interState rivers or river valleys.*

(1) Parliament may by law provide for the adjudication of any dispute or complaint with respect to the use, distribution or control of the waters of, or in, any interState river or river valley.

(2) Notwithstanding anything in this Constitution, Parliament may by law provide that neither the Supreme Court nor any other court shall exercise jurisdiction in respect of any such dispute or complaint as is referred to in clause (1).

2. InterState Rivers in a Federal Nation

The legislative powers relating to water, like the adjudicatory provisions, were also divided so as to create a structure in which the Union of India could take measures to secure the optimum utilisation of what is possibly the most precious

national resource, in a manner that is good for India—and not just in a way that balances the interests of States.

Schedule VII of the Indian Constitution, which allocates legislative power between the federal Union and States, differentiates between regulation of interState rivers (vested in the Union Parliament, in List I, Item 56) and the use of water, irrigation, and canals, generally (vested in States, in List II, Item 17). A declaration by Parliament relating to the regulation and development of interState rivers would denude the States of their legislative field in Entry 17 of List II. Traditional justifications for vesting the control of interState rivers in the Union have revolved around the claim that Parliament controls matters of national interest, while States control matters of local interest.⁴ The consumptive use of river water, on the one hand, as Seervai has noted, is fundamentally *local* in nature.⁵ At the same time, in current times where the *use* of water is in multiple forms, and with the increasing emphasis on delocalisation of agricultural practices, the national significance of the use of water cannot be minimised. Unlike land and mineral resources, however, interState rivers are not static, and the use of water from interState rivers inevitably affects the use of such water in other States through which the river flows.

3. Constitutional History

A historical perspective of interState river water dispute resolution, as a narrative of its legal history, begins from the Government of India Act 1919. Also known as the Rowlatt Act, this law laid the foundation for self-governance on a quasi-federal basis, by creating a 200-seat assembly to advise the British Viceroy and provincial governments, albeit with a limited remit. In this structure, 'water' was a provincial subject, but all control vested in the Viceroy/Secretary of State. The Union government retained the power to intervene or override provincial authorities. 'Irrigation' was a reserved subject. Expenditure on irrigation was made subject to the vote of the provincial legislature, but the administration of irrigation works was reserved to the Governor-General in Council and was under the ultimate control of the Secretary of State.

The Government of India Act 1935 (the '1935 Act') brought about significant changes in the distribution of powers between the Crown and the provinces in relation to water. List II of the Seventh Schedule of the Act of 1935 recognised the powers of the provincial legislatures. While ports, fishing, and fisheries beyond territorial waters were reserved under List I, Entry 19 reserved to the Provinces 'Water, that is to say, water supplies, irrigation and canals, drainage and embankments, water storage and water power'.

Sections 130 and 131 of the 1935 Act dealt with resolution of disputes between provinces relating to water. The government of any Governor's province, or the ruler of any federal State, if apprehensive of any potential prejudicial effect by any executive/legislative action or omission with respect to the use, distribution, or control of water from any source, could complain to the Governor-General. If the Governor-General was of the opinion that the issues involved were of sufficient importance, he could appoint a commission of those having domain knowledge, to investigate and report to him on the matters to which the complaint related. Upon receipt of a report of the commission, the Governor-General could give his decision on the matter. The remedy against the decision lay by way of a reference to His Majesty in Council.

Article 262 of the Constitution differs from Sections 130 and 131 of the 1935 Act in three significant ways.

First, the 1935 Act in Section 133 by itself barred the jurisdiction of any court over interState river water disputes, whereas Article 262 confers upon Parliament the power to enact a law to bar the jurisdiction of the Courts.

Secondly, the structure of the Seventh Schedule makes the legislative field

allocated to States subject to Parliament's power to legislate over interState rivers.

Thirdly, the constitutional framework that the 1935 Act created to resolve interState river water disputes was done away with—as it had to be. Parliament was empowered to devise a suitable machinery for dispute resolution.

One of the suggestions mooted before the Sarkaria Commission, which reviewed Centre–State constitutional relations, related to modifying the constitutional scheme of distribution of legislative powers so as to shift the present Entry 17 to List I. This suggestion was rejected, noting that even in the present dispensation, where Entry 56 enables the Union to enact legislation for this purpose, it was ‘a case of non-use of a given power by the Union than one of want of the same ...’⁶ The Commission criticised the way in which the process of resolution of disputes through tribunals had proved to be extremely long-winded, and pointed out the hazards of interim reliefs. It suggested that a time limit be fixed in which tribunals should be constituted and that the award of a tribunal should have the binding effect of a decree of the Supreme Court (which was implemented in 2002⁷). It also recommended that the Union be given *suo motu* powers to set up a tribunal.

4. Constitutional Design: Political Negotiation or Adjudication

The Constituent Assembly of India was faced with the choice of political versus adjudicatory resolution of disputes of distribution of waters of interState rivers. The pre-Independence structure was workable because political sovereignty lay in the Crown, and dissatisfaction with a decision on interState river water claims had no political consequences on the decision maker—the representatives of the Crown. Nonetheless, the 1935 Act introduced an adjudicatory flavour in the manner of resolution of water disputes.

In independent India, the political consequences of such decisions upon democratically elected governments at the Union and the States made it imperative to create a process that would leave space for consensual resolution as well as, where necessary, adjudication by a judicial or quasi-judicial forum. It clearly could not be left solely to the Union of India to mediate in such differences. Current events bear testimony to the reluctance of the political executive of the Union to intervene in—much less take proactive steps to resolve—disputes relating to interState river waters.

The second disadvantage of designating the Union as the authority to resolve

such disputes would have been that States would have then resorted to remedies of judicial review against the decision of the Union. The nature of the judicial review process is such that a challenge could be laid on narrow grounds. The absence of an adjudicative machinery to deal with water disputes would have led to the States suing each other in the Supreme Court, or suing the Union of India or challenging any executive intervention by it.

Surprisingly, the question of how interState river water disputes are to be settled attracted little debate in the Constituent Assembly. An exception to the general jurisdiction of the Supreme Court over federal disputes⁸ was carved out for interState river water disputes, and draft Article 242-A envisaged that such disputes would be determined by the President—which means the executive government of the Union.⁹ The Drafting Committee modified this to suggest that interState river disputes should be determined in such manner as Parliament saw fit. This led to the insertion of what is now Article 262 of the Constitution.

III. PARLIAMENT'S ROLE: THE INTER-STATE RIVER WATER DISPUTES ACT

1. The River Boards Act

In 1956, the Parliament of India enacted two legislation dealing with the subject of interState river waters. The first of these was the River Boards Act 1956, which was enacted with the declaration that the Union government should take under its control the regulation and development of interState rivers and river valleys in the public interest.¹⁰ Despite this, fifty-eight years have gone by without the constitution of a single River Board and the Act remains a dead letter. The consequence of the declaration is one of the great uncertainties of constitutional law on the subject—Seervai’s view on the River Boards Act and this declaration was that ‘it could not have been intended that the State’s legislative power should be pro tanto affected by the Act which, for practical purposes, is dead ... it is more than arguable that the declaration is ineffective and inoperative as long as the Act remains inoperative’.¹¹

2. The InterState River Water Disputes Act

The second legislation enacted by Parliament—the IRWDA 1956—was an Act to provide for the adjudication of disputes relating to waters of interState rivers and river valleys. Unlike the River Boards Act, this law has been used frequently, and has led to considerable litigation.

The significant features of the IRWDA are:

1. it defines ‘water disputes’;
2. it excludes such disputes from the jurisdiction of the Supreme Court;¹²
3. it confers a power upon the Union government to constitute tribunals to resolve such disputes.

The Act defines water disputes to include disputes that pertain to the ‘use, distribution and control’ of interState rivers or valleys. Such disputes include conflicts arising from the interpretation of interState river water sharing agreements and treaties, and disputes over the levy of water rates.¹³ When a dispute has occurred, or, in the opinion of a State Government, is likely to occur, the State makes a request to the Union government to refer the dispute to a tribunal.¹⁴ It is only when the Union government is of the opinion that water

disputes cannot be settled by negotiations, that it shall within one year from the receipt of such request constitute a Water Disputes Tribunal.¹⁵ Upon the constitution of a tribunal, the water dispute is referred to it for adjudication. The tribunal submits its report to the Union government setting out the facts as found by it, and more significantly, ‘giving its decision on the matters referred to it’.¹⁶ Section 6 of the Act mandates that the Union government shall publish the decision of the tribunal in the Official Gazette and the decision shall be final and binding on the parties to the dispute.

Preliminary challenges to the competence of Parliament to pass this law were unsuccessful: the opinion of the Supreme Court in the *Cauvery Presidential Reference* concludes this issue.¹⁷ The Court held that the IRWDA is relatable to Article 262 of the Constitution. The field of adjudication of water disputes is covered exclusively by Article 262. The Supreme Court also rejected the contention that Entry 97 of the Union List would also cover ‘use, distribution or control’ of the waters of an interState river.¹⁸ It is unfortunate that without noticing this judgment, the judgment in *Re Networking of Rivers* made observations to the contrary.¹⁹ Although the opinion in the *Cauvery Presidential Reference* is an *advisory* opinion under Article 143 of the Constitution and is not by itself binding, it has been subsequently cited with approval in the *Karnataka* case,²⁰ as well as other cases, and to this extent, its ratio is binding.

3. The Principles of InterState River Water Dispute Resolution

The IRWDA gives no indication of the principles that have to be applied by the tribunal in deciding water disputes. There are, however, some observations, in the *Cauvery Presidential Reference* opinion of the Supreme Court that indicate that one consideration is the application of the principle of equity, which translates to an ‘equitable share of each State’ in the allocation of water.²¹

The Supreme Court and tribunals presided over by eminent judges have also borrowed from principles applied in transnational water disputes. The jurisprudence of equitable distribution, and the manner of its determination, has been the subject of considerable evolution. American cases, where the US Supreme Court has dealt with water disputes for more than a century, have provided the foundation for development of robust principles by Indian tribunals. In *State of Andhra Pradesh v State of Maharashtra*,²² the Supreme Court cited with approval the US Supreme Court’s decision in *Washington v*

Oregon,²³ adopting the principle that a contest between the States is to be settled in ‘a large and ample way that alone becomes the dignity of the litigants concerned’,²⁴ and the ‘burden of proof falls heavily on [the] complainant, more heavily ... than in a suit for an injunction where States are not involved’.²⁵

A discussion of the principles of resolution of water disputes can be found in some of the awards of the tribunals, as well, notably, the Bhargava award in the *Narmada* waters case, and the *Cauvery* tribunal award.

IV. INTER-STATE RIVER DISPUTE RESOLUTION: CONCERNS AND DIFFICULTIES

Although initial resolutions of interState river water disputes under the IRWDA were successful (for instance, early disputes relating to the Krishna, Godavari, and Narmada rivers),²⁶ three sets of concerns have arisen with the functioning of interState river water tribunals. Part 1 of this section discusses the intervention of courts despite the narrow bar in Section 11 of the IRWDA. Part 2 focuses on the powers of tribunals and discusses the enforcement of tribunal awards and their powers of interim relief. Part 3 analyses the process of dispute resolution and is mostly concerned with delays in constituting the tribunals.

1. The Bar Against the Supreme Court’s Jurisdiction

Challenges to the IRWDA’s bar on the Supreme Court’s jurisdiction in interState river water disputes have arisen in several contexts.

The bar on the jurisdiction of the Court turns on the definition of ‘water disputes’ in the IRWDA, since the jurisdictional bar is limited to ‘water disputes’. The second context of examination of the jurisdiction of the Court stems from the issue of locus standi. On the one hand, the Court has rightly held that only States may raise ‘water disputes’, but in doing so it has had to reconcile this with the issue of enforcement of the fundamental right to water. The Supreme Court has, however, almost consistently held that the jurisdiction of the Court, whether under Article 32 (original jurisdiction in enforcing fundamental rights) or Article 131 (original jurisdiction in federal disputes) stands excluded by virtue of Article 262 of the Constitution read with Section 11 of the IRWDA. This position was clarified in the decision in *Atma Linga Reddy v Union of*

India.²⁷ Despite this, in certain specific circumstances, the Court would have the jurisdiction to intervene. Two of these are discussed below.

a. ‘Water Disputes’ and the Jurisdiction of the Supreme Court

The definition of ‘water disputes’ in Section 2(c) of the IRWDA is wide.²⁸ the first expression of width is ‘any dispute or difference ...’ Thus, as long as the dispute broadly relates to the three areas set out in the three clauses, it would constitute a ‘water dispute’. The expression ‘waters of, or in ...’ used in Article 262—reflected in Section 2(c)—could be construed as widening the scope of the expression ‘water disputes’ in respect of which Parliament may enact legislation. Thus, a ‘water dispute’ is not limited to the use, distribution, or control of the waters of an interState river. It may also extend to a dispute as to the use of the water ‘in, any interState river ...’

The Court has, however, limited this definition—and the concomitant bar on jurisdiction—to unadjudicated water disputes, holding that disputes arising between federal units out of *adjudicated disputes*, including those relating to the enforcement of tribunal awards, could be resolved under Article 131. While the pure logic of the decision in the backdrop of the statutory language may be questionable, its wisdom is apparent. Experience has shown that the tribunals have not proved to be the most efficacious forums for dispute resolution. The way in which the governments (Union as well as of the States) treat tribunals has shown that this machinery has failed to command the respect it deserves as a constitutional forum. The Supreme Court, armed with the power to punish for contempt, is able to deal with States in a manner far more effective than tribunals—especially in respect of matters that have political overtones. Thus in practical terms, the trade-off between leaving unadjudicated disputes to be resolved by tribunals and limiting the courts’ jurisdiction to enforcing awards in relation to adjudicated disputes strikes the correct balance.

The Supreme Court has also found ways of finding jurisdiction to vindicate the rights of States where a tribunal would not have served the purpose. In *State of Haryana v State of Punjab*,²⁹ a suit was filed by the State of Haryana for a decree declaring that the political settlements (embodied also in an agreement) were binding on the State of Punjab, casting an obligation upon it to restart and complete the portion of the SYL canal project that lay in Punjab. Rejecting a preliminary objection raised by the State of Punjab (based on the bar of Section 11 read with Section 2(c) of the Act) the Supreme Court held that when the

averments in the plaint as well as the relief sought were not ‘related to the use, distribution or control of the water from the Ravi-Beas project’ but centred around the obligation of the State of Punjab to construct the SYL canal within its territory for ‘carrying [the] water from the Project to the extent the said water has already been allocated in favour of the State of Haryana’,³⁰ the suit was not barred under Section 11 as it was not a ‘water dispute’. The Court here followed the decision of the constitutional bench in *State of Karnataka v State of Andhra Pradesh*³¹—which had held that the question of maintainability had to be decided upon the averments made by the plaintiff and the relief sought for.

In a somewhat different vein, in *State of Orissa v Government of India*,³² the Supreme Court upheld the contention of the State of Orissa that a difference had arisen between the two States relating to the diversion of the water from the river into a side channel weir and a flood flow canal, and the question whether these activities constituted a violation of an agreement that had been arrived at between the two States, would constitute a ‘water dispute’.³³

In the first *Mullaperiyar* case, the Supreme Court rejected the contention that a petition under Article 32 was barred, as the dispute in the case related primarily to the safety of the dam—the right of Tamil Nadu to the water was not in issue.³⁴

b. *Locus Standi and Water Disputes*

The Supreme Court has restricted the hearing of some disputes that might fall under the IRWDA’s restriction. Some cases have considered the question of locus standi to raise a water dispute. On a plain reading of the Act, a water dispute is raised by the State when the ‘interests of the State, or of any of the inhabitants thereof ...’ in the waters of an interState river are affected. It does not recognise the right of any inhabitant or group of inhabitants to raise such a dispute. In *Atma Linga Reddy*,³⁵ the Supreme Court in a petition filed by residents of Mahboobnagar in Andhra Pradesh dealt with issues relating to a scheme under which a canal was to be made for supply of water to the State of Karnataka. Declining jurisdiction on the ground that the courts could not entertain petitions raising ‘water disputes’, the Court rejected the contention that the petitioners had a right independent of the State to a remedy in view of Article 21 of the Constitution. Any issue that has been decided by the tribunal would, in law, be binding on the respective States. Once the award is binding on the States,

it will not be open to a third party (in that case, the public interest litigation petitioners) to challenge the correctness thereof.³⁶

In *Gandhi Sahitya Sangh v Union of India*,³⁷ the Court categorically held:

Under Article 131 of the Constitution of India, the water disputes between two States can only be brought by a State and not by an individual or a society ... the petitioner has no *locus standi* to challenge the validity of the Act or setting up of the Tribunal and also to the reference of the disputes for adjudication to the Tribunal.

Despite these judgments, law reports are replete with instances of private groups filing petitions.

2. Powers of the Tribunals: Interim Relief and Post-Award Litigation

a. Interim Relief

Section 5 of the IRWDA requires the Union government to ‘refer the water dispute and any matter appearing to be connected with, or relevant to, the water dispute to the Tribunal for adjudication’. This, in turn, raised the question of whether tribunals have the power to grant States interim reliefs in water disputes. The opinion of the Supreme Court in the *Cauvery Presidential Reference* settled this question of the power,³⁸ holding clearly that a tribunal has the power to grant interim relief. The Court held that the power to grant interim relief was implicit in Section 5(1) of the Act. It also held that any interim order passed or relief granted (other than a purely procedural matter) would be deemed to be a report and a decision within the meaning of Section 5(2).

Overlooking this judgment, a bench of two learned judges have taken the view that the Supreme Court has the power to grant interim relief in water disputes. In *State of Orissa v Government of India*,³⁹ the Supreme Court, dealing with a petition under Article 32 of the Constitution, directed the setting up of a tribunal. However, it held that until a tribunal was constituted, it had the power to grant interim relief. This conclusion was based on two propositions:

- (1) The bar under Section 11 of the Act will come into play once the Tribunal is constituted and the water dispute is referred to the said Tribunal.

Till then, the bar of Section 11 cannot operate, as that would leave a party without any remedy till such time as the Tribunal is formed, which may be delayed.⁴⁰

(2) Notwithstanding the powers vested by Section 9 of the Act in the Water Disputes Tribunal to be constituted by the Union government under Section 4, which includes the power to grant the interim order, this Court under Article 32 of the Constitution has ample jurisdiction to pass interim orders preserving the status quo till a Tribunal is constituted which can then exercise its powers under Section 9.⁴¹

It is submitted that both these propositions require reconsideration. Section 11 of the Act provides that ‘Notwithstanding anything contained in any other law, neither the Supreme Court nor any other court shall have or exercise jurisdiction in respect of any water dispute which may be referred to a Tribunal under this Act.’ Section 4 of the Act makes it mandatory to refer a dispute to a tribunal once the Union government is of the opinion that it cannot be resolved by negotiation. Until such time as such opinion is formed, the dispute continues to be a ‘water dispute which may be referred to a Tribunal’. The bar under Section 11 would apply when the dispute satisfies the definition of a ‘water dispute’. It does not refer to the stage *after* the reference of the dispute to a tribunal.

The second proposition is equally flawed. The exclusion of jurisdiction is on account of the statutory bar enacted in Section 11—which has to be read along with Article 262 of the Constitution. As held in the *Cauvery Presidential Reference*⁴² Article 262 alone encompasses the field of resolution of water disputes, and empowers Parliament by law to exclude the jurisdiction of the courts. Section 11 of the Act achieves that purpose. The general principle applicable to construction of statutes—namely, that any interpretation that creates a situation where a citizen is left remedy-less should be eschewed—can have no application where the statutory provisions read with Article 262 admit of no ambiguity.

Finally, it is equally a settled principle that the power to grant interim relief is an adjunct to the power to grant the final relief. A Court that has no power to decide a dispute cannot take a prima facie view of the merits of the dispute and grant interim relief.

b. Post-Award Litigation

(I) APPEALS AGAINST AWARDS

Although some of the awards of tribunals have been sought to be appealed in petitions filed in the Supreme Court under Article 136 of the Constitution, the question whether the Supreme Court can entertain an appeal by special leave under Article 136 against an award is not settled. Article 136 grants the Supreme Court the power to hear appeals by special leave ‘from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal in the territory of India’. The observations of the Supreme Court in *State of Tamil Nadu v State of Karnataka*⁴³ would suggest that the Supreme Court could examine constitutional or legal issues that may arise out of an award.

In that case, the *Cauvery* tribunal had declined to entertain applications for interim relief. In an appeal under Article 136 from its order, an objection as to the maintainability of such a petition for special leave was raised on the basis of the bar under Section 11 read with Article 262. Rejecting this objection, the Court held:

Thus, we hold that this Court is the ultimate interpreter of the provisions of the Interstate Water Disputes Act, 1956 and has an authority to decide the limits, powers and the jurisdiction of the Tribunal constituted under the Act. This Court has not only the power but obligation to decide as to whether the Tribunal has any jurisdiction or not under the Act, to entertain any interim application till it finally decides the dispute referred to it.⁴⁴

After the tribunal passed the interim award, the matter found its way to the Supreme Court in the *Cauvery Presidential Reference*, and the Supreme Court held that an interim award was an ‘award’ within the meaning of Section 6 of the Act.⁴⁵ It is possible to contend that an order declining relief is equally an award—which is appealable (albeit on limited grounds). This being so, if an award could as a matter of principle be subject to an appeal, there would be no warrant to exclude an appeal against a final award. This view would not militate against the general proposition that a suit under Article 131 is limited to *adjudicated disputes*. An appeal by special leave would only examine the legality and constitutional validity of the award on the principle that as far as the laws and the Constitution is concerned, it is the Supreme Court which is the final interpreter and for this purpose has the power to sit in appeal against the judgment or order of any quasi-judicial tribunal.

(II) ENFORCEMENT AND IMPLEMENTATION

Article 262 of the Constitution and Section 2(c)(i) of the IRWDA facially cover all disputes relating to the use, distribution, or control of the water. The Supreme

Court, in reconciling Article 131 with Article 262, held that the enforcement of award of a tribunal in relation to ‘adjudicated disputes’ does not raise a water dispute, and a suit for that purpose would be maintainable. In *State of Karnataka v State of Andhra Pradesh*,⁴⁶ the Court revisited the issue of Article 131 vis-à-vis Article 262 of the Constitution. The Court held that the maintainability of a suit under Article 131 would depend upon the averments made in the plaint—accepting the principle that Article 131 of the Constitution was also subject to Article 262 (if Parliament made a law excluding the jurisdiction of the Court).⁴⁷ But a suit in which the relief sought is substantially for the implementation of an award by way of a direction to the Union government to take the necessary steps under the Act would not be barred. The Court held that if the assertions made in the plaint and the relief sought is a claim on the basis of an *adjudicated dispute* (the mere enforcement of which is sought for by filing a suit under Article 131), the suit would not be barred.⁴⁸

The test enunciated in this case, namely, that it would depend on the averments made in a plaint, is over-broad, and may fall foul (if literally understood) of principles set out in the Code of Civil Procedure 1908, as well as of principles of constitutional law—the latter being predominant in construction of competing constitutional provisions such as Articles 131 and 262. The *demurrer* test is applicable at the initial stage—where a defendant challenges the maintainability of a suit at the threshold. However, if at the end of the trial, the Court comes to a conclusion that what appeared to be an adjudicated dispute is not really so, or that apart from the adjudicated dispute the Court has to resolve other factual or legal controversies that fall within the definition of a ‘water dispute’, it would be compelled by the constitutional bar on its jurisdiction to decline relief in the suit. The *Karnataka* suit was not at the initial stage—it was at the final stage of the trial. The application of the demurrer test of limiting the challenge to jurisdiction to the averments made in the plaint was questionable.

3. Delays in Resolving Disputes

Delays in resolving interState river water disputes are a matter of grave concern. The Sarkaria Commission, appointed by the Union government in 1983 to examine Centre–State relations, noted the ‘inordinate delay in securing settlement of such disputes’⁴⁹ and that the consequent ‘loss to the States and to the nation as a whole, is irreparable’.⁵⁰ The Commission recommended that a time limit be prescribed for the constitution of tribunals⁵¹—this was implemented through a series of amendments to the IRWDA in 2002. The current Act provides that the reference to the tribunal must be made within one year of the receipt of a complaint from a State.⁵² This has not solved the difficulties of delay, particularly when it comes to the constitution of tribunals and the publication of awards.

a. Constitution of Tribunals

Much of the delay arises at the stage of constitution of a tribunal. In order to put in motion the process to establish a tribunal to resolve a ‘water dispute’, the first step is that a State Government must make a request to the Union government. The language of Section 4 of the Act does not limit the right to make a request to a State Government that is prejudicially affected. It provides that ‘When any request under Section 3 is received from *any* State Government in respect of *any water dispute ...*’ Arguably where a dispute has arisen, even a State against which allegations are made of acting in a manner prejudicial to other riparian States can move the Union government to constitute a tribunal. The next condition is that ‘the Union government is of opinion that the water dispute cannot be settled by negotiations ...’ Prior to its amendment in 2002, the statute did not prescribe any time limit during which the Union government was obliged to set up a tribunal. The 2002 amendment provided that the Union government shall, within a period not exceeding one year from the date of receipt of the request, constitute the tribunal. Thus, the period available for negotiations is now limited to one year.

Despite the plain language of the statute—and prior to its amendment in 2002, which imposed the duty to act within a period of one year, the track record of the Union government has been questionable—partly on account of the fact that

even the constitution of a tribunal may have serious political consequences. The problems inherent in the constitution of a tribunal are reflected in the judgment of the Supreme Court in *Tamil Nadu Sangam v Union of India*,⁵³ where the Union government for a considerable period of time did not constitute a tribunal, despite the simmering disputes, which at times turned violent, between Tamil Nadu and Karnataka. Even after a petition was filed in the Supreme Court, the Supreme Court directed the Union of India, in the first instance, to take instructions in order to see whether the dispute could be resolved amicably. The Supreme Court, while issuing a mandamus, held that:

The Central Government as the guardian of the interests of people in all the States must, therefore, on all such occasions, take prompt steps to set the constitutional machinery in motion. Fortunately, the Parliament has by enacting the law vested the Central Government with the power to resolve such disputes effectively by referring the matter to an impartial Tribunal.⁵⁴

The Court underscored the fact that in the Bill (in the draft Section 4) the expression used was ‘may’, but the statute as enacted by Parliament substituted it with the word ‘shall’.⁵⁵

It is submitted that the proposition that Section 4, on its plain language, is mandatory, is clearly right. Thus, where the Union government is of the opinion that a dispute has arisen, and that it cannot be resolved by negotiations, then the Union government is under a mandatory duty to set up a tribunal. However, some of the observations in the judgment do not accord with the settled principles of judicial review. From the facts set out in the judgment, it appears that after the judgment was reserved, the Union of India informed the Court that it did not want to undertake any further negotiations and that the matter was left for disposal by the court. The judgment observed that ‘the Central Government must be held to be of the opinion that ...’⁵⁶ Such a formulation does not accord with settled principles of judicial review. However, where the Court is satisfied that on the material before the Union government, applying the *Wednesbury* principle, no reasonable person could necessarily form (or continue to hold) an opinion that the dispute can be resolved by negotiation, the Court could in judicial review hold that as a matter of law, the condition precedent for the appointment of a tribunal stands satisfied.

In a recent judgment, however, *Re Networking of Rivers*,⁵⁷ the Supreme Court made some observations without noticing the earlier judgments, and which observations, even though tentative, are, it is submitted, clearly *per incuriam*. The *River Networking* case took the view that:

[T]he use of [the] expression ‘may’ in the Constitution does not indicate a clear legislative intent,

thus, it may be possible that Section 11 of the Act could refer only to such disputes as are already referred to a Tribunal and which are outside the purview of the Courts. Once a specific adjudicatory mechanism is created, that machinery comes into operation with the creation of the Tribunal and probably, then alone will the Court's jurisdiction be ousted.⁵⁸

It is submitted that the language of Article 262 admits of no ambiguity. The expression 'may' is only because Article 262 enables Parliament to make law for the resolution of interState river water disputes, and also enables Parliament to oust the jurisdiction of the courts. Once such a law is made—as has been done—and the jurisdiction of the courts ousted, the enabling language of Article 262 would not be determinative of the matter. Section 11 of the IRWDA provides that neither the Supreme Court nor any other Court shall have or exercise jurisdiction in respect of any water dispute, which may be referred to a tribunal under the Act. The word 'may' in Section 11 refers to a water dispute, which is amenable to reference to a tribunal.

As held by the Supreme Court in the *Cauvery Presidential Reference* opinion, once the Union government is of the opinion that a water dispute cannot be resolved by negotiation, it is under the duty to refer such a dispute to a tribunal. The IRWDA is a complete code and the resolution of a water dispute can only be under the IRWDA. The interpretation given—tentative as it is—could, if accepted, defeat the constitutional objective of insulating the courts from 'water disputes', for if this interpretation is correct, then it must logically follow that the Union government is under no obligation to constitute a tribunal, and unless the Union government elects to constitute a tribunal and refer a dispute to it, the courts, including the Supreme Court, would have jurisdiction to entertain writ petitions or suits raising water disputes. This would clearly be contrary to the intention of the Constituent Assembly as well as parliamentary intent in enacting the Act.

The observations of the Court that the IRWDA 'was also enacted with reference to the same entry'⁵⁹ (referring to Entry 56)—one of the premises for these tentative conclusions—are also flawed in that a constitutional bench in the *Cauvery Presidential Reference* discussed this at length and came to the conclusion that the IRWDA was relatable to Article 262 of the Constitution and was not relatable to either Entry 17 or Entry 56.

b. Publication of Awards

Section 6 of the Act requires the Union government to publish the decision of

the tribunal in the Official Gazette. It is only upon publication that the award becomes final and binding. Subsection (2) of Section 6 provides that ‘after’ its publication, the award ‘shall have the same force as an order or decree of the Supreme Court’. Section 6A was added to the statute in 1980. It was added to create the statutory basis, to put in place the mechanism contained in the Narmada award relating to the distribution of waters and the operation of the facilities to be put in place pursuant to the award, including the Sardar Sarovar dam. The award, a remarkable piece of work, as valuable for its jurisprudence as it is for the innovative structures created for administering the distribution of waters, provided for the sharing of the waters of the Narmada river between the riparian States of Maharashtra, Madhya Pradesh, and Gujarat. Another remarkable feature was the true act of federalism, by the Government of the day, of getting the three riparian States to agree to share these waters with the State of Rajasthan, which is not a riparian State in relation to the Narmada river.

Section 5(2) of the IRWDA requires the tribunal to ‘investigate the matters referred to it...’ Having done so, it has to forward its report to the Union government ‘setting out the facts as found by it and giving its decision...’ Clearly, there is a reason why Parliament cast a twofold obligation upon the tribunal. The facts found by a tribunal may justify a solution, in the larger national interest, that transcends the interests of the contesting riparian States. These facts may warrant, for example, a legislation under Entry 56 by Parliament. However, a decision by the tribunal can only be such as can be imposed upon the contesting States.

In *State of Karnataka v State of Andhra Pradesh*,⁶⁰ the Supreme Court had to deal with a suit praying for a mandatory injunction to compel the Union government to publish what was described in the award as Scheme B. Declining the relief, the Supreme Court held that a declaration of the tribunal by itself is not a *decision* which would require to be published. The Supreme Court held that ‘if the order is not meant to be merely declaratory in nature but is meant to be implemented and given effect to by the parties, then it would constitute a decision within the meaning of Section 5(2) and is required to be published by the Union government under Section 6 of the Act’.⁶¹ The Court held that there was a difference between the facts found in a report and the decision of the tribunal, and a scheme that had been enunciated in the order of the tribunal but which was not meant to be implemented *for it could not be given effect to by the parties to the dispute alone* could not be the decision of the tribunal under Section 5(2) of the Act.⁶² It could only be held to be the ‘facts found’ in the report submitted. The interim award made by a tribunal would also need to be

published under Section 6 in order to make it binding upon the States.⁶³

V. CONCLUSION, AND AN EVALUATION OF THE *MULLAPERIYAR* JUDGMENT

The recent case of the *Mullaperiyar Dam* has raised serious issues in relation to the resolution of water disputes. In this section, I briefly analyse the judgment, before offering some remarks in conclusion. The *Mullaperiyar Dam* judgment illustrates the wisdom of the framers of the Constitution in enacting Article 262 of the Constitution, particularly the point that water disputes cannot be decided by applying procedural rules contained in the Code of Civil Procedure. In this case, in the first round, in a petition under Article 32 of the Constitution,⁶⁴ the Supreme Court took it upon itself to decide whether Tamil Nadu should be allowed to raise the height of a dam across the Mullaperiyar river.

This case concerns the Periyar river, which flows through the State of Kerala. The dam was constructed in 1987, at the confluence of the Periyar and Mullayar rivers, and is known as the Mullaperiyar Dam. Although located in Kerala, the dam is operated by the State of Tamil Nadu, in pursuance of a historical agreement executed prior to the independence of India. Tamil Nadu's plans to raise the height of the dam were contested by Kerala, on the grounds of safety and the viability of doing so, with respect to the strength of the dam: this was a subject of persistent litigation before the Supreme Court.⁶⁵ Kerala also raised serious issues as to the backwater effect of the dam.

In the petition under Article 32, the Supreme Court gave short shrift to the concerns of the Kerala Government relating to the consequences of raising the water level of the Mullaperiyar Dam. It needs to be mentioned that the pleadings in the case were sketchy—the Kerala Government did not articulate with clarity and precision its concerns as to the effects of raising the height of the dam.

In 2003, Kerala enacted the Kerala Irrigation and Water Conservation Act 2003. After the judgment of the Supreme Court, by a 2006 amendment, this Act fixed the dam height, deemed certain old dams, including the Mullaperiyar Dam, to be endangered, and set up an authority to examine issues of safety.

The Kerala legislation was challenged as being a usurpation of judicial power. The Court appears to have upheld this challenge, holding that a legal fiction cannot override a finding of fact. It rejected an argument that it was always open to a legislature to deem an environmentally sensitive structure to be unsafe so as

to warrant regulation by an authority constituted under State legislation.⁶⁶

The Mullaperiyar Dam is situated in Kerala. Indisputably the Kerala legislature has the competence to enact laws dealing with the dam, including its safety. Merely because the State of Tamil Nadu is a lessee of a land and the owner of the dam, a dispute relating to the implications of a Kerala law in relation to the dam does not become a dispute between the States. The legislation sought to get over the earlier judgment of the Supreme Court of India in a petition under Article 32 of the Constitution. If the legislation was beyond the competence of the State because it dealt with issues of dispute between two States, then the judgment in the previous case would equally be without jurisdiction, being contrary to the bar contained in Article 131 of the Constitution.

Finding the Kerala law unconstitutional, the Supreme Court held:

There is yet another facet that in federal disputes, the legislature (Parliament and State legislatures) cannot be judge in their own cause in the case of any dispute with another State. The rule of law which is [a] basic feature of our Constitution forbids the Union and the States from deciding, by law, a dispute between two States or between the Union and one or more States.⁶⁷

It is submitted that this proposition is clearly erroneous. The judgment of a court can always be nullified by removing its legal basis. If a dispute between two States arises out of laws prevalent in one of the States, a judgment deciding the dispute can always be changed by the State possessing the legislative competence, as long as the law does not have extraterritorial consequences. Being satisfied that the impugned law was a usurpation of judicial power, the Court declared the law to be unconstitutional. But then it went on to make observations reading in limitations on legislative powers of States, which observations are, it is submitted, erroneous. There is no question of irreconcilable laws by States as long as the laws are not extraterritorial and are within the bounds of Article 246(2). Absence of a legislative power to nullify a tribunal award is on account of the fact that, as explained in the *Cauvery Presidential Reference*, neither Entry 17 of List II nor Entry 56 of List I covers this field—it is exclusively dealt with by Article 262. The judgment of any court (including the Supreme Court) in relation to a law, which the State is competent to enact, is subject to being nullified if the legal basis on which the judgment has been rendered is altered—irrespective of the impact the impugned law has on other States.

The Supreme Court also held that the Mullaperiyar river—which admittedly rises in Kerala and goes into the sea in Kerala without passing through any other State—is an interState river. The three reasons given were:

1. in submissions in the previous case, counsel had contended that a petition under Article 32 was barred by Article 262 (which submission was not accepted), even though there was no such assertion in pleadings;
2. a small part of the catchment lay in Tamil Nadu; and
3. Kerala had pleaded but not adequately proved that the river is an interState river. The Court, however, clarified that Tamil Nadu was not a riparian State.⁶⁸

Each of these reasons merits close scrutiny. The last reason suggests that for all time now the State of Kerala would have to accept that the Mullaperiyar river in fact is an intraState river, but qua the State of Tamil Nadu alone an interState river, because this finding would presumably be binding by the principle of issue estoppel on the State of Kerala forever.

The baffling consequence of this finding is that while the Mullaperiyar is an interState river, yet there is no other riparian State. Does this pave the way for Tamil Nadu laying claim to part of the waters, challenging the finding that it is not a riparian State, seeking a tribunal under Article 262? Would such a tribunal be allowed to revisit the finding that the river is an interState river—or would the misadventure of counsel in the Article 32 petition (arguing that Article 262 barred such a petition) bind the tribunal?

The second finding—that a part of the catchment lies in Tamil Nadu—opens the proverbial Pandora's box. Does this open the door for a large number of States to lay claim to waters based on catchments on a pro rata basis? It may be noted that indisputably the catchment that lay in Tamil Nadu was downstream from the dam!

VI. CONCLUSION

The US Supreme Court, which has a long history of water disputes, evolved principles on which it adjudicated the equities of riparian States, and evolved procedural systems for monitoring its decrees. The Indian Constituent Assembly found a balance between the structure of the 1935 Act that left these decisions to the Crown's representatives and the inadequacies of the traditional judicial remedies in dealing with these problems.

The tribunals constituted delivered on the faith reposed in them by the Constitution. The Bhargava Tribunal, which decided the Narmada water dispute, showed how an adept tribunal could adapt and evolve water sharing

jurisprudence and combine it with practical solutions that have stood the test of time. At a time when environmental concerns were minimal, it took care to put in place ameliorative measures to undo the possible environmental fallouts of such a project. It also put in place a machinery to deal with the human problem of displacement of project affected persons—this at a time when the Supreme Court has construed the rights under Article 21 as being limited to a protection against invasion of life or liberty by executive action not authorised by law.

Unfortunately, some of the later tribunals have been unequal to the task of resolving water disputes between the States—the proceedings have dragged on interminably and the solutions are not politically acceptable. The solution lies in strengthening the tribunal system of dispute resolution and addressing its shortcomings, rather than the courts reading down Article 262 and taking upon themselves the task of resolving water disputes.

In contemporary partisan politics, no Chief Minister or the party in power in a State would agree to give up its claim to a share of water, in favour of a neighbouring State, for fear of the political backlash of such a decision, however reasonable a proposal may be from the national perspective. The decades that have followed the enactment of the IRWDA have shown that the exclusion of the jurisdiction of the courts has only been partial—and rightly so, for the courts have found areas of jurisdiction for intervention—prior to the constitution of a tribunal, against the decision of a tribunal, and after the award of the tribunal, notwithstanding the provisions of Article 262 and the IRWDA.

The recurrence of interState river water disputes can be indicated through two sets of problems that have occurred in the past and will continue to recur. The first concerns how the courts and tribunals grapple with the increasing recognition of environmental concerns, particularly in the form of individual petitions under the general claim of the ‘right to life’. Since individual petitions are prohibited in interState river water disputes, an attempt at some reconciliation of these claims will undoubtedly arise. The second deals with State reorganisation, the adjustment of State boundaries in India, that inevitably brings with it the readjustment of claims over water sharing.

The wisdom of the framers of the Constitution in creating a machinery to deal with the intractable problem of resolving disputes relating to waters of interState rivers, and the wisdom of the Supreme Court, for the most part, in showing judicial restraint by declining jurisdiction in relation to water disputes (even when presented as a facet of the right to life under Article 21 of the Constitution) and by restraining States from riding roughshod over tribunal awards (interim and final) which were politically unpalatable—has been one of the strengths of the federal system. The occasional foray into areas which the Constituent

Assembly was wary of the courts treading upon has led to some questionable results. The *Mullaperiyar* judgments are a good example of the hazards of summary justice in the area of resolving federal issues.

¹ HM Seervai, *Constitutional Law of India: A Critical Commentary*, vol 3 (4th edn, Universal Book Traders 2002) 3247.

² Seervai ([n 1](#)) 3247.

³ Ramaswamy R Iyer, 'Inter State Water Disputes Act 1956, Difficulties and Solutions' (2009) 37(28) *Economic and Political Weekly* 2907, 2907.

⁴ See, on this point, Seervai ([n 1](#)) 3244.

⁵ Seervai ([n 1](#)) 3244.

⁶ *Report of the Sarkaria Commission on Centre–State Relations* (Government of India 1988), ch 17 <<http://interstatecouncil.nic.in/Sarkaria/CHAPTERXVII.pdf>>, accessed November 2015.

⁷ By inserting subsection (2) to s 6, which makes a published award binding having the same force as an order or decree of the Supreme Court.

⁸ Constitution of India 1950, art 131.

⁹ *Constituent Assembly Debates*, vol 9 (Lok Sabha Secretariat 1986) 1187, 9 September 1949.

¹⁰ River Boards Act 1956, s 2.

¹¹ Seervai ([n 1](#)) 3243.

¹² IRWDA, s 11.

¹³ IRWDA, s 2(c).

¹⁴ IRWDA, s 3.

¹⁵ IRWDA, s 4.

¹⁶ IRWDA, s 5.

¹⁷ *Re Cauvery Water Disputes Tribunal* (1993) Supp (1) SCC 96(2).

¹⁸ *Re Cauvery Water Disputes Tribunal* ([n 17](#)) [69].

¹⁹ *Re Networking of Rivers* (2012) 4 SCC 51. A fuller discussion of this judgment is given in Section IV.3.

²⁰ *State of Karnataka v State of Andhra Pradesh* (2000) 9 SCC 572.

²¹ *Re Cauvery Water Disputes Tribunal* ([n 17](#)) [72].

²² (2013) 5 SCC 68.

²³ 297 US 517 (1936).

²⁴ *Washington* ([n 23](#)) 529.

²⁵ *Washington* ([n 23](#)) 524.

²⁶ Ramaswamy R Iyer, *Water: Perspectives, Issues, Concerns* (Sage Publications 2003) 27.

²⁷ (2008) 7 SCC 788.

²⁸ The expression 'water dispute' is defined in language of considerable width. Section 2(c) of the Act defines it thus:

'Water dispute' means any dispute or difference between two or more State Governments with respect to—

(i) the use, distribution or control of the waters of, or in any interState river or river valley;
or

- (ii) the interpretation of the terms of any agreement relating to the use, distribution or control of such waters or the implementation of such agreement; or
- (iii) the levy of any water rate in contravention of the prohibition contained in section 7.

- ²⁹ (2002) 2 SCC 507.
- ³⁰ *State of Haryana* ([n 29](#)) [7].
- ³¹ *State of Karnataka* ([n 20](#)).
- ³² (2009) 5 SCC 492.
- ³³ *State of Orissa* ([n 32](#)) [48].
- ³⁴ *Mullaperiyar Environmental Protection Forum v Union of India* (2006) 3 SCC 643.
- ³⁵ *Atma Linga Reddy* ([n 27](#)).
- ³⁶ *Narmada Bachao Andolan v Union of India* (2000) 10 SCC 664 [52].
- ³⁷ (2003) 9 SCC 356 [2].
- ³⁸ *Re Cauvery Water Disputes Tribunal* ([n 17](#)) [93]–[96].
- ³⁹ *State of Orissa* ([n 32](#)).
- ⁴⁰ *State of Orissa* ([n 32](#)) [51].
- ⁴¹ *State of Orissa* ([n 32](#)) [50].
- ⁴² *Re Cauvery Water Disputes Tribunal* ([n 17](#)) [93]–[98].
- ⁴⁴ *State of Tamil Nadu v State of Karnataka* (1991) Supp (1) SCC 240 [15].
- ⁴³ (1991) Supp (1) SCC 240.
- ⁴⁵ *Re Cauvery Water Disputes Tribunal* ([n 17](#)) [98].
- ⁴⁶ (2000) 9 SCC 572.
- ⁴⁷ *State of Karnataka* ([n 20](#)) [24].
- ⁴⁸ *State of Karnataka* ([n 20](#)) [59].
- ⁴⁹ *Report of the Sarkaria Commission on Centre–State Relations* ([n 6](#)) ch 17, para 17.1.01.
- ⁵⁰ *Report of the Sarkaria Commission on Centre–State Relations* ([n 6](#)) ch 17, para 17.4.08.
- ⁵¹ *Report of the Sarkaria Commission on Centre–State Relations* ([n 6](#)) ch 17, para 17.4.11.
- ⁵² IRWDA, s 4(1) as amended by Act 14 of 2002.
- ⁵⁴ *Tamil Nadu Cauvery Neerppasana Vilaiporulgal Vivasayigal Nala Urimai Padhugappu Sangam* ([n 53](#)) [17].
- ⁵⁸ *Re Networking of Rivers* ([n 19](#)) [68].
- ⁵³ *Tamil Nadu Cauvery Neerppasana Vilaiporulgal Vivasayigal Nala Urimai Padhugappu Sangam v Union of India* (1990) 3 SCC 440.
- ⁵⁵ *Tamil Nadu Cauvery Neerppasana Vilaiporulgal Vivasayigal Nala Urimai Padhugappu Sangam* ([n 53](#)) [18].
- ⁵⁶ *Tamil Nadu Cauvery Neerppasana Vilaiporulgal Vivasayigal Nala Urimai Padhugappu Sangam* ([n 53](#)) [18].
- ⁵⁷ *Re Networking of Rivers* ([n 19](#)).
- ⁵⁹ *Re Networking of Rivers* ([n 19](#)) [71].
- ⁶⁰ *State of Karnataka* ([n 20](#)).
- ⁶¹ *State of Karnataka* ([n 20](#)) [12].

⁶² *State of Karnataka* ([n 20](#)) [12].

⁶³ *Re Cauvery Water Disputes Tribunal* ([n 17](#)) [98].

⁶⁷ *State of Tamil Nadu* ([n 64](#)) [152].

⁶⁴ *State of Tamil Nadu v State of Kerala* 2014 SCC OnLine SC 432.

⁶⁵ AJ Thatheyus, Delphin Prema Dhanaseeli, and P Vanitha, 'InterState Dispute over Water and Safety in India: The Mullaperiyar Dam, a Historical Perspective' (2013) 1(2) American Journal of Water Resources 10.

⁶⁶ *State of Tamil Nadu* ([n 64](#)) [146].

⁶⁸ *State of Tamil Nadu* ([n 64](#)) [204]–[209].

CHAPTER 29

FISCAL FEDERALISM

NIRVIKAR SINGH*

I. INTRODUCTION

INDIA is an obviously large and heterogeneous nation, with its unity partially determined by geography, history, and culture, but also shaped and preserved in recent decades by the framework of its Constitution. The constitutional structure, by recognising the need for multilevel governance in a country so large and heterogeneous, has arguably been critical in the nation's evolution since Independence. The very fact of enshrining multiple levels of government in the Constitution, with loci of independent authority, has made India a federal nation, though the process of nation building was not one of explicit federation of independent units.¹ India's main sub-national units are its States, which are large, more homogeneous in many respects than the nation as a whole, and have independently elected governments.

The political federalism initially embedded in the Constitution through the design of State-level Governments was subsequently enhanced by the creation of a layer of elected local governments. At the same time, the political structures have been complemented by fiscal federal structures, also included in the Constitution, that provide the lifeblood of political federalism. The fiscal aspects of federalism are the subject of this chapter. Fiscal federalism covers matters of expenditure and revenue at different levels of government, as well as the fiscal links between levels of government. These links can be direct, in the case of intergovernmental transfers, or indirect, as when different levels of government raise revenue from the same or overlapping tax bases. The expenditure authority assigned to sub-national governments is an obvious corollary of political federalism, since the power to elect a government is meaningless if that government has no control over spending. Less obviously, the power to tax at the sub-national level is also crucial, and intergovernmental transfers may be an inadequate substitute for this sub-national power. Issues of what constitutes true revenue authority in the Indian case are complex, and arguably at the heart of challenges that the nation's fiscal federal system must tackle.

The remainder of this chapter is organised as follows. Section II summarises

and analyses the basic original structures of fiscal federalism in India, including assignments of spending and revenue, and mechanisms and institutions for making transfers across levels of government. These institutions include the Finance Commission, Planning Commission, and various central ministries. Section III traces the various constitutional amendments that have taken place in the sixty-plus years since the adoption of the Constitution, including changes in expenditure and revenue authorities, changes in transfer mechanisms, and most significantly, the creation of a tier of local governments. This section includes a discussion of the process of amending the Constitution, trying to understand the intellectual and political drivers of change in this regard. Section IV discusses the working of the institutions of fiscal federalism over the decades, in the context of the various constitutional provisions and amendments, paying particular attention to how these provisions and modifications have been implemented in practice. Section V assesses debates and legal cases pertaining to the constitutionality of the practice of fiscal federalism in India at various times, and to what extent these cases together provide a coherent and comprehensive legal view of Indian fiscal federalism. Topics of relevance in legal cases include institutions governing intergovernmental transfers, the distinction between taxes and fees, and the scope of authority of different levels of government. Section VI provides a summary conclusion.

II. THE INITIAL FRAMEWORK

India became an independent democratic nation in August 1947 and a constitutional republic in January 1950. The Constitution explicitly incorporated a federal structure, with States as sub-national entities that were assigned specified political and fiscal authorities. States' boundaries were not inviolate, but have been repeatedly redrawn by unilateral central action, as allowed by the Constitution. India now comprises twenty-nine States, six 'Union Territories' (UTs), and a National Capital Territory (NCT), Delhi. In general, the Constitution was structured to give the Union government residual authority and considerable sovereign discretion over the States, creating a relatively centralised federation.

The primary expression of statutory constitutional authority in India comes through directly elected parliamentary-style governments at the national and State levels, as well as nascent directly elected government bodies at various local levels. The national parliament has two chambers, the Lok Sabha (House of

the People), directly elected in single-member, first-past-the-post constituencies, and the Rajya Sabha (Council of States), indirectly elected by State legislators. The Prime Minister and council of ministers serve as the executive branch, rather than the largely ceremonial President. The States mostly have single-chamber legislatures, with Chief Ministers in the executive role. Most UTs are governed directly by appointees of the Union government. Each State also has a Governor, appointed by the President, but effectively an agent of the Prime Minister. Overlapping political authorities at the Central and State levels have been dealt with through intra-party bargaining, and, more recently, through explicit bargaining and discussion. An InterState Council (ISC) was provided for in Article 263 of the Constitution, and created in 1990, and it has become a forum where some political and economic issues of joint concern are collectively discussed and possibly resolved.²

At inception, the Indian Constitution clearly laid out the areas of responsibility of the Central and State Governments, with respect to expenditure authority, revenue raising instruments, and the legislation needed to implement either. Expenditure responsibilities were specified in separate Union and State Lists, with a Concurrent List covering areas of joint authority.³ Tax powers of these two levels of government were specified in various individual articles.⁴ Legislative procedures for each level, particularly with respect to budgets and appropriations, were spelled out in detail in the Constitution, and are similar to parliamentary democracies elsewhere, having followed the British model.

Powers of legislation for the Centre and States follow the responsibilities assigned in the three constitutional Lists, but there are several relatively broad 'escape clauses', which give the national Parliament the ability to override the States' authority in special circumstances. Furthermore, the assignment of legislative powers ignores potential conflicts, such as when international treaties, the signing of which is a central power, affect State subjects, but this is perhaps unavoidable in a summary constitutional assignment.⁵ When conflicts over legislation arise between the Centre and the States, the Supreme Court is the arbiter. The framework of the Constitution tends to favour central authority in such cases. The power to amend the Constitution also resides with the national Parliament, with a weak requirement that half or more of the States ratify the amendment for it to take effect.

The functions of the Union government are those required to maintain macroeconomic stability,⁶ international trade and relations, and those having implications for more than one State, for reasons of economies of scale and cost-efficient provision of public services.⁷ The major subjects assigned to the States

comprise public order, public health, agriculture, irrigation, land rights, fisheries and industries, and minor minerals. The States also assume a significant role for subjects in the Concurrent List, such as education and transportation, social security, and social insurance.

The initial constitutional assignment of tax powers in India was based on a principle of separation, with tax categories being exclusively assigned either to the Centre or to the States, through the Union and State Lists, with further guidelines spelled out in Articles 268 to 274 and Articles 276 to 279. Most broad-based taxes were assigned to the Centre, including taxes on income and wealth from non-agricultural sources, corporation tax, taxes on production (excluding those on alcoholic liquors), and customs duty. These were often taxes where the tax revenue potential was greater, as a result of relatively lower collection costs, and higher elasticities with respect to growth. The Centre was also assigned all residual tax powers. At the sub-national level, a long list of taxes was constitutionally assigned to the States, but only the tax on the sale of goods has turned out to be significant for State revenues. This narrow effective tax base was largely a result of political economy factors (eg, rural landed interests were initially quite powerful in government at the State level) that have eroded or precluded the use of taxes on agricultural land or incomes (and also of user charges for public irrigation and even electricity) by State Governments.⁸

The realised outcome of the Indian assignments of tax and expenditure authority, their manner of implementation, and the response of different levels of government and taxpayers to the assignment and implementation was a substantial vertical fiscal imbalance, in the sense of States' own revenue raising being inadequate to meet their assigned expenditure responsibilities. The large vertical fiscal imbalances between levels of government were not unanticipated, and provisions were included in the original Constitution to cover Centre–State transfers through the creation and operation of a Finance Commission (FC).⁹ There is a theoretical case for this kind of arrangement, based on the greater economic efficiency of national tax collection combined with sub-national spending for many kinds of public goods and services.

The Constitution provided for the sharing of the proceeds of certain centrally levied taxes (eg, non-corporate income tax¹⁰ and Union excise duty¹¹) with the States, as well as grants to the States from the Consolidated Fund of India.¹² The FC, which is appointed by the President of India every five years (or earlier if needed), makes recommendations on these transfers, which have been mostly, but not always, unconditional.

While the FC decides on tax shares and makes grants, a completely separate

body, the Planning Commission (PC), established by a resolution of the central cabinet in March 1950, has made grants and loans (in the ratio 30:70 for the major States)¹³ for implementing development plans, which were introduced at this time. As planning gained emphasis, extending to each State as well, the PC became a major dispenser of such funds to the States, also coordinating central ministry transfers: one-third or more of total Centre–State transfers are made through these channels. As there was no specific provision in the Constitution for these plan transfers, the Union government channelled them under the miscellaneous (and ostensibly limited) provisions of Article 282. In August 2014, the Prime Minister announced that the PC would be wound up and replaced with a new organisation. This new organisation was announced in January 2015, and named the NITI Aayog, with a new leadership and a new organisational structure.¹⁴

Various central ministries give grants to their counterparts in the States for specified projects, either wholly funded by the Centre (central sector projects) or requiring the States to share the cost (centrally sponsored schemes). The ostensible conceptual rationale for these programmes is to finance activities with a high degree of interState spillovers, or which are merit goods (eg, poverty alleviation and family planning), but they may often be driven by pork-barrel objectives. These projects are supposed to be monitored by the PC, and coordinated with the overall State plans. Categorical transfers by central ministries have increased in the past decade, reflecting political drivers as well as the inability in a federal system to have a constitutional check on the Centre's power to make such grants.

A final area that impinges on federal finance is that of government borrowing. Article 292 of the Constitution gives the Centre the power to borrow, subject to the security of the Consolidated Fund of India, and to any limits that might be placed on it by Parliament. Similarly, Article 293(1) has provisions for borrowing by State Governments, though they may not borrow abroad. Article 293(2) allows the Centre to make loans to the States, or provide guarantees to loans taken by them, subject to possible conditions laid down by Parliament. Significantly, according to Article 293(3), States cannot borrow without the consent of the Centre if they are already indebted to the Centre, or it is a guarantor for existing loans. In fact, that condition has prevailed almost always, since the Union government was, until fairly recently, the States' main source of lending, and every State was indebted to the Centre.¹⁵

III. AMENDMENTS

India's fiscal federal arrangements have been subject to a variety of modifications through constitutional amendments. On the expenditure side, education was on the State List until 1977, when it was moved to the Concurrent List as part of the Forty-second Amendment. This amendment, passed during the Emergency period, also made other changes to the Seventh Schedule assignments of responsibility between the Centre and States,¹⁶ as well as various other significant changes to the Constitution (some of which were later reversed).¹⁷

The first time the constitutional assignment of taxes was amended was in 1956, when the language governing interState sales taxes was sharpened and clarified. Articles 269, 286, and the Seventh Schedule of the Constitution were all modified in this Sixth Amendment. InterState sales taxes were to be levied and collected in accordance with an Act of Parliament,¹⁸ but with the proceeds accruing to the States and not going into the Consolidated Fund of India. The original provisions of the Constitution led to some ambiguities in States' jurisdictions over taxes, even though interState taxes were always intended to be outside the purview of the States.¹⁹

In 1983, another change pertaining to interState sales taxes was made, this time to deal with ambiguities in the language of the original provisions that allowed for avoidance or diminution of sales taxes in certain situations. The Forty-sixth Amendment modified Schedule 7 (adding a category to the Union List pertaining to interState consignments of goods) and Articles 269, 286, and 366.²⁰

The third time that a constitutional amendment dealt with taxes, in the Sixtieth Amendment of 1988, the change made was straightforward, simply raising the ceiling on possible State or local taxes on professions from Rs 250 to Rs 2,500. The figure had been specified in the original Constitution, and had been made unrealistic by decades of inflation and real growth. Of course, this problem will recur periodically.

The most recent modification of tax assignments came in 2004, and was more major. The Eighty-eighth Amendment introduced taxes on services as an explicit entry in the Union List in Schedule VII, modified Article 270, and inserted a new Article 268A. Given the Centre's residuary powers of taxation, taxes on services had implicitly been within the authority of the Centre. The language of the amendment included imprecise language indicating that a services tax would be shared with the States, and the government's statement of objects and reasons

discussed the amendment in the context of the introduction of a Value Added Tax (VAT), but this entire area of sales taxation is still in a state of evolution, as will be discussed in subsequent sections.

There has been only one constitutional change in the mechanism of Centre–State transfers, although institutional practices have varied and evolved over time. In the initial constitutional design of the tax-sharing arrangement between the Centre and the States, only the revenues from certain central taxes, such as income tax, were shareable with the States. A large proportion of such taxes went to the States, distorting Union government incentives for collecting them. In 1994, the Tenth Finance Commission proposed that the entire Consolidated Fund of India be the pool that would be shared, removing distortions of incentives across different categories of central tax revenue. This recommendation led to the Eightieth Amendment in 2000, which essentially implemented the proposed new sharing mechanism.

The most sweeping constitutional change in India's fiscal federal arrangements came with the Seventy-third and Seventy-fourth Amendments, which created, respectively, stronger rural and urban local governments than had hitherto been possible. Local government was initially, and remains, under the control of the States, being in the State List of the Seventh Schedule. However, the amendments added the Eleventh and Twelfth Schedules to the Constitution, detailing rural and urban local government expenditure responsibilities. Many of these remained concurrent with the States, which also retained control over local finances, in that local tax authority remained circumscribed, with transfers from State funds through new State Finance Commissions providing funds for the new expenditure responsibilities.

State Governments have varied in the level and quality of implementation of new local expenditure authorities and revenues to support them. The structure of the Constitution made this inevitable, to some extent, but the amendments could, perhaps, have offered a firmer approach to devolving revenue authority to local governments, since it provided much greater political decentralisation than had existed in the past. The mismatch between revenue and expenditure authority for local governments is much greater than for State Governments, and both levels of mismatch may require constitutional change rather than just improvements in existing institutional frameworks: this is discussed in subsequent sections.^{[21](#)}

IV. FISCAL FEDERALISM IN PRACTICE

The processes leading to amendments in the Constitution pertaining to taxes, expenditures, and intergovernmental transfers illustrate one aspect of the working of fiscal federalism in India. In the case of the Sixth Amendment, dealing with interState sales taxes, the initial impetus came from legal cases involving State Governments and private corporations, adjudicated by the Supreme Court. The Court's decisions and interpretations brought out the ambiguities in the existing constitutional language. The Union government then appointed a Taxation Inquiry Commission in 1953–54, leading to a report with recommendations in 1955, which in turn formed the basis of the parliamentary bill and the amendment the following year.

In the case of the issues leading to the Forty-sixth Amendment, the driver was once again legal cases that went up to the Supreme Court, and the rulings of the Court created a clear need for a stronger and clearer articulation of the tax status of certain transactions. In this case, the matter was referred to the Law Commission of India, which is appointed periodically by the executive branch to examine a variety of legal issues. The report was prepared by the Sixth Law Commission in 1974, but took some years to be translated into constitutional change legislation, during which time further legal cases arose.

The Sixtieth Amendment, in 1988, was relatively straightforward, and was enacted simply in response to representations from several State Governments. The Eightieth Amendment, dealing with intergovernmental tax sharing, was also not driven by legal disputes, but was instead shaped by conceptual arguments in favour of greater economic efficiency, developed by the Tenth Finance Commission. The Eighty-eighth Amendment arose as part of a much broader process of reform of sales taxes in India. The initial assignments of authority to tax goods and services, as well as how they were subsequently implemented, created problems of overlapping of tax bases, and cascading of taxes (in which values that are taxed include taxes paid elsewhere), both of which reduce the efficiency of the indirect taxes. A version of VAT, which avoids or reduces the problems, was introduced at the central level as early as 1986, but a more comprehensive VAT covering the States did not come into force until 2003–05. It was in this last period, therefore, that the Eighty-eighth Amendment, clarifying the Centre's power to tax services, was introduced and adopted. The ongoing attempt to devise and implement a comprehensive Goods and Services Tax (GST) to supersede the existing VAT represents, in some ways, a culmination of over two decades of reform of the indirect tax system.²²

The Forty-second and the Seventy-third and Seventy-fourth Amendments were quite different in character and process from all these other constitutional changes in fiscal federal structures. Rather than technical issues pertaining to the

power to tax, or the basis for tax sharing, the drivers were complex political forces. The Forty-second Amendment was remarkably broad, and passed hurriedly in an abnormal political situation. The reassignment of education from the State List to the Concurrent List was a relatively small part of the sweeping scope of the amendment, and, while problematic in some respects, has not been reversed, and has, to some extent, ratified a pre-existing reality. The two 1993 amendments giving more explicit constitutional status and powers to local governments, on the other hand, took decades to come to fruition, and can even be thought of as a continuation of fundamental debates on the nature of Indian federalism that go back to India's initial Constituent Assembly and its constitution-making exercise. Ultimately, the difficult process of political bargaining between the Centre and the States led to a compromise that still arguably lacks some essential features in the sphere of fiscal federal arrangements, that is, the weakness of local governments in the sphere of independently raising their own revenues.

The evolution of Indian fiscal federalism has not just been shaped by constitutional changes. The PC's role in influencing various Centre-State transfers has been driven by changing political equations, sometimes leading centralising impulses, at other times responding to the impacts of political decentralisation. The National Development Council (NDC) was set up soon after the PC. It is chaired by the Prime Minister, and its members include selected central cabinet ministers, Chief Ministers of the States, and members of the PC. It plays an important role in plan formulation, serving as a forum for political bargaining (as did the PC itself, though less explicitly).

The PC itself saw its role vary over time. For example, until 1969, Plan transfers were project based. At that time, the NDC switched to a formulaic approach, but discretion and political bargaining have continued to play a role. In the 2000s, for example, central ministry transfers for national missions in health and education and a national rural employment scheme greatly increased the relative importance of discretionary Centre-State transfers. The Plan transfer formula has also been the subject of political bargaining: in 2013, the Union government commissioned a report that seemed to undermine or question the practice and methodology of classifying certain States as 'Special Category', qualifying them for a more favourable transfer formula. The ISC has also become a forum (broader than the NDC) where political and economic issues of joint concern can be collectively discussed and possibly resolved. For example, the Tenth Finance Commission's recommendation on changing the Centre-State tax-sharing arrangement was discussed and refined in the ISC before becoming a legislative proposal and then a constitutional amendment.

The existence of Plan and central ministry transfers has clearly impinged on the ability of the FC to take a comprehensive approach to the horizontal division of the States' share of the combined Centre–State tax pool. Periodically, though, the FC has challenged the rationality of the approach to Plan transfers in particular, since the distinctions between developmental and non-developmental expenditures have lacked a clear economic rationale. On the other hand, the FC, while it has provided a relatively stable formula for its horizontal division among the States—primarily meant to increase and equalise their fiscal capacity—has struggled with its own objectives. In addition to formulaic transfers, it has made various grants with negative incentive effects, and, in recent years, has sought to make transfers conditional on the fiscal performance of the States. This last effort was spurred by Central instructions to the FC to help control State fiscal deficits. In sum, the FC has also responded to changing national fiscal conditions and macroeconomic goals, in ways that have involved conflicting approaches to different components of Centre–State transfers.²³ The constitutional language pertaining to the FC has permitted this breadth and variation in its working.

Turning to the practice of sub-national borrowing, as noted earlier, some central loans are made under the supervision of the PC, and have been tied to PC grants in a fixed proportion. Central loans have also included funds from multilateral agencies or other external sources, which are earmarked for specific programmes and projects in particular States. After the reforms of the 1990s, States have more freedom to negotiate directly with multilaterals, and the Centre plays combined roles of approver, guarantor, and intermediary. Finally, there can be ad hoc central loans based on special circumstances or exigencies in individual States, and short-term ways and means advances to provide revenue smoothing. One of the FC's major concerns in recent periods has been to increase the fiscal discipline in sub-national borrowing arrangements, through aggregate borrowing caps, and a shift from discretionary lending or on-lending by the Centre to more market-mediated borrowing by the States. Various (non-transparent) borrowing mechanisms also exist for local-level governments, and these will increase in importance as urbanisation requires greater infrastructure spending. So far, none of the changes in sub-national borrowing practices has required a constitutional change.

V. LEGAL CASES AND LESSONS

There are several ways of categorising the range of legal cases pertaining to

India's constitutional arrangements for federal finances. The first is by topic, which includes taxes, expenditure authorities, intergovernmental transfer mechanisms, and sub-national government borrowing mechanisms: this will be the primary organising principle used here. Secondly, legal cases differ according to the set of governments involved, for example, whether they deal with one level of government (Centre, State, or local), or with intergovernmental relations. Thirdly, private sector parties may or may not have been involved in a particular case. Fourthly, some cases have led to constitutional amendments, but in general, legal cases are resolved by specific judicial interpretations of constitutional language. As described earlier, the Sixth and Forty-sixth Amendments were both responses to judicial interpretations of existing constitutional language that was not satisfactory to the legislative and executive branches of government.

1. Taxes

Legal cases involving taxes have, unsurprisingly, been very common, especially when there is a direct opposition of interests between private sector entities that wish to reduce their tax burdens, and governments that want to maintain or increase revenue. Given the large number of cases, the discussion here will be selective. Many cases that are not considered in detail in this chapter deal with technical issues of what qualifies as income, what constitutes a good,²⁴ what constitutes consumption or use, and so on.

Many cases have involved the scope and application of a particular tax, and appeals to the Supreme Court have hinged on the interpretation of constitutional language. In 1954, the Court made a significant observation in *Navinchandra Mafatlal v The Commissioner of Income Tax, Bombay City*.²⁵ The case had originally been brought in 1950, and involved a question of whether ‘income’ included ‘capital gains’. Citing a string of cases going back before Independence, the Court noted that ‘in construing words in a constitutional enactment conferring legislative power the most liberal construction should be put upon the words so that the same may have effect in their widest amplitude’.²⁶ The Court echoed this view in *The Western India Theatres Ltd v The Cantonment Board Poona Cantonment*, in 1959.²⁷

In a 1969 case, *M/S Jain Bros v The Union of India*, the Supreme Court made a specific Statement on double taxation in the context of an income tax case: ‘The Constitution does not contain any prohibition against double taxation even if it be assumed that such a taxation is involved in the case of a firm and its partners after the amendment of s. 23(5) by the Act of 1956; nor is there any other enactment which interdicts such taxation.’²⁸

In 1978, in *Avinder Singh v State of Punjab*, the Court made a broader explicit observation on the constitutional validity of double taxation, concluding, ‘There is nothing in Art. 265 of the Constitution prohibiting double taxation.’²⁹ This statement made explicit a position implicitly taken in the *Western India Theatres* case. In *Avinder Singh*, the Court went on to observe, rather sweepingly, that ‘Bad economics may be good law and vice versa.’³⁰ As an aside, this kind of judicial thinking raises serious concerns about the approach to lawmaking on matters that affect economic activity of all kinds, not just federal finance issues.

The *Avinder Singh* case has been cited in many other subsequent court judgments, and its pronouncement on double taxation was quoted at length in

Municipal Council Kota v The Delhi Cloth & General Mills Co Ltd in 2001, in a case involving levy of an octroi-like tax.³¹ Broadly, these kinds of cases have affirmed that the discretion of the Central and State Governments to impose taxes is quite broad under the Constitution of India. Arguably, this puts the onus on politicians to reform tax laws, and the Constitution where necessary, to limit double taxation where it is most likely to cause economic harm. The recent introduction of VAT, and plans for a GST, together represent an ongoing effort to rectify problems in existing laws and constitutional guidelines on tax authority.³²

Another example of the Supreme Court's providing a broad interpretation of the power to tax, this time for the Union government, concerned a case involving the import of country liquor into the Union Territory of Delhi: *Satpal & Co v Lt Governor of Delhi*.³³ The Court's ruling provided a clear statement of residuary powers of the Centre:

[E]xcept the matters specifically enumerated in List II (State List) in the Seventh Schedule, Parliament's plenary power to legislate extends to all conceivable matters which can be topic of legislation, and even this limitation on its power vanishes when Parliament legislates for part of the territory of India not included in a State. The three dimensional picture becomes complete, viz. (i) to select topic for legislation (ii) enactment of legislation on the topic and (iii) to impose tax in respect of such subject matter of legislation by reference to Art. 248 which confers power to make any law with respect to any matter not enumerated in Lists II and III including the power to impose tax not mentioned in either of those lists.³⁴

Other rulings of the Supreme Court have upheld powers of retrospective taxation (eg, *The Tata Iron & Steel Co Ltd v The State of Bihar*;³⁵ *Chhotabhai Jethabhai Patel and Co v Union of India*³⁶) and broad discretion as to how a tax is levied (eg, *Jullundur Rubber Goods Manufacturers Association v Union of India*,³⁷ *Goodricke Group Ltd v State of West Bengal*³⁸). These rulings have come in various cases, some involving the Centre and others individual States.

Issues of fiscal federalism arise more squarely in cases of overlapping or concurrent authority. While the Centre's power to tax is only buttressed by its residuary powers under the Constitution, the States' powers are circumscribed, even in the case of the State List in the Seventh Schedule.³⁹ For example, Entry 50 in the State List is 'Taxes on mineral rights subject to any limitations imposed by Parliament by law relating to mineral development'. The State of Orissa (now Odisha) levied a tax on mineral or coal bearing lands. In *State of Orissa v Mahanadi Coalfields Ltd*, the Supreme Court ruled that this tax was in substance a tax on minerals and mineral rights, and was therefore pre-empted by a previous Act of Parliament—the Mines and Minerals (Development and Regulation) Act

of 1957.⁴⁰

Less than a decade later, however, the Supreme Court reversed itself on this subject, in *State of West Bengal v Kesoram Industries Ltd.*⁴¹ The judgment in this case is lengthy and offers detailed perspectives on the relative powers of the Centre and the States. After a review of numerous other precedents and related cases, the ruling stated, ‘Entries 52, 53 and 54 in List I are not heads of taxation. They are general entries. Fields of taxation covered by Entries 49 and 50 in List II continue to remain with State Legislatures in spite of Union having enacted laws by reference to Entries 52, 53, 54 in List I.’⁴² Furthermore, ‘So long as a tax or fee on mineral rights remains in pith and substance a tax for augmenting the revenue resources of the State or a fee for rendering services by the State and it does not impinge upon regulation of mines and mineral development or upon control of industry by the Union government, it is not unconstitutional.’⁴³

Aside from its core argument, the Supreme Court’s ruling in *Kesoram* also contained some broad statements about Indian federalism:

[T]he interpretation of the flexible provisions of the Constitution can be accompanied by dynamism and lean, in case of conflict, in favour of the weaker or the one who is more needy. Several taxes are collected by the Centre and allocation of revenue is made to States from time to time. The Centre consuming the lion’s share of revenue has attracted good amount of criticism at the hands of the States and financial experts. The interpretation of Entries can afford to strike a balance, or at least try to remove imbalance, so far as it can. Any conscious whittling down of the powers of the State can be guarded against by the courts.⁴⁴

It is arguable whether these statements represented an appropriate exercise of the Supreme Court’s powers, but that is a broader issue with regard to the working of the Court over many decades, and beyond the scope of this chapter.

States’ powers to impose sales taxes are limited by restrictions on interState sales taxes. As noted in Section 3, the Sixth Amendment was a major step in clarifying the nature of these restrictions, as well as defining the Centre’s authority in such cases. Prior to the amendment, the Supreme Court had had some difficulty with the provisions of Article 286, in *State of Bombay v The United Motors (India) Ltd.*⁴⁵ In essence, the Court did not believe that Article 286 completely disallowed States from taxing interState sales. This decision was substantially reversed the following year, in the ruling on *The Bengal Immunity Company Limited v State of Bihar*,⁴⁶ but the ambiguities reflected in these cases and judgments led to the Sixth Amendment. In the case of the Forty-sixth Amendment, the original case was *The State of Madras v Gannon Dunkerley & Co (Madras)*,⁴⁷ which defined sales of goods in such a manner that a series of subsequent Court decisions held a range of transactions not to be liable for sales

tax. This effective loophole was finally closed in 1982, through the constitutional amendment.⁴⁸

Another issue that has been the subject of legal attention has been that of taxes versus fees. Taxes and fees are distinguished in the Constitution, and the Supreme Court made an early ruling on the nature of this distinction, emphasising that fees must be for specific services, and that the fee revenue and cost of provision must also have some relationship: *The Commissioner, Hindu Religious Endowments v Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt*.⁴⁹ In this ruling, the levy under dispute was held to be a tax and not a fee, and was disallowed. However, in several subsequent decisions (eg, *Sreenivasa General Traders v State of Andhra Pradesh*⁵⁰) the Court has substantially broadened the concept of a fee, blurring the boundary between fees and taxes. Some of this change in interpretation was driven by the recognition that fees for regulatory services are more difficult to connect to the benefits of individual fee payers. On the other hand, even for regulatory fees, the possibility that they are partially used for general revenue raising remains.⁵¹ Interestingly, the legal discussions on taxes versus fees do not get at the heart of one of the more pervasive problems in Indian governance, which is the failure to charge for private goods or services that are publicly provided, such as electricity or irrigation water for farmers.⁵²

A final issue in the area of tax authority, directly related to federal issues, is that of intergovernmental tax immunities. Article 285 of the Constitution explicitly prohibits States from taxing property of the Union government. The definition of 'property' in this context is quite broad, and not restricted by the purposes to which it is put. However, there are some caveats in practice. The Railways are still liable to pay fees to local authorities for local services, as in *Union of India Owner of The Eastern Railway v The Commissioner of Sahibganj Municipality*.⁵³ Furthermore, various kinds of government corporations are not exempt from State taxation, as in *Western Coalfields Ltd v Special Area Development Authority, Korba*.⁵⁴ On the other hand, no property owned by the Union government can be taxed by a local authority, even if it is being leased out and used for commercial or residential purposes.

In the case of Central taxation of State Government properties, Article 289 of the Constitution protects State Government property from such taxation. However, Parliament may pass laws allowing the Centre to tax the business operations of a State, including property used for such operations, or income thereby generated. The Supreme Court has stated that imports and exports by a State Government can be subject to customs duties, and that State Government

production and manufacture can be subject to Union excise duties: this was done in an advisory opinion (with a 5:4 split) of the Court on the matter being referenced to it by the President of India.^{[55](#)}

2. Expenditures

Constitutional cases pertaining to expenditures have not had the same character as those for tax authorities. Public interest legislation has often played a role in cases involving the lack of efficacy of government spending (eg, cleaning up the River Yamuna), or the appropriateness of spending (eg, a subsidy for Haj pilgrims). The drivers of the Forty-second, Seventy-third, and Seventy-fourth Amendments, which made significant changes in expenditure assignments across levels of government, were political compulsions, and while other aspects of these amendments may have come under judicial scrutiny for constitutional validity, the modifications to expenditure assignments have been considered to be relatively innocuous.⁵⁶

The case of water management, however, provides an important example of federal issues on the side of expenditure powers. InterState river waters involve joint Central and State responsibilities, while most other water issues are, according to constitutional assignments, State responsibilities.⁵⁷ Parliament has not taken a lead in creating institutions to manage interState rivers, beyond passing an act to deal with disputes, the InterState River Water Disputes (ISRWD) Act of 1956. This legislation included provisions for the establishment of tribunals to adjudicate where direct negotiations had failed.⁵⁸

More generally, issues of environmental protection, including air and water pollution and preservation of natural resources such as forests, have invited considerable judicial activism, as in the intervention of the Supreme Court requiring that polluting taxi-rickshaws in the NCT of Delhi be converted to run on compressed natural gas. Mandal and Rao provide a comprehensive analysis of environmental issues in a federal context, including the Supreme Court's judicial activism, in the case of forest preservation, air pollution, and water management.⁵⁹ The Energy Resources Institute examines the impact of Supreme Court rulings on forests and mineral rights, arguing that the Court has greatly increased centralisation in the former case, but has decentralised in the latter, through its decisions in recent decades.⁶⁰

3. Transfers

Until the Eightieth Amendment, the constitutionally prescribed mechanism for sharing taxes between the Centre and States was restricted to a limited number of taxes. Furthermore, the Centre was able to further restrict the scope of sharing—it could and did impose an income tax surcharge that was non-shareable, even when income tax revenue itself was part of the shareable pool (and allocated chiefly to the States at the time). The amendment changed the sharing pool to be the entire Consolidated Fund of India, with some relatively small exceptions, thus simplifying the mechanism of vertical sharing (though not of horizontal division among the States) and improving and rationalising incentives for tax policy and collection.

Based on the specification of its constitutional role, the FC has made recommendations for vertical and horizontal tax sharing, and combined these with recommendations for various grants. The basic recommendations of the FC have tended to be accepted and implemented by the Centre, so there have not really been any constitutional issues that have arisen. The formulation and adoption of the Eightieth Amendment was also relatively smooth. Of course political bargaining does occur, and may influence FC-determined transfers at various levels: the composition of the FC, the special grants it makes, and perhaps even discussions over the horizontal tax-sharing formula. Politics also presumably shaped the Eighty-eighth Amendment, which kept service tax revenue under a new Article 268A outside the purview of the FC, giving the Centre scope for discretion as to how it chooses to share that revenue. Overall, issues with FC transfers have been in the realm of economic efficiency and horizontal equity, rather than any pertaining to constitutional law.

The constitutional issue has been somewhat livelier in the case of Central transfers made under Article 282. Unlike the relatively detailed language of Articles that govern the working of the FC, including tax sharing and grants, Article 282 is brief and non-specific: ‘The Union or a State may make any grants for any public purpose, notwithstanding that the purpose is not one with respect to which Parliament or the Legislature of the State, as the case may be, may make laws.’⁶¹ Article 282 has been used to justify Central ministry transfers, as well as PC transfers.

Court cases that have affirmed the breadth of the scope of Article 282 have not directly dealt with Central transfers, but have been High Court judgments regarding State Government grants. In 1960, in *Laxman Moreshwar Mahurkar v*

Balkrishna Jagannath Kinikar, the Bombay High Court's ruling stated:

If the Government purports to spend money for a purpose which it characterises as a public purpose though in point of fact it is not a public purpose, the proper place to criticise the action of the Government would be the legislature or the Appropriation Committee. The Courts are not the forum in which the Government's action could be sought to be criticised or restrained.⁶²

The issue being dealt with in this and subsequent cases (eg, *Bira Kishore Mohanty v State of Orissa*,⁶³ in the Orissa High Court, and *KN Subba Reddy v State of Karnataka*,⁶⁴ in the Karnataka High Court), as is clear from the quote, was the appropriateness of State Government spending decisions, rather than the constitutionality of an institutional mechanism for intergovernmental transfers.

On the other hand, there have been ongoing constitutional arguments against the justification of PC grants through Article 282. The Congress government in Tamil Nadu, in its memorandum to the Fourth Finance Commission in 1964, noted that:

Article 282 of the Constitution . . . occurs in the section dealing with miscellaneous financial provisions and permits the center as well as the states—to give grants for any public purpose. It could never have been the intention of the framers of the constitution that this Article should be overworked so as to become the more important instrument of financial assistance to the states and thus permit the center to assume control even over subjects which are solely within the competence of the states.⁶⁵

Other institutional voices, including the Administrative Reforms Commission and the FC itself, have at various times argued for Plan transfers to be overseen by the FC, permitting a comprehensive and more neutral approach to Centre–State transfer decisions.⁶⁶

The Supreme Court finally addressed the issue of Article 282 in *Bhim Singh v Union of India*.⁶⁷ This case was brought in 1999, and concerned the validity of the Member of Parliament Local Area Development (MPLAD) scheme, whereby individual MPs each received lump sum grants to be spent in their constituencies as they wished for public purposes. In the course of addressing the petition, the Court reviewed the entire gamut of mechanisms for Centre–State transfers,⁶⁸ and came down squarely on the side of an expansive interpretation of Article 282:

The analysis of Article 282 coupled with other provisions of the Constitution makes it clear that no restriction can be placed on the scope and width of the Article by reference to other Articles or provisions in the Constitution as the said Article is not subject to any other Article in the Constitution. Further this Article empowers Union and the States to exercise their spending power to matters not limited to the legislative powers conferred upon them and in the matter of expenditure for a public purpose subject to fulfilment of such other provisions as may be applicable to the Constitution their powers are not restricted or circumscribed.⁶⁹

While the Court did not address the validity of PC transfers directly, it noted the existence of a range of Central ministry schemes that have become intertwined with the PC's own efforts, and after considering the detailed features of the MPLAD scheme, found no cause for questioning its constitutionality.⁷⁰

The final conclusion of the Court remained somewhat self-contradictory, however, because it simultaneously assigned great breadth and discretion to transfers under Article 282, while still maintaining that its provisions were normally meant for special, temporary, or *ad hoc* schemes (Clause 3 in the following):

1. Owing to the quasi-federal nature of the Constitution and the specific wording of Article 282, both the Union and the State have the power to make grants for a purpose irrespective of whether the subject matter of the purpose falls in the Seventh Schedule provided that the purpose is 'public purpose' within the meaning of the Constitution.
2. The Scheme falls within the meaning of 'public purpose' aiming for the fulfilment of the development and welfare of the State as reflected in the Directive Principles of State Policy.
3. Both Articles 275 and 282 are sources of spending funds/monies under the Constitution. Article 282 is normally meant for special, temporary, or *ad hoc* schemes. However, the matter of expenditure for a 'public purpose', is subject to fulfilment of the constitutional requirements. The power under Article 282 to sanction grant is not restricted.⁷¹

In any case, the Supreme Court's affirmation of the scope of Article 282 remains in force for supporting Union government discretion in transfers, even as the PC has been slated for extinction.

4. Borrowing

Government borrowing has not been subject to constitutional or other legal cases. Plan transfers have been a major source of Central loans to the States, and State indebtedness increased dramatically in the 1990s,⁷² resulting in concerted efforts, through legislation and through incentive mechanisms designed by the FC, to control State debt and deficits. In general, the FC and the RBI have played roles in trying to improve sub-national borrowing mechanisms and practices, while the Union government, having passed its own fiscal responsibility legislation, pressured the States to follow suit.

VI. CONCLUSION

India has an elaborate set of constitutional arrangements with respect to fiscal federalism. These explicit arrangements have been augmented by additional practices, which have found constitutional justification in rulings of the Supreme Court, as the final arbiter on matters of interpretation of the Constitution. In general, the Constitution's arrangements have been flexible enough to accommodate various reforms, or have been occasionally amended when this was necessary. The Court has tended to adopt an expansive view of powers of government action, including the power to tax, especially at the Central level. More recently, the Court has tended to take an activist position in addressing government failures in areas such as environmental protection, but this activism has had varying effects on fiscal federal relations in different domains. Ongoing (the GST) and potential future (piggybacking on taxes at different levels of government) tax reform may require further constitutional amendments, and these will in turn require bargaining between different levels of government. Overall, the Constitution of India has provided a durable and flexible, if imperfect, framework for India's fiscal federal arrangements.

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¹ The constitutional structure has been centralised enough to lead some to label India as quasi-federal.

For example, the Constitution gives the Union, or Centre, the power to change State boundaries, or even extinguish States. The Supreme Court, in *Bhim Singh v Union of India* (2010) 5 SCC 538 [48], addressed the nomenclature and argued that India is ‘quasi-federal’.

² Constitution of India 1950, art 263. The ISC includes the Prime Minister, State Chief Ministers, and several Central Cabinet ministers as members. While the ISC is advisory, it has formalised collective discussion and approval of important matters impinging on India’s federal arrangements, including tax sharing and interState water disputes.

³ Arts 245–63, in Part XI of the Constitution cover legislative (arts 245–55) and administrative (arts 256–63) relations between the Union and the States, referring as needed to the three Lists assigning responsibilities. These Lists themselves are in the Seventh Schedule of the Constitution. All residual areas not explicitly mentioned are under the Centre’s authority, adding a significant centralising feature to the Constitution.

⁴ Tax provisions, including tax-sharing guidelines, were contained in arts 265, 268–74, 276, and 285–89 in Part XII of the Constitution.

⁵ Devesh Kapur and Pratap Bhanu Mehta, ‘The Indian Parliament as an Institution of Accountability’ (2006) Democracy, Governance and Human Rights Programme Paper Number 23, 29 <<https://casi.sas.upenn.edu/sites/casi.sas.upenn.edu/files/bio/uploads/The%20Indian%20Parliament.pdf>>, accessed November 2015. The authors give the example of international trade agreements on agriculture, which is in the State List, while international affairs are in the Union List.

⁶ These include issuing currency and coinage, dealing in foreign exchange, foreign loans, the operation of the Reserve Bank of India (RBI), international trade, banking, insurance, and operation of stock exchanges.

⁷ These include the operation of railways, posts and telegraphs, national highways, shipping and navigation on inland waterways, air transport, atomic energy, space, regulation and development of oilfields and major minerals, interstate trade and commerce, and regulation and development of interState rivers.

⁸ One problem in sub-national tax assignments lay in an inconsistency in constitutional provisions. Although art 286 does not allow restrictions on interState transactions, Entry 52 in the State List empowers the States to levy tax on the entry of goods into a local area for consumption, use, or sale. In many States, the tax was assigned to urban local bodies (octroi).

⁹ Constitution of India 1950, art 280.

¹⁰ Constitution of India 1950, art 270.

¹¹ Constitution of India 1950, art 272.

¹² Constitution of India 1950, art 275.

¹³ The special category States have received a much higher proportion (90 per cent) of their Plan fund allocations as grants.

¹⁴ *NITI Aayog* can be translated from Hindi as ‘Policy Commission’. In a play on words, the acronym NITI stands for National Institute for Transforming India. While the term ‘planning’ has been done away with in the name, a Minister of State for Planning remains in the cabinet. The new institution has been spoken of as a think tank, but that role was also played by the old PC. State Chief Ministers are slated to have a greater role in the new body, but real change will occur if the conceptualisation of expenditures moves away from ‘planning’, and the processes of allocation and monitoring of fund flows become more efficient. In particular, giving States more flexibility and control over transfers from the Centre will represent true reform.

¹⁵ Operationally, the RBI, as the central bank, manages the debt of all levels of government, and, in the past, typically did not allow market borrowing by State Governments that were already indebted.

¹⁶ For example, forests and judicial administration were also moved from the State List to the Concurrent List in this amendment.

¹⁷ There have been other amendments that strengthened State or Central powers, especially in the case of

land reform, but also other aspects of economic control of the private sector, for example, the Constitution (Fortieth Amendment) Act 1976, another piece of Emergency-era legislation. There is an analogy with the power to tax, which also represents power over private sector activity, but there is no explicit consideration of fiscal domains in such cases.

¹⁸ The Central Sales Tax Act 1956 achieved this purpose.

¹⁹ The framers of the Constitution were aware of the need for a common market, but also included a rather broad escape clause. Art 301 of the Constitution states, 'Subject to the other provisions of this part, trade, commerce and intercourse throughout the territory of India shall be free.' However, art 302 empowers Parliament to impose restrictions on this freedom in the 'public interest'—a term that is both very broad and not clearly defined.

²⁰ Art 366 is in the Miscellaneous Provisions section, and covers a range of definitions, including 'goods'.

²¹ See also [KC Sivaramakrishnan, 'Local Government'](#) (chapter 31, this volume); M Govinda Rao and Nirvikar Singh, *The Political Economy of Indian Federalism* (Oxford University Press 2005); Nirvikar Singh, 'Fiscal Federalism and Decentralization in India', background paper for World Bank project on assessment of decentralisation in developing countries <http://mpr.ub.uni-muenchen.de/1447/1/MPRA_paper_1447.pdf>, accessed November 2015.

²² The Constitution (One-hundred-and-fifteenth Amendment) Bill was introduced in Parliament in 2011, but lapsed. The new NDA government then introduced a revised version of the bill in the 2014 winter session of Parliament, the Constitution (One-hundred-and-twenty-second Amendment) Bill. Factors holding up its passage have included the States' fears that they will lose tax revenue, and their desire to be protected against these risks. The amendment itself is quite complicated, and will alter arts 246, 248–50, 268–71, 279, 286, 366, and 368, as well as the Sixth and Seventh Schedules. The Bill was approved by the Lok Sabha in May 2015, but further issues were raised and referred to a Rajya Sabha Select Committee. This committee submitted an overall positive report in July 2015. At the time of writing (November 2015), it appeared that the States' concerns could be met, but parliamentary political manoeuvring by the opposition continued to hold back the passage of the Bill.

²³ See Rao and Singh ([n 21](#)) for a more detailed discussion.

³⁴ *Satpal & Co* ([n 33](#)) [8]. This statement was based on an earlier Supreme Court ruling on residuary powers, by a 4:3 majority, in *Union of India v Harbhajan Singh Dhillon* (1971) 2 SCC 779.

⁴⁴ *Kesoram Industries Ltd* ([n. 41](#)) [50]. Even before the *Kesoram Industries* judgment, the Supreme Court, in *International Tourist Corporation v State of Haryana* (1981) 2 SCC 318, had cautioned against allowing the Centre's residuary powers of taxation to effectively whittle down the power of State legislatures. This case preceded the *Mahanadi Coalfields* case as well, which was decided against the State of Orissa, so, as one would expect, there is an ongoing tension between broad principles that the justices may seek to uphold and the details of legislative and constitutional provisions in the context of specific legal cases.

²⁴ Depending on the specific case, these definitional questions can affect whether a State can impose a tax or not, or whether a tax authority comes under the State or the Centre. A good example of the latter is a recent case, *Bharat Sanchar Nigam Ltd v Union of India* (2006) 3 SCC 1, in which the Supreme Court ruled that the use of electromagnetic spectrum for mobile phone connections constitutes a service, taxable by the Centre, and not a sale of goods taxable by the States.

²⁵ AIR 1955 SC 58.

²⁶ *Navinchandra Mafatlal v The Commissioner of Income Tax Bombay City* AIR 1955 SC 58 [6].

²⁷ AIR 1959 SC 582.

²⁸ (1969) 3 SCC 311 [6].

²⁹ (1979) 1 SCC 137 [4].

³⁰ *Avinder Singh* ([n 29](#)) [4].

³¹ (2001) 3 SCC 654. This ruling referenced yet another ruling supporting the validity of double taxation, namely *Shri Krishna Das v Town Area Committee Chirgaon* (1990) 3 SCC 645.

³² The GST may also correct some egregious instances of double taxation by the Centre and States: eg, a Karnataka High Court ruling, *Bharti Airtel Ltd v State of Karnataka* ILR 2011 Karnataka 2859, that a particular transaction was subject to State VAT, as a sale of goods, even though it had already been charged service tax, as a provision of service.

³³ (1979) 4 SCC 232.

³⁵ AIR 1958 SC 452.

³⁶ AIR 1962 SC 1006.

³⁷ (1969) 2 SCC 644.

³⁸ (1995) Supp (1) SCC 707.

³⁹ The Concurrent List does not have any significant entries pertaining to taxation.

⁴⁰ (1996) 8 SCC 621.

⁴¹ (2004) 10 SCC 201.

⁴² *Kesoram Industries Ltd* ([n 41](#)) [129].

⁴³ *Kesoram Industries Ltd* ([n 41](#)) [129]. There was also a lengthy dissenting opinion in this case, by SB Sinha J.

⁴⁵ AIR 1953 SC 252.

⁴⁶ AIR 1955 SC 661.

⁴⁷ AIR 1958 SC 560.

⁴⁸ A completely different kind of interaction between the Centre and States with respect to sales taxes occurred in the 1990s, when the Union government brokered an agreement among State Governments to reduce tax competition in the form of sales tax reductions provided to prospective private investors in the State. As a result of this agreement, sales tax incentives were explicitly disallowed, and floor rates were set, although other forms of incentives have continued.

⁴⁹ AIR 1954 SC 282.

⁵⁰ (1983) 4 SCC 353.

⁵¹ Note that taxes may be earmarked, as in the case of the national education cess, and imposed on classes of users, as for a privately provided service.

⁵² These are examples of serious economic inefficiencies for which improved political mechanisms may be the solution—the constitutional framework provides no direct guidance.

⁵³ (1973) 1 SCC 676.

⁵⁴ (1982) 1 SCC 125.

⁵⁵ *Special Reference No 1 of 1962* AIR 1963 SC 1760.

⁵⁶ A different set of issues and cases have concerned the asymmetries in the assignments to some States, such as Jammu and Kashmir and those in the Northeastern region: see [Louise Tillin, 'Asymmetric Federalism'](#) (chapter 30, this volume).

⁵⁷ Entry 17 in the State List makes water a State subject, qualified by Entry 56 in the Union List, which states: 'Regulation and development of interstate rivers and river valleys to the extent to which such regulation and development under the control of the Union is declared by parliament by law to be expedient in the public interest.' Art 262 explicitly grants Parliament the right to legislate over the matters in Entry 56, and also gives it primacy over the Supreme Court in such cases. Local water infrastructure is now a local government responsibility, since the constitutional amendments of 1993.

⁵⁸ The ISRWD Act was later amended to clarify that tribunal decisions have the same force as Supreme Court orders, though this was implicit in the original legislation. See Alan Richards and Nirvikar Singh, 'Water and Federalism: India's Institutions Governing InterState River Waters' (1996) Report prepared for the Centre on Institutional Reform and the Informal Sector (IRIS), at the University of Maryland, under

Cooperative Agreement No DHR-0015-A-00-0031-00, with the US Agency for International Development. In practice, even Supreme Court orders have not broken logjams in some of the most intractable interState water disputes. See [Harish Salve, 'InterState River Water Disputes'](#) (chapter 28, this volume) for a detailed discussion. Water management in general is treated in Nirvikar Singh, 'Federalism and Water Management in India' in Stephen Howes and M Govinda Rao (eds) *Federal Reform Strategies: Lessons from Asia and Australia* (Oxford University Press 2013).

⁵⁹ Subrata Mandal and M Govinda Rao, 'Overlapping Fiscal Domains and Effectiveness of Environmental Policy in India' (2005) National Institute of Public Finance and Policy Working Paper 05/25 <http://www.nipfp.org.in/media/medialibrary/2013/04/wp05_nipfp_025.pdf>, accessed November 2015.

⁶⁰ The Energy Resources Institute, *Environmental Federalism in India: Forests and Compensatory Afforestation* (The Energy Resources Institute, 2014) <http://www.teriin.org/ResUpdate/federalism/pdf/Environmental_Federalism_Report_February_2014_Final>, accessed November 2015. In the case of forests, the Court has yet to make a final decision, but its response to a petition that was converted into public interest legislation was to take effective control of forests: see *TN Godavarman Thirumulpad v Union of India* (1997) 2 SCC 267. In the case of minerals, the Court has somewhat changed its position from the kind of ruling given in *State of West Bengal v Union of India* AIR 1963 SC 1241, in which it rejected the State's claim to full sovereignty in its allotted sphere of powers. In particular, in *Orissa Mining Corporation Ltd v Ministry of Environment and Forests* (2013) 6 SCC 476, the Court effectively allocated decisions on mining to local *Gram Sabhas* (village assemblies).

⁶² AIR 1961 Bom 167 [5].

⁶⁹ *Bhim Singh* ([n 1](#)) [56].

⁶¹ Constitution of India 1950, art 282.

⁶³ AIR 1975 Ori 8.

⁶⁴ AIR 1993 Kar 66.

⁶⁵ This position had been stated in essential terms by K Santhanam in 1959, as quoted in Government of Tamil Nadu, *Report of the Centre-State Relations Enquiry Committee* (Government of Tamil Nadu 1971).

⁶⁶ This change would still not deal with Central ministry transfers, which have grown in recent years, and represent a somewhat natural function of the Union government, to meet national-level goals in health, education, and other aspects of basic welfare of India's citizens. There is a distinct and deeper issue as to whether planning is required at all in India's current economic system.

⁶⁷ *Bhim Singh* ([n 1](#)).

⁶⁸ The Court also discussed various constitutional provisions with respect to appropriations, in particular arts 112–14, since limits on these provisions were argued by the petitioners.

⁷⁰ *Bhim Singh* ([n 1](#)) [58], [76]. In particular, the Court judged that the MPLAD scheme did not impinge on the authority of local governments and other sub-State-level government institutions, such as District Planning Committees, involving them in the process of implementation.

⁷¹ *Bhim Singh* ([n 1](#)) [97].

⁷² States also borrow from captive sources such as Post Office savings and employee pension contributions, as well as multilateral organisations (through the Union government), and even from the market. There is also some limited municipal borrowing, typically under the auspices of the relevant State Government.

CHAPTER 30

ASYMMETRIC FEDERALISM

LOUISE TILLIN

I. INTRODUCTION

THIS chapter provides a comprehensive overview of the legal architecture by which the Indian Constitution grants differential rights to certain States and groups therein. It focuses on the legal status and consequences of the asymmetrically federal provisions included in the Indian Constitution and amendments over time with regard to autonomy arrangements in India's Northeastern region; the 'special status' of Jammu and Kashmir; the administration of tribal areas under the Fifth and Sixth Schedules; and provisions intended to mitigate intraState inequalities in the States of Andhra Pradesh, Maharashtra, Gujarat, and Karnataka. A major contribution of the chapter is its comprehensive analysis of Supreme Court judgments relating to the asymmetric features of the Constitution. The body of case law is relatively small, but provides insights into the way in which States—and citizens—have sought to test the possibilities, limits, and boundaries of autonomy arrangements. The chapter assesses the role of the courts in upholding asymmetrical provisions and protecting the rights of territorially concentrated minorities in the context of the wider political environment. While many of the Constitution's asymmetrical provisions are the outcome of negotiated political settlements, the longer-term protection of autonomy arrangements—which, by their nature, apply to groups who are minorities on the national political stage—may not be assured through democratic politics alone.

II. THE SIGNIFICANCE OF ASYMMETRIC FEDERALISM IN INDIA

Asymmetry—the granting of differential rights to certain federal subunits, and the recognition thereby imparted for distinct, territorially concentrated 'ethnic' or 'national' groups—is a common feature of federalism in pluri-ethnic or pluri-national settings. By providing some federal subunits with greater powers of

self-governance, asymmetrical devices allow territorially concentrated cultural groups or nationalities to achieve a degree of self-determination within a federal set-up.¹ Asymmetrical constitutional arrangements typically arise either in response to demands from mobilised nationality groups, or when a new entity is guaranteed certain privileges or protections at the time of joining an existing federation.²

The normative case for asymmetric federalism builds heavily on the work of Charles Taylor on the ‘politics of recognition’ and that of Will Kymlicka, who have been at the forefront of debates about asymmetry in Canada with respect to the status of French-speaking Quebec.³ Kymlicka draws a distinction between ‘nationality-based’ units, which are home to national minorities, and ‘regional units’, which are better seen as sub-divisions of a national majority community.⁴ As Requejo argues, ‘To equate national minority communities with mere regions, or to treat them exactly the same as federal subunits that are controlled by members of the national majority, is intrinsically inequalitarian, both in substantive and procedural terms.’⁵ Some scholars go as far as to argue that almost all successful multinational federations are asymmetrical.⁶ But asymmetry that meets the normative expectations outlined above can be hard to achieve in practice because of objections from regional politicians within those units without special arrangements.⁷

Asymmetry is an essential characteristic of Indian federalism, and its approach to the accommodation of ethnic diversity.⁸ Stepan, Linz, and Yadav describe asymmetry as central to India’s ability to cohere as what they define as a ‘State-nation’ as opposed to ‘nation-state’ by recognising multiple modes of belonging in India and providing constitutional protection to differential layers of autonomy within the federal system.⁹ The post-colonial Indian State has attempted to overcome the ‘assimilationist individualism’ inherent in a liberal conception of citizenship by embracing a ‘differentiated citizenship’ and by creating States on an ethno-linguistic basis.¹⁰ But not all of these States have been created on a legally asymmetric footing: the linguistic reorganisation of State boundaries in southern and western India in the 1950s was a largely symmetric reform. It created States with similar rights to self-governance, although it recognised significant de facto asymmetries with regard to languages and culture.¹¹ Yet in some parts of the federation, explicit use has been made of asymmetrical devices as a mode of conflict resolution and the accommodation of distinctive national histories and aspirations. It is these de jure devices, and their legal status, that are the subject of the chapter.

There is a degree of Centre–region bargaining inherent in the negotiation of asymmetrical arrangements which are, in practice, frequently an adaptive or reactive element of constitutional settlements rather than an original feature. As Robert Agranoff states: ‘Asymmetry depends upon...a polity which is sufficiently flexible, accommodative, and innovative to incorporate complex differences and identities which have political salience.’¹² In India, asymmetric features of the Constitution reflect improvisation over time in response to evolving challenges in different regions, rather than being a pristine element of the 1950 Constitution. In the earliest instance, this involved working out a transitional constitutional structure for Jammu and Kashmir, which was in the midst of conflict at the time of the Constituent Assembly. Subsequently, separate agreements were reached with Nagas and Mizos that were enshrined within Article 371 via constitutional amendments. Mechanisms for managing inequalities within States became pressing during the linguistic reorganisation of State boundaries when regions that had previously fallen under different jurisdictions were amalgamated at varying levels of economic development. These situations gave rise to new sections of Article 371. A separate arrangement was also reached governing the accession of Sikkim to the Indian Union in the early 1970s.

The Indian experience with asymmetric measures counters some of the earlier pessimism of Charles Tarlton, the first scholar to write explicitly about asymmetry in federal settings.¹³ Tarlton raised concerns about the ‘secession potential’ created by asymmetrical arrangements. Many scholars now argue the opposite—that it is the denial of asymmetry that is more likely to fuel secessionist bids.¹⁴ Yet there is considerable concern in India of a different kind, namely that autonomy arrangements have been substantially eroded over time, and that this has happened with the approval of the courts. This concern is raised particularly with regard to the status of Jammu and Kashmir. The extension of very numerous constitutional provisions to Jammu and Kashmir via Presidential orders has reduced the extent to which Article 370 has actually functioned as a form of ethnic conflict management. The Article has been severely undermined as a feature of the Constitution that could provide recognition or protection to the legitimate autonomy claims of the Kashmir Valley.¹⁵

Furthermore, there are concerns that asymmetrical provisions generate new kinds of tension, and may not ultimately achieve the ends for which they were established. For instance, asymmetric arrangements which offer differential autonomy for territorially concentrated ethnic or nationality groups frequently do little to protect the rights of minorities within those subunits, or the rights of

interState migrants (even if the migrants had special status or access to affirmative action measures within their State of origin). For such reasons, as has been seen in India's Northeast, the agreement of asymmetric constitutional status for certain territorially concentrated groups has fed into cascading claims for autonomy from groups who sit outside these State-sanctioned regimes of recognition.¹⁶ Tensions between constitutionally protected group rights and the rights of individuals to equal treatment within particular territories—in terms of access to educational institutions, political representation, and public employment—have frequently been subjects of legal dispute. On the whole, the Supreme Court has upheld the constitutionality of asymmetric arrangements that allow for the protection of group rights in certain territories such as Article 371D with reference to the Telangana region of Andhra Pradesh, and Article 371F with regard to Sikkim. Yet, as the history of Telangana's demand for separate statehood suggests, these legal protections for intraState equity were insufficient in practice to stem complaints of unfair treatment, which propelled further demands for self-governance.

As well as the one-off provisions designed to respond to particular mobilised demands, wider asymmetric provisions—especially those designed for the governance of areas inhabited by tribal communities—reflect official developmental ideologies. Articles 370 and 371—which contain the largest number of asymmetrical provisions—sit within Part XXI of the Constitution, 'Temporary, Transitional and Special Provisions'. The words 'temporary' and 'transitional' are significant. Many asymmetric measures were explicitly envisaged as transitional devices to protect 'backward' areas, home to vulnerable populations not ready for 'full' democracy or seen as vulnerable to exploitation. The enshrining of special provisions for tribal populations recognised the unevenness of capitalist development, and the fact that this was overlaid by cultural differences. This developmentalism went hand in hand with State building, especially in Northeast India.¹⁷

Flowing from the protective—and transitional—impulses governing asymmetric devices, in many instances they provide substantial powers to the Union government (in the person of the President) or appointees of the Centre (principally Governors), in the States concerned. This has become especially problematic in the case of Jammu and Kashmir, due to features of Article 370, which have enabled extensive revisions to Jammu and Kashmir's status by Presidential order. They lead Khosla to question whether Article 370 has even emerged as asymmetric in the opposite sense to that intended, since it has given the Union greater powers with regard to Jammu and Kashmir than it has with

other States.¹⁸ In the case of Sikkim, the President was given the power—within two years of the State’s accession—to amend or modify any laws in force before the Constitution to align them with constitutional provisions; and according to Article 371F(l), ‘any such adaptation or modification shall not be questioned in any court of law’.¹⁹

An additional constitutional issue raised by asymmetric arrangements in general is the situation that arises when representatives within an autonomous unit are able to vote in the national parliament on issues that do not concern their region, while representatives from elsewhere cannot vote on the same issues within the autonomous unit. This is perhaps most well known as the ‘West Lothian’ question in the United Kingdom with regard to Scotland, but in principle it also applies to India, where States such as Nagaland and Mizoram have the power to restrict the application of laws in their territory. Yet the asymmetrical character of representation within Parliament mitigates this potential complaint in India. Unlike many other federations, India’s States have unequal representation in the Rajya Sabha (Council of States), based on their population size. Thus those small States which have asymmetrical constitutional status have weak representation in Parliament overall and do not have a disproportionate influence on all-India legislation. This has helped reduce the extent to which asymmetrical provisions have become a subject of Union-level controversy. But the structure of political representation in the federal second chamber in which small States have very weak representation also underlines the extent to which the effective long-term operation of asymmetric arrangements depends on their constitutional and legal status rather than finding protection within political institutions themselves.

III. CONSTITUTIONAL PROVISIONS FOR ASYMMETRY IN INDIA

India’s Constitution contains two principle forms of asymmetry: first, specific arrangements permitting higher degrees of autonomy and self-governance for individual States and regions (Fifth and Sixth Schedules; Article 370 relating to Jammu and Kashmir; 371A relating to Nagaland; and 371G relating to Mizoram), and secondly, provisions that mandate some States to operate positive discrimination measures to mitigate inter-or intraState inequality (Article 370; parts of Article 371). There are also more basic differences with regard to the governance of States and Union Territories, with the latter subject to greater central control. The distinctions between States and Union Territories replaced

the earlier more complex demarcations between different types of State at Independence—Parts A, B, and C States—that reflected varying historical arrangements under British colonialism. In addition to these special provisions, the Constitution also makes it clear that different arrangements can be adopted with respect to particular States and not others. Article 2 makes provision for Parliament to ‘admit into the Union, or establish, new States on such terms and conditions as it thinks fit’. A ruling by a constitutional bench of the Supreme Court in 1993 held that although these terms and conditions must be compatible with the ‘basic features’ of the Constitution, this does not mean that the conditions need to be the same as those that govern all other States.²⁰ Thus—as upheld by a subsequent constitution bench—the asymmetrical features of the Constitution are part of a single legal order, which permits differential treatment of regions and groups.²¹ They are not representative of legal pluralism.²² But, as will be shown, several benches have also asserted that certain asymmetrical provisions legitimately supersede the fundamental rights.

The section that follows documents the constitutional origins of India’s asymmetric federal features, and goes on to look at their legal status by considering a developing body of case law. It first covers the main forms of asymmetry included in the Constitution as initially agreed by the Constituent Assembly: Article 370, and the Fifth and Sixth Schedules. It then goes on to look at the subsequent additions to the Constitution as a result of negotiated settlements under Article 371.

1. Article 370 and the Special Status Granted to the State of Jammu and Kashmir

Jammu and Kashmir is the only State in the Union which negotiated special terms of entry to the Union at the point of accession, and which today has its own Constitution. On the eve of Independence and the partition of the subcontinent, there was uncertainty about the future of this former Princely State with a Muslim majority but under Hindu rule, situated on the border between India and Pakistan. While almost all other Princely States acceded to India, Jammu and Kashmir held out. It finally acceded to India in October 1947 under duress, in return for military aid during an uprising against the maharaja in Poonch. The new Indian and Pakistani armies were drawn into their first conflict, resulting in an eventual ceasefire in January 1949, which established the

present-day ‘Line of Control’ between Pakistani and Indian Kashmir.²³ From this point on, the terms of Kashmir’s accession and its status within the Indian Union have been deeply contested.

Jammu and Kashmir’s Instrument of Accession was clear that it did not commit the State to acceptance of any future constitution of India. The Governor-General’s letter of acceptance of the accession stipulated that ‘as soon as law and order have been restored in Kashmir and her soil cleared of the invader; the question of the State’s accession should be settled by a reference to the people’.²⁴ Except for Kashmir, every other Princely State had accepted the uniform provisions for governance of former Princely States under Part B of the Constitution of India under the Indian Independence Act 1947.²⁵ Jammu and Kashmir declared its intention to have its own constitution drafted by its own Constituent Assembly. Initially, the State only acceded to India in foreign affairs, defence, and communications.

Article 370 was debated for over five months by Nehru and Sheikh Abdullah, the National Conference leader to whom Maharaja Hari Singh had handed over power after his accession. As eventually approved by the Constituent Assembly in October 1949, the Article exempted the State from constitutional provisions governing other States. Parliament’s legislative powers over Jammu and Kashmir were restricted to the areas of defence, foreign affairs, and communications (as per the original Instrument of Accession). Under the Article, Parliament could only have legislative powers in any other areas on the specification of the President, and with the ‘concurrence’ of the State government.²⁶

The Article also gives the President the power to cease the operation of Article 370 or to amend it, but only on the recommendation of the Constituent Assembly of the State. Ordinary processes of constitutional amendment do not apply. Because the Indian Constitution was promulgated before the convening of a Constituent Assembly in Kashmir (which took place only on 31 October 1951, lasting until November 1956), Article 370 was explicitly intended as an ‘interim arrangement’ until the Assembly met. The interim nature of the arrangement was made clear by N Gopalaswami Ayyangar in the Constituent Assembly of India.²⁷ As Noorani argues, once the Constituent Assembly of Jammu and Kashmir had dispersed, after adopting the Constitution of Jammu and Kashmir in 1956, the only authority to amend Article 370 to alter the nature of federal arrangements for the State had disappeared, and ‘all additions to Union powers since then are unconstitutional’.²⁸

Writing while Jammu and Kashmir’s Constituent Assembly was sitting, legal

scholar Paras Diwan described:

The picture of the new Kashmir which is unfolding itself gradually and slowly is of a Kashmir possessing wide autonomy, a member of the Indian Union, a Republic within the Indian Republic; and a Kashmir whose defence, foreign affairs and communications will be ruled by the Indian Union, and for the rest it would be sovereign of its own fate, builder of its own destiny.²⁹

Yet very quickly such optimism about the extent of asymmetry protected by the Constitution was challenged. Nehru, who sought Kashmir's closer integration with India, and Sheikh Abdullah, who sought to protect its autonomy, developed a working relationship in the years after Independence. They forged the Delhi Agreement in July 1952 recognising Jammu and Kashmir's autonomy. But by early 1953, relations had soured. Divisions within the top leadership of Abdullah's National Conference came to the fore over Abdullah's increasingly pro-Independence stance. On 9 August 1953, Abdullah was dismissed as Prime Minister of Jammu and Kashmir and arrested under the Public Security Act. Sheikh Abdullah's dismissal and imprisonment marked a deterioration in relations between the Union government and the State of Jammu and Kashmir. It also opened a phase in which the sanctity and spirit of Article 370 has been consistently undermined.

In 1954, the Constitution (Application to Jammu and Kashmir) Order was issued, extending numerous provisions of the Indian Constitution to the State, with the approval of the Constituent Assembly then in session. The order gave the Union government the right to legislate in the State on the majority of items on the Union List; gave the Supreme Court full jurisdiction in Jammu and Kashmir; put the State's financial and fiscal relations with the Union government on a par with other States; and extended the fundamental rights to Jammu and Kashmir with the caveat that they could be suspended in the interests of 'security' and without judicial review.³⁰ In 1956, the State's new Constitution was promulgated—in Sheikh Abdullah's continued absence. The most important provision of the Constitution was for an elected Head of State (in contrast to a Governor appointed by the Union government as in other States), the *Sadar-i-Riyasat* who was to be elected by a majority of the State Assembly and would in turn appoint a Prime Minister. The Constitution also gave the State legislature the ability to define permanent residents of the State (which was important to the ability of the State to maintain special provisions around landownership); and introduce a State flag (unlike other States).

In the forty years after 1954, however, as many as ninety-four of ninety-seven entries in the Union List, and 260 of 395 articles of the Constitution, were extended to Jammu and Kashmir under Presidential Orders.³¹ This has included

the replacement of the elected Head of State—the *Sadar-i-Riyasat*—by a Governor appointed by the Centre, and a Chief Minister—in line with other States.³²

2. Legal Status of Article 370: Case Law and Ongoing Disputes

Important areas of dispute with regard to the constitutional settlement—or uncertainty—under Article 370 have hinged on the question of whether amendments to the status of Jammu and Kashmir made after the disbanding of the Constituent Assembly are legal. In other words, how far should the Article be seen as a living part of the Constitution, legitimately subject to ongoing amendment over time as Jammu and Kashmir's situation evolved?

These are sensitive political questions. The Legislative Assembly of Jammu and Kashmir in 2000 demanded the implementation of a State Autonomy Committee report which called for the restoration of the State's pre-1953 status, since Article 370 had been 'emptied of its substantive content' as a result of Presidential Orders since then.³³ The State Autonomy Committee report called for a new Article to supplant Article 370 to establish a fresh compact between the Union and the State. Article 370, it wrote, 'has acquired a dangerously ambiguous aspect. Designed to protect the State's autonomy, it has been used systematically to destroy it.'³⁴ The Bharatiya Janata Party, in power at the Centre when the State Autonomy Committee report was published, takes the opposite position. Its official party policy, reiterated in manifesto commitments, calls for the abrogation of Article 370 altogether—a position that sees the increasing integration of Kashmir with India as legitimate. Some commentaries see Article 370's survival of regime changes in New Delhi and within, in the context of 'democratic elections and federal arrangements', as representing the fact that Jammu and Kashmir has come to enjoy a form of 'federal autonomy'.³⁵ Yet such an interpretation glosses over the extent of change in Kashmir's constitutional status over time.

The Supreme Court's first ruling on Article 370, *Prem Nath Kaul v State of Jammu and Kashmir*,³⁶ upheld the interpretation that the temporary provisions of Article 370 were based on the assumption that the 'relationship between India and the State should be finally determined by the Constituent Assembly of the State itself'.³⁷ The bench ruled that 'the continuance of the exercise of powers conferred on Parliament and the President by the relevant temporary provisions

of Article 370(1) is made conditional on the final approval by the said Constituent Assembly'.³⁸ President Rajendra Prasad in 1952 had himself stated his own conclusion that 'Clause (3) of Article 370 was not to be used from time to time as occasion required.'³⁹

However, two subsequent Supreme Court benches, first in *Sampat Prakash v State of Jammu and Kashmir*,⁴⁰ and then in *Mohd Maqbool Damnoo v State of Jammu and Kashmir*,⁴¹ marked a sharp break in the Supreme Court's view of Article 370.⁴² In the first case, the Supreme Court rejected the argument that 'modifications made by the President in exercise of powers under this Article, subsequent to the enforcement of the Constitution of the State, would be without any authority of law.'⁴³ The case related to provisions for preventive detention which had been repeatedly extended under Presidential Orders. The bench found that the President's discretionary powers under Article 370 remained operative, since the Constituent Assembly had not recommended the cessation of Article 370, and the material circumstances that had given rise to the Article had not altered.⁴⁴ The bench also stated that it was bound to follow a previous ruling under *Puranlal Lakhanpal v President of India*.⁴⁵ The petitioner in this case had objected to a provision included in the first 1954 Constitution (Application to Jammu and Kashmir) Order, to replace the direct election of members of the Lok Sabha from Jammu and Kashmir with their indirect election by the State Assembly. He described this as a 'radical alteration' that was not justified as a 'modification' under Article 370. In this case, the Court found that the term 'modification' in Article 370 should be subject to the widest possible interpretation. It stated that:

The object behind enacting Article 370(1) was to recognise the special position of the State of Jammu and Kashmir and to provide for that special position by giving power to the President to apply the provisions of the Constitution to that State with such exceptions and modifications as the President might by order specify.⁴⁶

The later *Mohd. Maqbool Damnoo v State of Jammu and Kashmir* case upheld a similar line of reasoning. In this case, the petitioner had challenged the constitutionality of the replacement of the *Sadar-i-Riyasat* with a Governor. The Court held that the Governor is the successor to the *Sadar-i-Riyasat* and is able to give the State Government's concurrence to any amendments under Article 370. Thus we can see that the Court has, over time, helped to strengthen the role of the President as guardian of the spirit of autonomy, rather than acting itself to protect Jammu and Kashmir's differential autonomy from political intervention on the basis of its distinctive constitutional settlement.

3. Fifth and Sixth Schedules

The other principal area of asymmetry incorporated at the time of the Constituent Assembly was for special measures for governance in areas inhabited by ‘indigenous communities’ or ‘Scheduled Tribes’ under the Fifth and Sixth Schedules of the Constitution. The Fifth Schedule, which operates in majority tribal districts outside the Northeast gives the Union government, under the representation of the Governor, somewhat greater powers to intervene in the interests of the socioeconomic development of Scheduled Tribes. Each State with Scheduled Areas is supposed, under the Constitution, to establish a Tribes Advisory Council to advise on matters pertaining to the ‘welfare and advancement’ of the Scheduled Tribes as may be referred to them by the Governor. The Governor is given the power to declare that particular acts of Parliament or the relevant State legislature are not to apply in Scheduled Areas, as well as to make regulations with regard to land sales by Scheduled Tribes and the operation of moneylenders who lend money to members of Scheduled Tribes. Subsequent legislation, including the Panchayats (Extension to Scheduled Areas) Act 1996 has been adopted only for Scheduled Areas. This Act gives *Gram Sabhas* in Scheduled Areas statutory rights over the management of land and some natural resources.

In the Sixth Schedule areas of the Northeast, more extensive powers of self-governance were granted to autonomous district councils (ADCs). At the time of writing of the Constitution, autonomous councils were established for ‘hill tribal’ communities in Assam, including Nagas. As a result of the subsequent reorganisation of Assam, ADCs are now to be found in the States of Assam, Meghalaya, Tripura, and Mizoram. There is a total of ten ADCs under the Sixth Schedule, and a further five autonomous councils and five ADCs in the hill areas of Manipur, which were created in non-Sixth Schedule areas.⁴⁷ Under the Sixth Schedule, district councils were given the powers to make laws with respect to: land use and allotment (but not to override the compulsory acquisition of land for ‘public purpose’ by the government); forest management (except reserved forests); irrigation; regulation of shifting cultivation; establishment of village or town councils; inheritance of property; marriage and social customs. ADCs have some rights to raise revenue, and to regulate moneylending and trading by non-tribals, but overall rely heavily on State Governments for their finances. More extensive powers were granted to some councils subsequently via constitutional amendments to the Sixth Schedule, as ‘plains tribals’ also sought constitutional

recognition of their community rights within Assam, including through the Bodoland movement, which resulted in the Bodo Accord of 1993, and provision for a Bodoland Territorial Council. By contrast to these Sixth Schedule provisions, as Jyotirindra Dasgupta suggests, the Fifth Schedule offers more ‘protection than autonomy’.⁴⁸

Ambedkar noted in the Constituent Assembly that the autonomous councils in Sixth Schedule areas had been partly inspired by measures adopted in the United States for Native Americans. The difference between the Fifth and Sixth Schedules, he outlined, was driven by an attempt to recognise the cultural difference and autonomy of tribal communities in Assam:

The tribal people in areas other than Assam are more or less Hinduised, more or less assimilated with the civilisation and culture of the majority of the people in whose midst they live. With regard to the tribals in Assam that is not the case. Their roots are still in their own civilisation and their own culture ... Their laws of inheritance, their laws of marriage, customs and so on are quite different from that of the Hindus. I think that is the main distinction which influenced us to have a different sort of scheme for Assam from the one we have provided for other territories.⁴⁹

The Sixth Schedule also demonstrates continuity with British colonial approaches to governing parts of the Northeast, which established protective legal regimes for the social customs and traditions, religious practices, land, resources, and property ownership of tribal communities.⁵⁰ As Baruah notes, the ‘ethnic homeland subtext’ evident in these constitutional provisions today is influenced by ‘colonial efforts to create protected enclaves for “aborigines” where they could be allowed to pursue their “customary practices”’.⁵¹ These provisions reflect paternalistic approaches to governing tribal areas.

The Sixth Schedule provisions were never accepted by Naga nationalists, who had instead asserted their right to self-determination, and called for recognition of their sovereignty as independent from the nascent Indian State.⁵² In June 1947, the Naga National Council had reached an agreement with the then Governor of Assam, Hydari, which in theory had recognised the right of the Nagas to self-governance, and a right to review the agreement after ten years. Yet the Bordoloi Sub-committee which made recommendations to the Constituent Assembly on the ‘Tribal and Excluded Areas’ of the NorthEast Frontier (Assam) did not honour this separate arrangement reached with the Nagas. Rather, the Naga Hills were treated as a part of Assam and offered the same form of self-governance under ADCs offered to other hill areas.⁵³ The Naga National Council therefore viewed the Sixth Schedule as a betrayal of earlier commitments. They proceeded to hold a plebiscite on independence from India in 1951, to boycott the first parliamentary elections in 1952, and the ‘Naga

independentists' subsequently turned to armed struggle.⁵⁴ As will be outlined below this eventually resulted in a more far-reaching autonomy beyond the Sixth Schedule for a new State of Nagaland.

The Sixth Schedule was not unanimously embraced by members of the Constituent Assembly either, some of whom expressed their desire for a more assimilationist approach, highlighting concerns that the special provisions exacerbated the likelihood of separatism. Kuladhar Chaliha, a member from Assam, averred: 'If you see the background of this Schedule you will find that the British mind is still there. There is the old separatist tendency and you want to keep them away from us. You will thus be creating a Tribalstan just as you have created a Pakistan.'⁵⁵ But countering this view, Dr KM Munshi (with whom Dr Ambedkar indicated his agreement), stated:

We want that the Scheduled Tribes in the whole country should be protected from the destructive compact of races possessing a higher and more aggressive culture and should be encouraged to develop their own autonomous life; at the same time we want them to take a larger part in the life of the country adopted.⁵⁶

4. Case Law on Fifth and Sixth Schedules

A major area of legal dispute under the Fifth and Sixth Schedules has concerned rights to the land and natural resources in tribal areas, and the extent to which the autonomy arrangements under these schedules restrict private economic activity by non-tribals in areas often rich in forests and minerals. In a historic ruling in *Samatha v State of Andhra Pradesh*,⁵⁷ a constitutional bench of the Supreme Court held that land in government or private hands could not be transferred for mining purposes to non-tribals in Fifth Schedule areas. In the judgment, the bench stated:

The Fifth and Sixth Schedules constitute an integral scheme of the Constitution with direction, philosophy and anxiety to protect the tribals from exploitation and to preserve valuable endowment of their land for their economic empowerment to elongate social and economic democracy with liberty, equality, fraternity and dignity of their person in our political Bharat.⁵⁸

The ruling meant that all mining leases granted to non-tribal private businesses in Scheduled Areas of Andhra Pradesh were considered illegal. This gave rise to complaints that the ruling undermined industrial activity in Scheduled Areas, and calls were made to amend the Fifth Schedule to effectively nullify the judgment. An amendment was not enacted, but subsequent benches have

adopted a more liberal approach to the subject of land use and industrial activity in Scheduled Areas, and explicitly questioned the *Samatha* ruling. In *Balco Employees Union v Union of India*,⁵⁹ the Court expressed strong reservations about the earlier ruling, and held that the granting of a mining lease to BALCO in a Scheduled Area of Chhattisgarh was permissible because it was governed by the law of Madhya Pradesh, not Andhra Pradesh.⁶⁰ In another earlier ruling on a Sixth Schedule area, *District Council of United Khasi and Jaintia Hills v Sitimon Sawian*,⁶¹ the Court also ruled that the district council acted beyond its jurisdiction in passing a law governing the ‘transfer’ of land to non-tribals, since the Schedule only reserved rights over ‘land use, occupation and allotment’ not its transfer.

In addition to land, the rights of district councils over forests and natural resources have also been contested. In *District Council of the Jowai Autonomous District vs Dwet Singh Rymbai*,⁶² the Supreme Court ruled that while the district council has the right under the Sixth Schedule to levy taxes on lands and buildings, it had no right to extract royalties on timber from private forests on land under its jurisdiction. In a 2013 judgment on mining in the Niyamgiri Hills of Orissa, the Court held that the State Government had been correct to rule that the State:

[H]as the ownership over the mines and mineral deposits beneath the forest land and that the STs [Scheduled Tribes] and other TFDs [traditional forest dwellers] cannot raise any claim or rights over them ... the State Government has the power to reserve any particular area for bauxite mining for a public sector corporation.⁶³

But it recommended that the *Gram Sabha* be directed to consider whether the bauxite mine affects the religious rights of Scheduled Tribes and other forest dwellers.⁶⁴ The judgment is largely concerned with the implications of the 2006 Forest Rights Act and the 1996 Panchayats (Extension to Scheduled Areas) Act; the latter applies in areas under the Fifth Schedule. These rulings imply that as the exploitation of natural resources intensifies, there are limits to the status of provisions that had originally been framed with the more paternalistic intention to protect Scheduled Tribes from economic exploitation.

Finally, in a significant 2005 ruling a constitutional bench of the Supreme Court gave an instructive ruling as to the legal standing of asymmetrical features within the Constitution more generally. In *Pu Myllai Hlychho v State of Mizoram*,⁶⁵ the Court ruled that the Sixth Schedule is not a ‘constitution within a constitution’. The case revolved around the rights of the Governor to dismiss members of the district council on his discretion rather than on the advice of the

Council of Ministers, who are supposed to aid and advise the Governor in the exercise of his functions as per the provisions of Article 163 applicable to all States. As Khosla remarks, ‘the argument being put forward [by the claimant in this case] is that the Schedule is not a site of asymmetric federalism, where a single legal order may treat two constituent parts differently; rather, there are two different legal orders at work’.⁶⁶ In rejecting the argument, the Court effectively established that the Sixth Schedule is not an instance of legal pluralism.⁶⁷ Yet in a ruling the following year, a separate bench of the Supreme Court offered a slightly different interpretation, without reference to the *Pu Myllai Hlychho* case. It ruled that:

The tribal areas of Assam are governed not by the relevant provisions of the Constitution which apply to other constituent States of the Union of India but by the provisions contained in the Sixth Schedule. These provisions provide for a self-contained code of governance of the tribal areas forming part of Assam and they deal with all the relevant topics in that behalf.⁶⁸

This ruling struck down a complaint that the exclusion of Christians from election as customary chiefs, or *Dolloi*, contravened Article 15—a fundamental right prohibiting discrimination on the grounds of religion. The bench held that the exclusion was neither ‘unreasonable nor arbitrary’, since the *Dolloi* performed both administrative and religious functions, and Christians could not perform the latter. Thus there continues to be a degree of legal ambiguity around the extent to which the Sixth Schedule supersedes basic provisions of the Constitution.

5. Special Provisions for Other States: Articles 371 to 371J

Article 371	Special provision with respect to the States of Maharashtra and Gujarat
Article 371A	Special provision with respect to the State of Nagaland
Article 371B	Special provision with respect to the State of Assam
Article 371C	Special provision with respect to the State of Manipur
Article 371D	Special provisions with respect to the State of Andhra Pradesh
Article 371E	Establishment of Central University in Andhra Pradesh
Article 371F	Special provisions with respect to the State of Sikkim
Article 371G	Special provision with respect to the State of Mizoram
Article 371H	Special provision with respect to the State of Arunachal Pradesh
Article 371I	Special provision with respect to the State of Goa
Article 371J	Special provisions with respect to the State of Karnataka

In the decades after the promulgation of the Constitution, additional special provisions have been included for numerous States under clauses of Article 371. As Dasgupta remarks, '[l]ike all dynamic institutional designs, the one for federalizing the Indian political system left a lot to gradual learning from practice'.⁶⁹ It was within Article 371 that much of that gradual learning was expressed. The provisions within this Article deal principally with special arrangements for new States that have been created or admitted since Independence as a result of two processes: the reorganisation of State boundaries which gave rise to concerns about intraState equity in newly merged regions; and the resolution of ethnic conflicts in the Northeast.

a. IntraState Equity Provisions and their Legal Standing

In the first instance, following the linguistic reorganisation of State boundaries between 1953 and 1960, constitutional amendments addressed concerns about how the new States would be integrated in order to achieve equitable development across sub-regions with different histories of administration. Article 371 initially made special provisions to support intraState equity across both (a) the Telugu-speaking regions of Andhra Pradesh, particularly addressing the integration of the Telangana region of the former Princely State of Hyderabad with parts of erstwhile Madras province; and (b) Maharashtra and Gujarat. Provision was made for the establishment of separate development boards for each of the sub-regions of the new States; for the 'equitable allocation of developmental expenditure'; for equitable arrangements for technical and vocational education, and public employment across the sub-regions. Again, the Governor is responsible for oversight of these provisions. A considerably more recent constitutional amendment in 2012 introduced Article 371J, which makes similar provision in Karnataka for the development of the Hyderabad–Karnataka region, including the reservation of a proportion of educational seats and State government posts for 'persons who belong to that region by birth or by domicile'.⁷⁰

In the case of Andhra Pradesh, Article 371 offered a degree of constitutional backing to the 'Gentleman's agreement' signed in Delhi in 1956 by representatives from Telangana and Andhra on safeguards for Telangana when the regions were amalgamated. However, these original safeguards went beyond what was initially included in Article 371. They included guarantees that revenues raised in Telangana would be spent in the region; protections for local

recruitment from within Telangana to State public services; restrictions on the sale of agricultural land to outsiders; and protection of the status of the Urdu language.⁷¹ As tensions persisted between *mulkis* (Telangana residents) and non-*mulkis* over recruitment to State public services in the Telangana region, the Union government introduced the Andhra Pradesh Public Employment (Requirement as to Residence) Rules, stating that fifteen years' continuous residence would be required for appointment to government jobs in Telangana.

When the State Government sought to enforce these residence restrictions on public employment, the rules were challenged in the courts and declared unconstitutional by the Supreme Court in March 1969 in *AVS Narasimha Rao v State of Andhra Pradesh*.⁷² The Court held that they contravened a fundamental right—Article 16 on the equality of opportunity in public employment. Thus, at this stage, Article 371 was not recognised as providing legal grounds for differential treatment of one region's residents over those of another.

Discontent around the non-enforcement of these provisions played into the 1969 agitation for separate statehood for Telangana. In 1973, following the agreement of a 'six-point formula' by leaders of Andhra Pradesh, a constitutional amendment introduced the separate clauses of Articles 371D and E (with effect from 1 July 1974) covering new and more extensive provisions for intraState equity in Andhra Pradesh following the Telangana agitation.⁷³ Article 371D gives the President the power to compel the State Government to make special provision for access to public employment and education for residents of different regions of the State; as well as the power to establish an administrative tribunal to address grievances about civil service appointments.⁷⁴ Several Presidential Orders were subsequently enacted covering admissions to educational institutions and recruitment to public employment. By and large, the Supreme Court has since upheld the asymmetric character of the intraState equity provisions contained in Article 371D, and even strengthened them against interventions by the State Government.

There have been at least a dozen Supreme Court judgments relating to Article 371D, making it the most contested asymmetrical provision of the Constitution. In a significant ruling, *P Sambamurthy v State of Andhra Pradesh*, the Supreme Court ruled that clause 5 of Article 371D was unconstitutional, since it violated a 'basic and essential feature of the Constitution', the 'rule of law' or the separation of powers.⁷⁵ Clause 5 had given the State Government the power to modify or annul orders by the Administrative Tribunal set up to adjudicate on grievances related to the appointment, allocation, or promotion to civil posts. Under *P Sambamurthy*, the State Government was prevented from challenging

judgments by the Administrative Tribunal. Subsequent rulings have followed this interpretation of clause 5 as unconstitutional. This weakened the ability of the State Government to overrule the Administrative Tribunal intended to oversee matters of public employment and strengthened the independence of the Tribunal to oversee the implementation of intraState equity provisions along asymmetrical lines within the State. The Court has confirmed that other clauses of Article 371D were constitutional.⁷⁶

The other main litigation dealt with by the Supreme Court in relation to Article 371D has related to the enactment of provisions that allow for recruitment to public employment or admission to universities on the basis of residence within particular regions of the State. The Supreme Court has upheld the provisions of Presidential Orders issued under Article 371D permitting recruitment within public sector employment to be undertaken within specified zones within the State. But benches have not wholly agreed on these provisions. In two judgments in 1989 and 2000, the Supreme Court overturned rulings by the Administrative Tribunal that residential restrictions applied for promotion, as well as recruitment. The Court held that, in these instances, the State Government did have the power to override provisions under the Andhra Pradesh Public Employment (Organisation of Local Cadres and Regulation of Direct Recruitment) Order 1975 on the principle of ‘public interest and administrative exigencies’.⁷⁷ However, the bench in *V Jagannadha Rao v State of Andhra Pradesh* found these earlier judgments to have been incorrectly decided.⁷⁸ It held that special rules framed by the Governor under Article 309 on recruitment and conditions of service in public employment were unconstitutional in light of the *non-obstante* clause of Article 371D. Other rulings related to educational institutions have confirmed that judgments which restrict the ability of medical colleges to impose residence requirements do not apply to Andhra Pradesh and Jammu and Kashmir.⁷⁹ Yet such legal interpretations of the asymmetric content of Article 371D did not offer succour to the proponents of separate statehood for Telangana, which was eventually granted in 2013—and not on a legally asymmetric basis.

b. Autonomy Arrangements and Ethnic Conflict Resolution in Northeast India

The second major group of provisions under Article 371 relate to the resolution

of ethnic conflicts in India's Northeastern region, which have involved the embedding of differential forms of autonomy for some States in recognition of their distinctive culture and majority tribal communities. These provisions have underlined 'Northeast India's exceptionalism' through their recognition of special rights for certain tribal groups.⁸⁰ The first of these new provisions came about as a negotiated settlement with 'Naga accommodationists', who sought a political solution to the ongoing conflict in the region. This culminated in the creation of Nagaland as a separate State in 1963 and accompanying special provisions under Article 371A which set out guarantees for Nagaland's autonomy. Later, in 1986, Article 371G introduced a similar asymmetrical status for the newly created State of Mizoram. Mizoram had also been an autonomous district under the Sixth Schedule, but from the 1960s a more conflictual relationship with the Government of India emerged. The Mizo National Front (MNF) led by Laldenga launched an armed rebellion in 1966 for an independent Mizoram government. The proximate trigger for the rebellion had been the slow response of the Assamese government to a famine in 1958–59 in the Lushai Hills inhabited by the Mizos.⁸¹ The rebellion, and massive counter-insurgency efforts in response to it, continued for two decades until the signing of the Mizo Peace Accord under which rebel leader Laldenga became Chief Minister of a new State, special autonomy provisions were enshrined in Article 371G, and the MNF agreed to lay down arms. As Stepan, Linz, and Yadav argue, the 'innovative offer ... of extreme asymmetrical federalism with large guarantees of cultural autonomy' was a critical component of the peace accord reached in the Mizo conflict.⁸²

Articles 371A and G provide that unless the State Legislative Assembly so decides, no act of Parliament applies in Nagaland and Mizoram related to the religious and social practices of Nagas and Mizos respectively, customary law, and administration of civil and criminal justice involving decisions according to customary law. In both States, the Legislative Assembly also has the power to restrict the application of any law related to the ownership and transfer of land, but only in Nagaland does that provision also extend to 'land *and its* resources'.⁸³ In addition, the Constitution (Fifty-seventh Amendment) Act of 1987 provided for the reservation of the overwhelming majority of seats in the State Assemblies of Nagaland, Meghalaya, Mizoram, and Arunachal Pradesh for Scheduled Tribes.⁸⁴ The Constitution (Seventy-second Amendment) Act of 1992 made similar provisions for reservations in Tripura as part of a Memorandum of Settlement with the Tripura National Volunteers, to provide for a 'greater share of tribals in the governance of the state'.

Article 371F deals with the terms of the accession of the small State of Sikkim to the Union in 1975. This constitutional provision allows for the continuation in force of any laws in place before Sikkim's accession unless amended or repealed by 'a competent Legislature or other competent authority'. The Article also allows for the President to reserve seats in the Legislative Assembly for different sections of the population. This led to the reservation of twelve seats for Sikkimese of Bhutia-Lepcha origin and one seat for the Sangha (Buddhist monasteries) of a total of thirty-two seats. Sikkim was also able to maintain the category of 'Sikkimese subject' to distinguish historical residents from newer immigrants, allowing the State Government to discriminate in favour of historical residents.⁸⁵

Significantly, the Supreme Court has ruled that Article 371F allows the continuation in force of previous laws, even where they are in conflict with fundamental rights. In other words its *non-obstante* clause offers protection from Article 13, which declares that all laws in force before the operation of the Constitution will be declared void if they contradict the fundamental rights. This interpretation was confirmed by the Supreme Court in *State of Sikkim v Surendra Prasad Sharma*.⁸⁶ In *RC Poudyal v Union of India*,⁸⁷ the Court upheld the constitutionality of departures from the 'one-person-one-vote' principle in Sikkim, where seats were reserved for some communities beyond their proportion of the population. A constitutional bench in the case also ruled that:

Article 2 gives a wide latitude in the matter of prescription of terms and conditions subject to which a new territory is admitted. There is no constitutional imperative that those terms and conditions should ensure that the new State should, in all respects, be the same as other states of the Indian Union. However, the terms and conditions should not seek to establish a form or system of government alien to and fundamentally different from those the Constitution envisages.⁸⁸

c. Frontiers of Asymmetry: Land and Natural Resource Governance

To date there has been no major litigation around either Article 371A or G. But, as Hausing delineates, important debates are taking place in Nagaland around constitutional interpretations which test the extent of the sovereignty over land and natural resources reserved for Nagaland under Article 371, and may see future legal challenge.⁸⁹ These add to the kind of conflicts seen earlier with the *Samatha* ruling with regard to the Fifth Schedule.

In July 2010, Nagaland took the major step of declaring all Union laws governing 'petroleum and natural gas' inapplicable in Nagaland, and set about

framing its own policies for oil block development and regulation.⁹⁰ Petroleum and natural gas were discovered in Nagaland in the 1970s by the Oil and Natural Gas Corporation (ONGC), a Government of India undertaking, which had been granted a petroleum exploration licence. ONGC's rights to oil exploitation have, however, been increasingly contested by local landowners.⁹¹

The Nagaland Assembly resolution asserted that: 'No Act of Parliament governing Petroleum and Natural Gas shall be applicable to the State of Nagaland and all such Acts shall be deemed to have become inapplicable to the State from the date of enactment of Article 371A(1)(a) of the Constitution of India regardless of previous acts of commissions and omissions.' The State Government proceeded to announce its own policies to govern oil exploration and invited interested companies. The new conditions were reported to include stipulations that any product would need to bear the prefix 'Naga', 16 per cent of earnings would be shared with the State Government, and if the company in question had activities in States with boundary disputes with Nagaland, this would be a factor in their appointment.⁹²

Despite a Petroleum Ministry confirmation in response to a parliamentary question in March 2011 that Article 371A did cover the exploitation of natural resources, the Union government has subsequently reversed this stance. The Petroleum Ministry now argues that the move of the Nagaland Legislative Assembly was unconstitutional on the grounds that Article 371A only provides the State Government 'negative powers' to declare a law does not apply; it does not have 'positive powers' to legislate or regulate areas that are under central control.⁹³ As Hausing suggests, this dispute represents an important test-case of the full potential of Article 371A: 'The controversy ... highlights that despite its federal credentials, the actually existing centralist federal framework in India is inadequate to accommodate Naga exceptionalism and negotiated sovereignty under Article 371A.'⁹⁴

IV. CONCLUSION

The Indian Constitution contains many examples of asymmetric federalism. These features are a crucial part of the architecture governing the expression and capaciousness of the promise of differential membership within the Indian Union as a means of providing recognition to the multiple identities and nationalities across the breadth of its territory. Yet the legal standing of these measures has

not previously been closely analysed. The role of the Supreme Court is particularly significant in the governance of autonomy arrangements over the long term. As we have seen, many asymmetrical features of the Constitution have emerged as a result of politically negotiated settlements to individual conflicts. The courts have a critical role to play in ensuring that asymmetrical federal mechanisms offer ongoing protection from majoritarianism for territorially concentrated minorities despite changes of political dispensation at the level of either State or Union government.

This chapter has demonstrated that the Supreme Court has played a mixed and somewhat inconsistent role with regard to constitutional asymmetry. It has effectively permitted the weakening of Article 370 regarding Jammu and Kashmir over time, legitimising ongoing revisions to the Article that have extended much of the Constitution to the State. However with regard to the Fifth and Sixth Schedules, and elements of Article 371, Court interventions have strengthened the asymmetric content of these provisions over time. Successive benches of the Supreme Court have upheld the fact that the Sixth Schedule and Article 371F (related to Sikkim) supersede the fundamental rights and, for instance, allow for positive discrimination on the grounds of religion. They have also, on paper, strengthened the role of the Administrative Tribunal in Andhra Pradesh under Article 371D to police the operation of positive discrimination on the basis of residence in matters of public employment. However, this was not sufficient to ensure compliance on the ground or ultimately to resolve a demand for statehood by the Telangana region.

The legal frontiers of autonomy arrangements are still being tested, as recent disputes in the context of economic liberalisation have made clear. Some of the most vociferous disputes concern the extent to which the Fifth and Sixth Schedules, and Article 371A, provide local, Scheduled Tribe communities with the right to manage the exploitation of natural resources within their jurisdiction. These are likely to remain areas of struggle and debate into the future as States and their citizens seek to test the possibilities and limitations inherent in the asymmetric federal architecture of the Constitution. The other area of ongoing contestation relates to the rights of minorities that are not subject to constitutionally protected special rights. Groups who sit outside these regimes of recognition have themselves frequently mobilised to make their own demands for recognition either as Scheduled Tribes or Other Backward Classes depending on their location, or for separate statehood.⁹⁵ These pressures on the political and constitutional architecture of Indian federalism arising from within changing structures of political economy throw light on its adaptive qualities, while also raising questions about who is the ultimate arbiter of autonomy.

¹ Michael Burgess, *Comparative Federalism: Theory and Practice* (Routledge 2006) 209–25; Will Kymlicka, ‘Is Federalism a Viable Alternative to Secession?’ in Percy B Lehning (ed) *Theories of Secession* (Routledge 1998) 111–50; Alfred Stepan, Juan Linz, and Yogendra Yadav, *Crafting State-Nations: India and Other Multinational Democracies* (Johns Hopkins University Press 2011).

² John McGarry, ‘Asymmetry in Federations, Federacies and Unitary States’ (2007) 6(1) *Ethnopolitics* 105.

³ Will Kymlicka, *Politics in the Vernacular: Nationalism, Multiculturalism and Citizenship* (Oxford University Press 2001); Charles Taylor, *Multiculturalism and the Politics of Recognition* (Princeton University Press 1992); see also Louise Tillin, ‘United in Diversity? Asymmetry in Indian Federalism’ (2007) 37(1) *Publius: The Journal of Federalism* 45.

⁴ Kymlicka ([n 3](#)).

⁵ Ferran Requejo, ‘Federalism in Plurinational Societies: Rethinking the Ties Between Catalonia, Spain and the European Union’ in Dimitrios Karmis and Wayne Norman (eds) *Theories of Federalism: A Reader* (Macmillan 2005) 302.

⁶ Alfred Stepan, ‘Toward a New Comparative Politics of Federalism, Multinationalism, and Democracy: Beyond Rikerian Federalism’ in Edward L. Gibson (ed) *Federalism and Democracy in Latin America* (Johns Hopkins University Press 2004) 40.

⁷ McGarry ([n 2](#)); Christina Isabel Zuber, ‘Understanding the Multinational Game: Toward a Theory of Asymmetrical Federalism’ (2011) 44(5) *Comparative Political Studies* 546.

⁸ Kymlicka ([n 3](#)); Stepan ([n 1](#)); Rekha Saxena, ‘Is India a Case of Asymmetrical Federalism?’ (2012) 47(2) *Economic and Political Weekly* 70.

⁹ Stepan ([n 1](#)).

¹⁰ Rajesh Dev, ‘Human Rights, Minorities and Relativism in NorthEast India’ (2004) 39(43) *Economic and Political Weekly* 4747.

¹¹ Tillin ([n 3](#)).

¹² Robert Agranoff, ‘Power Shifts, Diversity and Asymmetry’ in Robert Agranoff (ed) *Accommodating Diversity: Asymmetry in Federal States* (Nomos Verlagsgesellschaft 1999) 22.

¹³ Charles Tarlton, ‘Symmetry and Asymmetry as Elements of Federalism: A Theoretical Speculation’ (1965) 27(4) *Journal of Politics* 861.

¹⁴ McGarry ([n 2](#)).

¹⁵ Tillin ([n 3](#)); AG Noorani, *Article 370: A Constitutional History of Jammu and Kashmir* (Oxford University Press 2011); Sumantra Bose, *Kashmir: Roots of Conflict, Paths to Peace* (Harvard University Press 2003) 70.

¹⁶ Sara Shneiderman and Louise Tillin, ‘Restructuring States, Restructuring Ethnicity: Looking Across Disciplinary Boundaries at Federal Futures in India and Nepal’ (2014) *FirstView Modern Asian Studies*.

¹⁷ Bérénice Guyot-Réchar, ‘Nation-Building or State-Making? India’s NorthEast Frontier and the Ambiguities of Nehruvian Developmentalism, 1950–1959’ (2013) 21(1) *Contemporary South Asia* 22.

¹⁸ Madhav Khosla, *The Indian Constitution* (Oxford University Press 2012) 75.

¹⁹ Constitution of India 1950, art 371F[1].

²⁰ *RC Poudyal v Union of India* (1994) Supp (1) SCC 324 [5].

²¹ *Pu Myllai Hlychho v State of Mizoram* (2005) 2 SCC 92.

²² Khosla ([n 18](#)) 84.

²³ Bose ([n 15](#)) 41.

²⁴ Bose ([n 15](#)) 36.

²⁵ Paras Diwan, ‘Kashmir and the Indian Union: The Legal Position’ (1953) 2(3) *International and*

Comparative Law Quarterly 333, 342; Noorani ([n 15](#)) 3–4.

²⁶ Constitution of India 1950, art 370.

²⁷ Noorani ([n 15](#)) 6; Tillin ([n 3](#)).

²⁸ Noorani ([n 15](#)) 8.

²⁹ Diwan ([n 25](#)) 350.

³⁰ Bose ([n 15](#)) 69.

³¹ Noorani ([n 15](#)) 13–14.

³² This took place under the Constitution (Application to Jammu and Kashmir), Second Amendment Order 1965, and the Constitution of Jammu and Kashmir (Sixth Amendment) Act, which amended the State's constitution (see documents in Noorani ([n 15](#))).

⁴⁶ *Puranlal Lakhanpal* ([n 45](#)) [4].

³³ Rekha Chowdhary, 'Autonomy Demand: Kashmir at Crossroads' (2000) 35(30) *Economic and Political Weekly* 2599, 2600.

³⁴ Chowdhary ([n 33](#)) 2601.

³⁵ Saxena ([n 8](#)) 74.

³⁶ AIR 1959 SC 749.

³⁷ *Prem Nath Kaul* ([n 36](#)) [38].

³⁸ *Prem Nath Kaul* ([n 36](#)) [34].

³⁹ Rajendra Prasad's note to the Prime Minister, 6 September 1952, reprinted in Noorani ([n 15](#)) 210.

⁴⁰ AIR 1970 SC 1118.

⁴¹ (1972) 1 SCC 536.

⁴² Khosla ([n 18](#)) 77; Noorani ([n 15](#)).

⁴³ *Sampat Prakash* ([n 40](#)) [4].

⁴⁴ *Sampat Prakash* ([n 40](#)) [7].

⁴⁵ AIR 1961 SC 1519.

⁴⁷ Balveer Arora and others, 'Indian Federalism' in KC Suri (ed) *ICSSR Research Surveys and Explorations—Political Science: Indian Democracy*, vol 2 (Oxford University Press 2013) 132.

⁴⁸ Jyotirindra Dasgupta, 'Community, Authenticity and Autonomy: Insurgence and Institutional Development in India's Northeast' (1997) 56(2) *Journal of Asian Studies* 345, 363.

⁴⁹ *Constituent Assembly Debates*, vol 9 (Lok Sabha Secretariat 1986) 1025, 6 September 1949.

⁵⁰ Kham Khan Suan Hausing, 'Asymmetric Federalism and the Question of Democratic Justice in Northeast India' (2014) 13(2) *India Review* 87, 92.

⁵¹ Sanjib Baruah, *Durable Disorder: Understanding the Politics of Northeast India* (Oxford University Press 2005) 11.

⁵² Hausing ([n 50](#)); Marcus Franke, 'Wars without End: The Case of the Naga Hills' (2006) *Diogenes* 53(4) 69.

⁵³ Franke ([n 52](#)) 84.

⁵⁴ Hausing ([n 50](#)) 92.

⁵⁵ *Constituent Assembly Debates*, vol 9 (Lok Sabha Secretariat 1986) 1008, 6 September 1949.

⁵⁶ *Constituent Assembly Debates*, vol 9 (Lok Sabha Secretariat 1986) 998, 5 September 1949.

⁵⁸ *Samatha* ([n 57](#)) [71].

⁶³ *Orissa Mining Corporation Ltd v Ministry of Environment and Forests* (2013) 6 SCC 476 [58].

⁶⁸ *Ewanlangki-E-Rymbai v Jaintia Hills District Council* (2006) 4 SCC 748 [5].

⁵⁷ (1997) 8 SCC 191.

⁵⁹ (2002) 2 SCC 333.

⁶⁰ *Balco Employees Union v Union of India* (2002) 2 SCC 333 [71]–[75]. See also Sanjay Upadhyay, ‘Tribals and Their Lands: Legal Issues and Concerns with Special Reference to Madhya Pradesh and Andhra Pradesh’ <http://siteresources.worldbank.org/INTINDIA/Resources/sanjay_upadhyay-paper.doc>, accessed November 2015.

⁶¹ (1971) 3 SCC 708.

⁶² (1986) 4 SCC 38.

⁶⁴ *Orissa Mining Corporation Ltd* (n 63) [59].

⁶⁵ *Pu Myllai Hlychho* (n 21).

⁶⁶ Khosla (n 18) 84.

⁶⁷ Khosla (n 18) 84.

⁶⁹ Dasgupta (n 48) 363.

⁷⁰ Constitution (Ninety-eighth Amendment) Act 2012.

⁷¹ Duncan Forrester, ‘Subregionalism in India: The Case of Telangana’ (1970) 43(1) *Pacific Affairs* 5.

⁷² (1969) 1 SCC 839. See also Forrester (n 71) 13.

⁷³ Constitution (Thirty-second Amendment) Act 1973.

⁷⁴ These special provisions for different regions have been maintained under the Andhra Pradesh Reorganisation Act 2014 which provided for the creation of Telangana. Under the Act, the following clause was substituted:

(1) The President may by order made with respect to the State of Andhra Pradesh or the State of Telangana, provide, having regard to the requirement of each State, for equitable opportunities and facilities for the people belonging to different parts of such State, in the matter of public employment and in the matter of education, and different provisions may be made for various parts of the States.

⁷⁵ (1987) 1 SCC 362 [5].

⁷⁶ *Dr C Surekha v Union of India* (1988) 4 SCC 526.

⁷⁷ *State of Andhra Pradesh v V Sadanandam* (1989) Supp (1) SCC 574; *Govt of Andhra Pradesh v B Satyanarayana Rao* (2000) 4 SCC 262.

⁷⁸ (2001) 10 SCC 401.

⁷⁹ *Pradeep Jain v Union of India* (1984) 3 SCC 654.

⁸⁸ *RC Poudyal* (n 20) [2].

⁸⁰ Arora (n 47) 132.

⁸¹ Sajjad M. Hassan, *Building Legitimacy: Exploring State–Society Relations in Northeast India* (Oxford University Press 2008) 6.

⁸² Stepan (n 1) 106.

⁸³ Hausing (n 50) (emphasis added).

⁸⁴ For a summary, see Shneiderman and Tillin (n 16) 16–17.

⁸⁵ Shneiderman and Tillin (n 16) 23.

⁸⁶ (1984) 5 SCC 282.

⁸⁷ (1994) Supp (1) SCC 324.

⁸⁹ Hausing (n 50).

⁹⁰ Hausing (n 50).

⁹¹ Hausing (n 50), 99–100.

⁹² Pranab Dhal Samatha, ‘Nagaland asserts right to frame own energy rules, alarm in Delhi’ *Indian Express* (New Delhi, 25 November 2013) <<http://archive.indianexpress.com/news/nagaland-asserts-right-to-frame-own-energy-rules-alarmin-delhi/1199156/0>>, accessed November 2015.

⁹³ Hausing ([n 50](#)); Samatha ([n 92](#)).

⁹⁴ Hausing ([n 50](#)) 104.

⁹⁵ Shneiderman and Tillin ([n 16](#)).

CHAPTER 31

LOCAL GOVERNMENT

KC SIVARAMAKRISHNAN*

I. INTRODUCTION

THE structure of local government in India has been the subject of a series of legal and political contestations, beginning from colonial rule and continuing to the independent modern State. The colonial Indian State embraced franchise in local governments while simultaneously withholding financial autonomy, reinforcing Lord Ripon's claim that they were administratively irrelevant, and 'designed as ... instrument[s] of political and popular education'.¹ In framing the modern Indian republic's Constitution, the Constituent Assembly was split between Gandhi's vision of *Panchayati Raj*—a State constituted of and governed by idealised, democratic self-governing village councils (*panchayats*) and Ambedkar's equally compelling understanding of the Indian village as a 'a sink of localism, a den of ignorance, narrow-mindedness and communalism'.² The current constitutional framework is an elaborate exercise in creating, constituting, and electing local governments, without directly devolving powers to them. Such powers are left, constitutionally, to States to devolve by legislation; as a consequence, although local representation has been achieved, we are still struggling to attain local self-government.

This chapter examines the background, scope, and content of the Seventy-third and Seventy-fourth Constitutional Amendments 1992 to the Indian Constitution. The Seventy-third Amendment compelled States to create self-governing, elected *panchayats* (village councils) across the nation, while the Seventy-fourth Amendment implemented similar requirements for urban areas, by requiring the creation of elected municipalities.

In the twenty-three years since the introduction of the Seventy-third and Seventy-fourth Amendments, Indian States have made slow and varying progress towards establishing local self-governing bodies, and devolving powers to them for local government. The process of devolution, both politically and financially, has been the subject of a number of analyses; however, the legal effects of these amendments remain largely unexamined. This chapter provides a

brief introduction to the legal questions and issues that arise from the Seventy-third and Seventy-fourth Constitutional Amendments, their framing, and implementation.

Section II of this chapter lays out the motivations and the context behind the Seventy-third and Seventy-fourth Constitutional Amendments, which formalised local government in rural and urban India, respectively. Section III focuses on issues of structure and implementation in local government. Section IV discusses the functions and powers of local governments, and finally, Section V contains a conclusion and examines the effectiveness of the Seventy-third and Seventy-fourth Constitutional Amendments.

II. ESTABLISHING REPRESENTATIVE LOCAL SELF- GOVERNMENT IN INDIA: A BRIEF HISTORY

1. Indigenous and Colonial Local Government

Local government in India has had a long indigenous and colonial history.³ The traditional system of local self-government in villages, by unelected councils, continued through the Mughal Empire,⁴ and urban government operated through delegated representatives of sovereign authorities. Early attempts to establish a formal structure for local government under colonial rule were seen as a project to inculcate democracy. Lord Ripon, as stated above, when passing a resolution for the creation of urban local bodies in 1882, viewed them primarily as ‘an instrument of political and popular education’.⁵

Although local councils had been established by charter prior to this, Lord Ripon’s resolution saw the introduction of limited franchise and representation for Indians on governing bodies in colonial cities.⁶ Steps for financial decentralisation were also implemented by the former Viceroy of India, Lord Mayo (1870);⁷ the local bodies were constituted by the former Viceroy of India, Lord Ripon (1882),⁸ as well as the Recommendations of the Royal Commission on Decentralisation (1909),⁹ making local self-government fully representative and responsible. However, these were not pursued aggressively until 1919, when reforms implemented by the British Secretary of State, Edwin Montagu, along with the then Viceroy, Lord Chelmsford, resulted in local self-government becoming a subject under the control of provincial governments.

The 1919 model was replicated to an extent in the Government of India Act 1935, which permitted provinces to control local government without creating a common legal structure or status for them. Essentially, colonial local self-governments were, as Sunil Khilnani describes them, ‘theatres of Independence’,¹⁰ allowing Indian politicians to gain representation and experience in the processes of parliamentary democracy; however, their powers, finances, and functions were limited and controlled by provincial and State legislatures and Central authorities.

When debating local government while framing the Constitution, several members of the Indian Constituent Assembly such as Arun Chandra Guha, KT Shah, RK Sidhwa, and others urged that the village *panchayats* (governing councils in villages) should be formally recognised as units of government, should be financially empowered, and should be the basic units of provincial governments.¹¹ A wide spectrum of members supported this position¹² and invoked the views of Gandhi, who had famously advocated a State constituted of

independent and self-sufficient ‘village republics’¹³ (commonly described as *Panchayati Raj* or rule by the village councils).

There was, however, equal opposition to the notion, led primarily by Dr BR Ambedkar, who chaired the Drafting Committee for the Indian Constitution. Dr Ambedkar insisted that *panchayats* or local self-government bodies did not merit separate mention as entities of the State, famously describing the typical Indian village as ‘a sink of localism, a den of ignorance, narrow-mindedness and communalism’.¹⁴ A proposed amendment to implement *Panchayati Raj* in a staggered fashion, moved by Dr KT Shah, did not succeed.¹⁵

Eventually, to break the impasse, a compromise formula was worked out by K Santhanam, and supported by Ananthasayanam Ayyangar.¹⁶ They proposed that a provision should be made in the Directive Principles of State Policy that ‘the State shall take steps to organise village *panchayats* and endow them with such powers and authority as may be necessary to enable them to function as units of self-government’. The Directive Principles of State Policy, constituting Chapter IV of the Indian Constitution, are unenforceable recommendations for the governance of India. The draft Article 31A proposed by them became what is currently Article 40 in the Constitution:

Organisation of village panchayats.—The State shall take steps to organize village panchayats and endow them with such powers and authority as may be necessary to enable them to function as units of self-government.¹⁷

As an unenforceable provision, this had limited value, and moreover, wholly ignored urban local governments. To allow States to legislate on these issues, List II of Schedule VII of the Constitution, which allocates legislative powers to the States, was provided with Entry 5, which gives States the power to legislate on:

Local government, that is to say, the constitution and powers of municipal corporations, improvement trusts, district boards, mining settlement authorities and other local authorities for the purpose of local self-government or village administration.¹⁸

The power to control local governments, therefore, was vested almost entirely with States; a position that is purported to have been altered by the grant of constitutional status to *panchayats* and municipalities, but remains, effectively, the same, despite the Seventy-third and Seventy-fourth Constitutional Amendments.

2. Local Government in Independent India

The constitutional position of this subordinate status of local government remained the same for many years. Local bodies remained under the control of State Governments and lacked independent constitutional footing. They were, consequently, subject to repeated supersession and interference in their functioning by States, and were also financially dependent on the States.¹⁹

By the mid-1960s about 60,000 village *panchayats*, 7,500 *panchayat samitis*, and 330 *Zilla Parishads* had been set up across the country. In some States, local acts such as the Madras Panchayats Act 1958 and Madras District Development Council Act 1958 for Tamil Nadu, resulted in the creation of *panchayat* unions, coterminus with development blocks, entrusting to them developmental and social welfare functions. The District Boards were replaced by District Development Councils, which acted as advisory bodies. In Maharashtra, the Bombay Panchayats Act 1958 and the Maharashtra Zilla Parishads and Panchayat Samitis Act 1961 created a three-tier system. Though these Acts envisaged an impressive list of duties and functions to be allocated to local governments, various problems in actual implementation were encountered partly because of frequent political changes.²⁰

In regard to urban local bodies, again, the position was worse. Most municipalities across the country were vulnerable to supersession by State Governments, irrespective of the political party, which was in power in the States. Indeed, the phenomenon of supersession began soon after Independence, when the Calcutta Corporation was superseded in 1948. The Madras Corporation was superseded in 1973, which lasted for twenty-four years. Another notorious example is the municipality of Gaya, which was set up in 1985 but was placed immediately under suspension and run by an administrator. Sixteen years later, in 2001, judicial intervention finally compelled the State Government to hold elections for the Municipal Corporation of Gaya.²¹

In 1986, the government appointed a committee chaired by eminent jurist LM Singhvi to assess the gaps and anomalies brought out by experience in regard to the rural and urban local bodies.²² The Singhvi Committee recommended that local self-government should be constitutionally recognised, protected, and preserved by the inclusion of a new chapter in the Constitution. The Committee further recommended that *Panchayati Raj* institutions should be constitutionally proclaimed as the third tier of the government.

3. Constitutional Amendments for Local Government

In 1988, the Government of India, then headed by Prime Minister Rajiv Gandhi, amplified the Singhvi Committee's recommendations and used them to advance some important objectives. This approach was evident in various speeches made by the Prime Minister, in different public functions. For example, in the inaugural function of the Golden Jubilee of the Maharashtra Legislative Assembly held in Bombay on 3 September 1988, Rajiv Gandhi observed that 'the transmission of democracy and development to the levels where the bulk of the people lived required a national debate and if necessary an amendment to the Constitution'.²³

Another important objective, as mentioned before, was to increase the number of persons holding elected office in the country. Introducing the Constitution (Sixty-fourth) Amendment Bill²⁴ on *Panchayati Raj* in the House of the People on 15 May 1989, Rajiv Gandhi observed that putting together both Houses of Parliament and all the State legislatures, the State had only between 5,000 and 6,000 persons representing a population of nearly 800 million. He envisaged that democracy in the *panchayats* on the same basis of sanctity as enjoyed by Parliament and the State legislature would bring in about seven lakh elected representatives. This would ensure the holding of regular and periodic elections and also provide for the reservation of Scheduled Castes and Scheduled Tribes on par with Parliament and the State legislatures.

Though Rajiv Gandhi obtained a resolution of different State legislatures as envisaged in Article 252, requesting Parliament to enact a law on the subject, some States, such as West Bengal and Tamil Nadu, strongly objected to Parliament embarking on this enactment.²⁵ The Chief Minister of Tamil Nadu, for instance, stated in his letter:

This State Government is not agreeable to the suggestion to transfer the subject entrusted to the State Governments under Entry 5 in the State List in the Constitution of India, to the Central List. The suggestion to entrust the conducting of Municipal Elections to the Election Commission is also not acceptable to us . . . I would like to observe on behalf of the people of Tamil Nadu, our government will not agree to the amendment of the Constitution which amounts to taking away the rights of State Governments.²⁶

The Sixty-fourth Constitution Amendment Bill for *panchayats* was introduced in the Lok Sabha on 15 May 1989 and the Sixty-fifth Constitution Amendment Bill for *nagarpalikas* (municipalities) was introduced on 8 August 1989. On 10 August, the Lok Sabha passed the Bills. However, on 13 October 1989 both the

Bills were defeated in the Rajya Sabha. Late in 1989 the National Front government was formed, with VP Singh as Prime Minister. On 4 September 1990, the government introduced in the Lok Sabha a composite Bill of Constitution Amendment (No 156 of 1990). On 7 November, the government itself fell. On 21 May 1991, Rajiv Gandhi was assassinated. On 21 June, the Narasimha Rao government was sworn in. That government declared that it would revive the *Panchayati Raj* initiative, and on 16 September two separate Bills were introduced as the Seventy-second and Seventy-third Constitution Amendment Bills. Both were referred to two Joint Parliamentary Committees. While there were some important differences between the Seventy-second and the Seventy-third Bills introduced as compared to the Sixty-fourth and Sixty-fifth Bills, the two Joint Parliamentary Committees significantly amplified the provisions and finalised the recommendations in July 1992.

On 22 December and 23 December 1992, the Amendment Bills with the recommendations of the JPC were considered and passed in the Lok Sabha and in the Rajya Sabha, respectively. In April 1993 both the Amendment Acts, renumbered as the Seventy-third and Seventy-fourth Constitutional Amendments, received the assent of the President and became law.

III. LOCAL GOVERNMENT IN THE CONSTITUTION AND IN STATUTES

1. Overview of Constitutional and Statutory Provisions on Local Government

In this part, an outline of constitutional and statutory provisions for local government in India is provided. It also covers the structure and composition of local governments, provisions for elections, representations, and electoral reservations, their duration and suspension, and the conduct of elections to local bodies.

The Seventy-third and Seventy-fourth Constitutional Amendments introduced [Part IX](#) (entitled ‘The Panchayats’) and Part IXA (entitled ‘The Municipalities’) into the Constitution. The most significant aspect of these amendments is that they do not, in fact, mandate the implementation of self-government. Rather, they mandate the creation of local self-governing bodies, but leave the question

of delegating powers and functions to these bodies to State legislatures. Articles 243G and 243W both provide that ‘the Legislature of a State, may, by law, endow ...’ the *panchayats* and municipalities with powers and functions. Similarly, the financing of local bodies is provided for by the Constitution of State Finance Commissions in Articles 243I and 243Y, which recommend distribution of funds to the State. The State, in turn, determines allocation to local bodies.

The remaining provisions of the Seventy-third and Seventy-fourth Constitutional Amendments contain detailed structural requirements on the structure, elections to, and representation in local self-government bodies. The product of this rather dichotomous drafting has led to a large body of litigation that focuses on local *representation*, and comparatively little that focuses on local *government*. It must be noted, in addition, that certain parts of India, in keeping with the Constitution, are not governed by Parts IX and IXA. Three exceptions operate: Union Territories, which are directly administered by the Centre, are subject to these provisions but can be exempted in part or whole by the President;²⁷ certain areas listed in the Sixth Schedule of the Constitution are exempted,²⁸ although Parliament and State legislatures can resolve to extend the constitutional provisions of local government to these areas.²⁹ Finally, cantonment areas fall under the control of defence forces and the Ministry of Defence.³⁰

Even as Parts IX and IXA of the Constitution provide for the constitution of local government bodies, States retain the power to frame laws that implement these parts, and govern how these bodies function, and what powers they assume. This power is drawn from Entry 5 of Schedule VII of the Constitution, which makes local government a subject for exclusive legislation by the States. State legislatures have therefore accumulated a plethora of laws on local government, both rural and urban, that predated the Seventy-third and Seventy-fourth Constitutional Amendments.

It is common for States to have specific statutes for urban and rural local government bodies (eg, the Tripura Panchayats Act 1993 and the Tripura Municipalities Act 1994). State Governments may, in addition, have specific acts for different types of local governments in rural or urban areas; for instance, the Karnataka Municipalities Act 1964 provides for smaller municipalities, while the Karnataka Municipal Corporations Act 1976 provides for larger municipal areas. In the case of larger cities, States may frame a specific statute for that city to enable it to address specific governance issues: for instance, the city of Mumbai’s corporation is governed by the much-amended Mumbai Municipal

Corporation Act 1888, while the City of Panaji Corporation Act 2002 makes specific provisions for the capital city of the State of Goa.

With the passing of the Seventy-third and Seventy-fourth Amendments, a minimal level of uniformity was brought into varying patterns of local governments across States. Consequently, Articles 243N and 243ZF allowed these existing State laws to continue after Parts IX and IXA were inserted in the Constitution, for a period of only one year, unless they were repealed or amended to be brought into conformity with the new constitutional provisions.

Inevitably, the compliance—or lack thereof—of State laws with the constitutional provisions has formed a rich source of litigation at the High Courts and at the Supreme Court.³¹ The Supreme Court has tended to endorse the powers of the State legislatures to legislate beyond the provisions of Parts IX and IXA of the Constitution—in *Bhanumathi v State of Uttar Pradesh*, Ganguly J held that the State could legislate to allow for no-confidence motions against the heads of *panchayats* even though the Seventy-third Amendment is silent on whether this is allowed. The power of States to legislate on local government, he pointed out, drew from Entry 5 of List II of Schedule VII, which remained in the Constitution despite the passing of the Seventy-third and Seventy-fourth Constitutional Amendments. Consequently, the Seventy-third and Seventy-fourth Constitutional Amendments do not prevent State legislatures from legislating on local government; rather, they allow States to legislate on all issues pertaining to them so long as the minimum requirements of these amendments are met.

2. The Structure and Composition of Local Government Bodies

The Constitution, in Parts IX and IXA, lays down a broad outline for the structure of local bodies. In doing so, these two parts create a baseline on which States may legislate to provide for variations to account for their individual populations, social structures, economies, and political frameworks. It is accurate to say that while the legal structure of local government bodies across India is not uniform, there are some uniform characteristics laid out by the Constitution.

The creation of rural and urban local bodies is mandatory. Article 243B says, ‘There *shall* be constituted in every State, Panchayats at the village, intermediate, and district levels ...’³² and similar language in Article 243Q provides for the constitution of municipalities in urban areas. Like *panchayats* at

the village, intermediate, and district levels, municipalities are of three kinds: *nagar panchayats* (city *panchayats*) for areas that are transitioning from rural to urban; municipal councils for smaller urban areas; and municipal corporations for larger urban areas. State legislatures ultimately determine how these categories are defined, although in Article 243Q the Constitution does provide some guidelines for this.³³

3. The Case of Industrial Townships: Subverting Representative Local Government

Although Article 243Q compels the constitution of municipalities in urban areas, a most obnoxious provision was introduced by a proviso to Article 243Q, allowing that a municipality may not be constituted in an urban area if the municipal services are proposed to be provided by an industrial establishment, in which case the area may be specified as an industrial township. This proviso was not a part of the draft introduced in Parliament, neither did it come up for consideration at all in the Joint Parliamentary Committee.

In 2009, a request for information was filed under the Right to Information Act 2005, to the Ministry of Urban Development.³⁴ This request sought information on the inclusion of this proviso to Article 243Q and sought to know, inter alia, whether this proviso was originally contained in the Bill, whether it was referred to the Joint Parliamentary Committee that reviewed the Bill, and whether any corporation had requested its inclusion. The response from the Ministry of Urban Development, received through letters dated 6 March 2009 (initial response) and 16 April 2009 (response on first appeal) has revealed that the then Chief Minister of Orissa, Biju Patnaik, and another Union Minister requested Prime Minister Narasimha Rao by a letter dated 20 November 1992 to consider excluding industrial townships from the purview of the amendment. Responding to this suggestion, a so-called political consensus was arrived at in haste and the proviso was introduced as a government motion at the stage of consideration of the Bill.³⁵

Given the fact that a Joint Parliamentary Committee had given its recommendations on the Bill already, this single clause ‘introduced by the Government’ did not attract any attention and the Bill was passed. Though the Joint Parliamentary Committee on local government as well as the government-appointed Commission on Administrative Reforms has decried this arrangement

of exclusion, the Government of India itself (Ministry of Commerce) advised various States to actively take advantage of the proviso and exempt industrial townships and Special Economic Zones (SEZs) from municipal purview. The Tata Nagar Steel Township in the Jamshedpur area has been the longest-standing effort to resist municipalisation.

The 'industrial township' proviso has been used to great effect by the Indian government to exclude what are known as SEZs from the purview of local government. The Special Economic Zones Act 2005 provides no role for local bodies, and only allocates functions between the State and Centre. Instead, these areas are to be governed by a 'Board of Approval'³⁶ and Development Commissioners for various sub-zones inside the SEZ.³⁷ Local bodies are not represented the management of SEZs. The loophole that the proviso to Article 243Q provides is therefore used to appoint real estate bodies, industrial councils, and industrial corporations as the heads of local government.³⁸ This has the effect of not only disenfranchising the residents of these zones, but also preventing them from participating in decisions that affect their daily lives.

The key example of this industrial township exception is the town of Jamshedpur, which has been run in this manner since 1922 by various entities that ultimately became Tata Steel.³⁹ When the Seventy-fourth Amendment came into force, a number of persons filed petitions seeking the constitution of a municipality and the conduct of elections. The issue here was that the Bihar and Orissa Municipal Act 1922, which originally governed this area, allowed for the creation of a 'notified area committee' composed of an industrial company, to govern an area in which an industrial establishment was located. Subsequent to the Seventy-fourth Amendment, this was deleted, to bring the Act in conformity with the amendment. The State could now declare an area to be an industrial township and exempt it from elected local government under Article 243Q, or create a municipality. In the High Court of Jharkhand, SJ Mukhopadhyay J had held that a valid notification of an industrial township had not been issued, and consequently, the State was directed to constitute a municipality or an industrial township in the manner provided by law.⁴⁰ The case was appealed and is still pending before the Supreme Court, and has not been concluded.⁴¹ Key questions concerning the validity of laws permitting the exemption of local government from industrial areas continue to remain unresolved. Very recently, in response to a Supreme Court direction, a meeting of public representatives in Tata Nagar preferred to remain under the Tata Company's private management rather than come under a municipality requiring payment of taxes.⁴²

Similar facts arose when the Seventy-fourth Amendment was implemented in

the State of Gujarat. Like Jamshedpur, the capital of Gujarat, Gandhinagar, was a notified area under the Gujarat Municipalities Act 1963. When the Act was amended to remove notified area committees and required the constitution of an industrial township, the State Government failed to respond, and no municipality or industrial township was constituted. Accordingly, a suit was filed in the Gujarat High Court seeking a writ directing the State to constitute a municipality.⁴³ KS Radhakrishnan CJ held that ‘by non-formation of the Municipal Corporation at Gandhinagar, the constitutional requirement ... has been given a complete go-bye’.⁴⁴

The inclusion of the proviso to Article 243Q also leaves open a number of constitutional issues that are yet to be decided. Can the corporate entities running an industrial township exercise sovereign functions that a municipality can—the levy of fees and taxes, etc? Can the term ‘industrial establishment’ be extended to any non-State body that acts as a promoter of an industrial area? Would it extend to real estate development agencies, which are geared towards disposing of the land and not supplying essential services? These questions remain open and unanswered.

The Supreme Court has only briefly touched upon these issues. In *Saij Gram Panchayat v State of Gujarat*,⁴⁵ the Supreme Court considered the question of whether the creation of an industrial township out of rural areas was contrary to the Constitution. Sujata Manohar J held that although industrial areas would be generally constituted in urban areas, this would include areas that were transitioning from rural areas to urban areas. The key issues that arise from the proviso to Article 243Q, accordingly, remain unanswered.

Today there are more than 500 entities in the country that are presently beyond municipal purview, including private development companies exercising sovereign powers as an industrial township. It is likely that this trend will continue.⁴⁶ As a result, the proviso to Article 243Q brought by the government itself has rendered a mortal blow to the very essence of setting up municipalities in urban areas as institutions of self-government.

4. The Composition of Local Bodies: Franchise and Representation

The most significant changes that Parts IX and IXA introduced to local bodies were the constitutional recognition of elected local representatives and adult

franchise for the same.⁴⁷ The scale of representation is extraordinary; more than three million persons are elected to *panchayats* and municipalities across the country.⁴⁸

Articles 243C and 243R provide for the composition of municipalities and *panchayats* whose members are to be chosen by direct elections from territorial constituencies. The principle that guides these elections is that the ratio of the territorial area of the local body to the number of seats it elects should be, as far as possible, the same throughout a State. Beyond this, State legislatures are empowered to make specific provisions for the election of chairpersons, for inclusion of other elected representatives such as Members of Parliament or State Legislative Assemblies.

An important major constitutional issue, which has so far not been agitated specifically, is the provision allowing members of the Union and State legislatures to be members of local bodies as well. Dual membership in Union and State legislatures is prohibited in Article 101 of the Constitution.⁴⁹ In the case of local bodies, however, this prohibition does not exist, and States are explicitly given powers to legislate for the representation of members of Union and State legislatures in local bodies, provided they are from the territorial constituency of those local bodies.⁵⁰ The prohibition on dual membership of State and Union legislatures is because both these bodies are considered on a par in constitutional status and are expected to operate exclusively in the domain as provided in the Seventh Schedule to the Constitution. If the basic intention of setting up *Panchayati Raj* and *nagarpalika* bodies as institutions of self-government on a par with Parliament and the State legislature was that they should exercise their functional domain in keeping with the Eleventh and Twelfth Schedules of the Constitution, there is no reason why these bodies alone should be subjected to the double membership of the Members of Parliament and members of the State legislature.⁵¹

Though the validity of persons holding such dual membership has not been specifically challenged, in a number of cases in the State High Courts, the nature and extent of powers under this membership have been questioned. In some cases it has been held that MPs and State legislators are invitees to the local bodies and do not have the right to vote as elected members.⁵² In some others it has been held they do have voting rights.⁵³ In the celebrated case relating to the MP's Local Area Development scheme, which was heard over several years by the Supreme Court, a kind of non-judgment eventually became available, stating that the division of executive power as between the government and the legislature was not clear in the Indian Constitution and as such there seemed to

be no bar on legislators entering upon the executive domain or being substantially involved in the implementation of local schemes,⁵⁴ though most of these schemes fall under the purview of local bodies.

In addition to the above constitutional provisions, local bodies were given fixed tenures;⁵⁵ and State Election Commissions were created to conduct elections for them.⁵⁶ State Finance Commissions were constituted to advise on their finances⁵⁷ and rules for reservations of seats for backward classes, castes, and women were introduced.⁵⁸ As with the structure and composition, these aspects of local government are left partly to the discretion of States, to be implemented through State legislation. For instance, disqualifications for membership of local bodies through elections are to be specified by State law.⁵⁹

States have made significant modifications to laws governing representation, particularly when it comes to reserving seats for Scheduled Castes, Scheduled Tribes, and Other Backward Castes. Articles 243D and 243T require that no less than one-third of the total seats in local bodies, including one-third of the reserved seats, are to be further reserved for women. Some States, such as Madhya Pradesh, Maharashtra, Bihar, Kerala, Karnataka, Orissa, and Chhattisgarh, have increased this to 50 per cent of seats for women, in urban local bodies. Moreover, reservations for Other Backward Castes are left to the States to determine, and consequently, conflicts over the amount of reservation and how it is calculated have frequently resulted in legal disputes.

A second, significant source of conflict has been over the interpretation of fixed tenure for local bodies. As local bodies operate almost entirely under State control, a common problem has been the suspension of elected local bodies in the course of political manoeuvring, and their replacement by an unelected 'administrator' by State Governments. In the Statement of Objects and Reasons that introduced the Seventy-third and Seventy-fourth Constitutional Amendments, specific reference was made to this problem, noting that 'In many States local bodies have become weak and ineffective on account of a variety of reasons, including the failure to hold regular elections, prolonged supersessions and inadequate devolution of powers and functions.'⁶⁰

Articles 243E and 243U attempt to remedy this by providing that local bodies have fixed tenures of five years. Elections must be held before the end of or within six months of the end of this period. States often claim delays in the conduct of elections for local bodies on the grounds of incomplete delimitation of constituencies after increases in population.⁶¹ Early in 2015, the Karnataka State Government claimed that it was unable to hold elections for the capital city of Bengaluru, since it proposed to trifurcate Bengaluru's municipal corporation.

This, the State argued, would require fresh delimitation, and until such delimitation took place, elections had to be postponed, and the municipality administered by a State official. The State Government was eventually compelled by the High Court of Karnataka to proceed with elections regardless of future proposals for municipal restructuring.⁶² Courts have generally disallowed delays such as this, usually holding that in such instances, elections should be held on the basis of the previous, existing delimitation. This is an uneasy compromise, as it often results in insufficient representation to burgeoning populations of reserved categories.⁶³

5. The Conduct of Elections to Local Bodies

In all the three draft amendment Bills that preceded the Seventy-third and Seventy-fourth Constitutional Amendments, it was proposed that an autonomous election commission be constituted. This body was to deal with the entire range of electoral functions for local bodies, such as delimitation, reservation of constituencies for Scheduled Castes and Scheduled Tribes, conduct and superintendence of elections, and other connected matters.⁶⁴

Provisions for the State Election Commissions were based almost entirely on the provision of the Central Election Commission.⁶⁵ The Election Commission in India, as a fiercely independent body, has resisted attempts on the part of the government to interfere with its ability to regulate and conduct elections.⁶⁶ Given the fact that the State Election Commissions are very much a clone of the Central Election Commission, it was expected that the same level of independence would apply.

Nevertheless, in several of the States, governments have encroached upon the jurisdiction of the State Election Commission and taken over some of the powers. For instance, in *Chanigappa v State of Karnataka*,⁶⁷ the Karnataka High Court held that the State Government could take over some functions of the State Election Commission, such as delimitation of constituencies, since these functions *preceded* the electoral process and were not a part of it. This in turn has invariably delayed the timely holding of elections and resulted in extensive litigation. The composition, inclusion, and exclusion of members from electoral rolls are frequently challenged, as are the delimitation of constituencies, and the powers exercised by the State Election Commissions.⁶⁸

It must be noted, however, that the Constitution, in an attempt to control the

vast amount of litigation generated by electoral processes in local bodies, had barred the jurisdiction of courts in any disputes concerning the validity of laws relating to delimitation, allotment of seats to constituencies, or that call into question the elections to any local bodies by allowing States to legislate and create alternative appellate bodies.⁶⁹ Courts do, however, interfere when State electoral appeals processes do not allow remedies in specific circumstances, or when there have been instances of violations of fundamental rights.⁷⁰ While a systematically applied test has not yet evolved, the formulation of the Delhi High Court in *Chand Kumar v Union of India*⁷¹ demonstrates how courts apply their powers in writ jurisdiction to overcome the prohibition on jurisdiction. In this case, R Lahoti J held that:

This Court has not been called upon to examine the validity of any law relating to delimitation of constituencies or the allotment of seats to such constituencies made or purporting to be made under Article 243ZG. Any delimitation if it falls foul of the statutory power under which it purports to have been made and smacks of arbitrariness, whim or fancy, offensive of Article 14 of the Constitution then it is open to judicial review under Article 226 of the Constitution on the well established parameters.⁷²

The irregularly applied test in Article 243ZG, coupled with a lack of clarity on the powers of the State Election Commissions, continues to lead to litigation in courts. While the conduct of local elections on a massive scale in India is laudable, there are still some issues, such as these, which require clarity, either by judicial or legislative intervention.

IV. THE FUNCTIONS AND POWERS OF LOCAL BODIES AND THEIR PLACE IN THE FEDERAL FRAMEWORK

1. Failures in Devolution and the Rise of Parallel Bodies

The most significant lacuna in the constitutional framework on local government is that the transfer of various State functions, such as the management of health, local education, sanitation, and housing, has been not directly implemented in Parts IX and IXA of the Constitution. Subjects that *could* be transferred to local bodies were listed in two Schedules to the Constitution, with the provision that States could, through State law, transfer these functions from the State

Government to local bodies.⁷³ Neither Article 243G (dealing with *panchayats*) or Article 243W (dealing with municipalities) makes the transfer of functions mandatory.

I have argued before that the language of Articles 243G and 243W creates an obligation on States to devolve powers and responsibilities listed in Schedules XI and XII by framing laws. The only leeway granted to States is the manner in which the statutes for devolvement are framed.⁷⁴ This view is not taken by the courts, which have held, by and large, that State legislatures have leeway not just on how and when power devolves to local bodies, but on whether to devolve such power at all.⁷⁵ The Allahabad High Court, for instance, has clearly held that Article 243G is ‘only an enabling provision. It enables the State Legislature endow panchayats with certain powers ... the legislature of a State is not bound to endow the panchayats with the powers referred to in Article 243G and it is in its discretion to do so or not.’⁷⁶ In Andhra Pradesh, a challenge raised to State laws that provided for incomplete devolution was rejected by the majority in *Ranga Reddy District Sarpanches Association v Andhra Pradesh*.⁷⁷ The petitioners, an association of *panchayat* chairpersons, argued that Article 243G was mandatory, compelling States to devolve powers. PS Narayana J, for the majority held:

A careful analysis of the Article makes it clear that the directives envisaged by Article 243G are discretionary in nature. Hence the contention that Article 243G and Eleventh Schedule of the Constitution had conditioned the Legislative power of the State in Article 246 and Seventh Schedule, cannot be accepted ... The power of the State Legislature to legislate on a subject relating to an entry in State List or Concurrent List is well governed by specific provisions and hence it cannot be said that by introduction of Article 243G by 73rd Constitutional Amendment, the power to legislate relating to those entries is in any way curtailed ...⁷⁸

The failure to devolve functions to local bodies has led to States replacing them with parallel executive bodies that carry out the same functions. For instance, although the management of water supply can be transferred to municipalities under Item 5, Schedule XI, it has become increasingly common for States to constitute executive-controlled Water Boards to manage these.⁷⁹ This is most common in questions of planning—although Part IXA provides for the constitution of district and metropolitan planning committees,⁸⁰ and for the delegation of planning powers to municipalities,⁸¹ it is almost ubiquitous for States to have ‘Development Agencies’ that take on this function.

A challenge to the diversion of planning functions from representative local bodies to executive ones was raised in *Bondu Ramaswamy v Bangalore Development Authority* (2010) 7 SCC 129. In a much criticised judgment,⁸² the

Supreme Court endorsed an act of the Karnataka State legislature that effectively removed town planning powers from the elected municipality for the city of Bengaluru and vested them in an executive-controlled ‘Development Authority’.⁸³ The challenge related to Article 243ZF, which allows laws predating the constitutional amendments on local government to continue only if they comply with the amendments.

The Court held, somewhat confusingly, that:

The benefit of Article 243ZF is available only in regard to laws relating to ‘municipalities’ ... neither any city improvement trust nor any development authority is a municipality, referred to in Article 243ZF. Thus Article 243ZF has no relevance to test the validity of the BDA Act or any provision thereof.⁸⁴

Bondu Ramaswamy’s case effectively implies that the State can legitimately restrict the powers of elected local self-government bodies by simply constituting another body and vesting powers in it. Such alternative bodies do not fall afoul of the Constitution, because they are not local self-government bodies.

Subsequent challenges to the diversion of local functions have failed, as the Supreme Court and High Courts, bound by *Bondu Ramaswamy*’s precedent and the wording of Parts IX and IXA, can neither authorise nor compel devolution. Thus, although Articles 243G and 243W envisage that the State will enable local bodies to ‘function as institutions of self-government’ the Supreme Court has found this an insufficient mandate to interfere with the State’s legislative powers to devolve functions at its own pace.

2. Financing Local Bodies: Powers of Taxation

Part of the incapacity of local bodies to function effectively stems from their inability to raise finances of their own. Articles 243H and 2343X, formulated in similar language, make it amply clear that any powers of taxation that local bodies have must be devolved upon them by State legislatures. The State Finance Commissions, constituted under Articles 243I and 243Y, are then authorised to recommend to State Governments the principles on which the revenue so collected is distributed between the State and local governments. The starvation of finances in local bodies has led to at least one instance of a court ordering the State to release funds that will enable a municipality to pay its dues to its employees.⁸⁵ Attempts by municipalities to levy taxes on areas where

powers have been devolved have also been successfully challenged, on the ground that the power to tax on subjects even within their control has to be specifically authorised by statutes.⁸⁶ The Bombay High Court, in a case where a challenge was raised to the constitutionality of municipal taxation laws in Maharashtra, held that a State could levy taxes on municipal subjects without transferring powers to municipalities. SC Dharmadhikari J held, ‘Eventually, the Municipality derives its power and authority to impose the tax from the law made by the Legislature.’⁸⁷

Consequently, with neither powers nor finances, municipalities and *panchayats* are almost wholly at the mercy of State Governments. While their elections, constitution, and composition are couched in imperative terms, their functional and financial powers remain limited and optional.

3. India’s Federal Framework and Local Bodies

The changes brought about by the Seventy-third and Seventy-fourth Constitutional Amendments were not purely administrative. An important impact of these amendments was on the federal structure of the nation. Historically envisaged as a careful balancing of powers and functions between States and a strong Centre, the addition of a third—constitutionally recognised—level was bound to lead to some confusion about the place of local bodies in the federal identity.

While strengthening of rural and urban local bodies could not be questioned as an objective, conferring on these bodies a status on a par with Parliament and the State legislatures or making them a third tier of the government was fraught with significant constitutional issues. As stated before, the Constitution clearly recognised that all matters connected with rural and urban local bodies were entirely within the legislative and executive jurisdiction of the States as per Entry 5 of the State List in Schedule VII to the Constitution. In order to pass these amendments to the Constitution, the government was obliged to obtain the consent of at least half the States, and it is true that the government did so.⁸⁸ It was then left open to the best judgment of the Rajiv Gandhi government to decide to what extent the authorisation by the State legislatures could be stretched.

While the Singhvi Committee had recommended a constitutional amendment to strengthen *Panchayati Raj* bodies, a subsequent government body, the

Sarkaria Commission, was not in favour of this approach.⁸⁹ The Sarkaria Commission preferred a model legislation to be prepared by the Government of India or alternatively, that specific support be provided to the various proposals through resolutions of the State Government. It recommended that the InterState Council, a constitutional body aimed at facilitating dialogue between the States, should be the forum in which a draft model law could be negotiated, and left to each State to individually adopt.⁹⁰ In a major constitutional decision that established the doctrine that parts of the Constitution constitute an unamendable 'basic structure', the Supreme Court noted that the Seventh Schedule, allocating power between the Centre and the States, could be 'rightly said to involve the federal structure and rights of the states'.⁹¹ The implications of this constitutional amendment, therefore—that it would constitute an invasion into the legislative power of the States—is something that the government was doubtless aware of before the Seventy-third and Seventy-fourth Constitutional Amendments were introduced.

This uneasy position was sought to be resolved by Rajiv Gandhi when in the conference of Chief Ministers on *Panchayati Raj* held on 5 May 1989 he observed that 'the Centre and the States share the responsibility for bringing *Panchayati Raj* to fruition. The constitutional framework for *Panchayati Raj* is primarily the responsibility of the Centre. The legislative details fall in the province of the States.'⁹² The result was an amendment that provided strictly for certain aspects: such as the regularity of elections, elected representatives, adult franchise—but simultaneously left certain other things to the discretion of the States—the type of management in local bodies, the implementation through legislation, and so on. The consequence of this is that local bodies have the constitutional status of being a third tier of the government, but are simultaneously subordinate to the State Government in several key functions and aspects.

V. CONCLUSION

In establishing local governments through constitutional amendment, the Indian State has created a constitutional status and broadened local government immensely. However, representation is meaningless without the power to execute decisions taken by a self-governing body. Until devolution of powers to local bodies is complete, the objectives of the Seventy-third and Seventy-fourth

Amendments remain incomplete. This, furthermore, is not a constitutional gap that the courts can fill: as we have seen, States cannot be judicially compelled to devolve powers. The onus therefore is on State Governments to undertake devolution, so that local bodies can operate effectively as governments.

Overall, an assessment of the Seventy-fourth Amendment indicates that notwithstanding the initial objectives of enlarging the funnel of participation and providing for a wider system of directly elected representative bodies, in actual effect the amendment has failed to fulfil this objective. While elaborate provisions operate, nevertheless, in regard to the composition of the municipal bodies including reservation of seats for Scheduled Castes/Scheduled Tribes, women and bodies like the State Election Commission and State Finance Commission, the total effect is that these bodies have been set up as mere shells without substance. Municipalities continue to be political and financial dependencies of the State with very few powers and responsibilities even in the provision of basic services. Thus, it must be conceded that the Seventy-third and Seventy-fourth Amendments have been failed attempts to widen and deepen federalism.

* This chapter remained unfinished at the time of the author's death. A substantial draft had been written, and the final version was edited and completed by Raeesa Vakil. The author was formerly the Secretary, Ministry of Urban Development, Government of India, and wanted it to be noted that as one among others involved in the drafting of the Seventy-fourth Amendment, he shares in the responsibility for the deficiencies in the drafting of the Amendment.

¹ Pardeep Sachdeva, *Local Government in India* (Pearson Education India 2011) 9.

² *Constituent Assembly Debates*, vol 7 (Lok Sabha Secretariat 1986) 39, 4 November 1948.

³ See generally, M Venkatarangaiya and M Pattabhiram (eds), *Local Government in India* (Allied Publishers 1969); KC Sivaramakrishnan, *Courts, Panchayats and Nagarpalikas* (Academic Foundation 2009).

⁴ SN Mallik, 'Local Self-Government in India' (1929) 145(2) *Annals of the American Academy of Political and Social Science* 36–44, 37.

⁵ Mallik ([n 4](#)).

⁶ Mallik ([n 4](#)).

⁷ 'Lord Mayo's Resolution on Provincial Finance, 1870, Resolution No 3334, dated 14 December 1870' in Venkatarangaiya and Pattabhiram ([n 3](#)) 96–103.

⁸ 'Lord Ripon's Resolution on Local Government, 1882, dated 20 May 1882' in Venkatarangaiya and Pattabhiram ([n 3](#)) 104–18.

⁹ 'Recommendations of the Royal Commission on Decentralisation, 1909' in Venkatarangaiya and Pattabhiram ([n 3](#)) 158–66.

¹⁰ Sunil Khilnani, 'India's Theatres of Independence' (1997) 21(4) *The Wilson Quarterly* 16–45.

¹¹ See the Speech by RK Sidhwa, *Constituent Assembly Debates*, vol 5 (Lok Sabha Secretariat 1986) 335, 30 August 1947.

¹² See eg, *Constituent Assembly Debates*, vol 7 (Lok Sabha Secretariat 1986) 256–84, 6 November 1948

(K Santhanam, Shibban Lal Saksena, and Arun Chandra Guha).

¹³ These views are primarily contained in a collection of essays entitled ‘Village Swaraj’ (Village Self-Rule). MK Gandhi, *Village Swaraj* ed HM Vyas (Navjivan Publishing House 1963).

¹⁴ *Constituent Assembly Debates*, vol 7 (Lok Sabha Secretariat 1986) 39, 4 November 1948. He was supported by Hussain Imam, *Constituent Assembly Debates*, vol 7 (Lok Sabha Secretariat 1986) 302, 8 November 1948, and Begum Aizaz Rasul, *Constituent Assembly Debates*, vol 7 (Lok Sabha Secretariat 1986) 305, 8 November 1948.

¹⁵ Amendment No 129, moved by KT Shah, *Constituent Assembly Debates*, vol 7 (Lok Sabha Secretariat 1986) 426–28, 17 November 1948.

¹⁶ Amendment No 927, moved by Ananthasayanam Ayyangar and K Santhanam, *Constituent Assembly Debates*, vol 7 (Lok Sabha Secretariat 1986) 520–27, 22 November 1948.

¹⁷ Constitution of India 1950, art 40.

¹⁸ Constitution of India 1950, Entry 5, List 2, Schedule 7.

¹⁹ See eg, Planning Commission of India, ‘Report of the Task Force on Panchayati Raj Institutions’ (2001) <http://planningcommission.nic.in/aboutus/taskforce/tsk_pri.pdf>, accessed November 2015.

²⁰ See generally, Dr Marina R Pinto, *Metropolitan City Governance in India* (Sage Publications 2000).

²¹ This has been reported in *Nandkishore Singh v State of Bihar* (2001) 2 PJLR 672.

²² Ministry of Panchayati Raj, ‘Recommendations of the LM Singhvi Committee’ <http://www.panchayat.gov.in/documents/401/84079/Recommendations_L_M_Singhvi_Committee_Report> accessed November 2015.

²³ Rajiv Gandhi, ‘Three Pillars of Our Nation’ (inaugural function of the Golden Jubilee of the Maharashtra Legislative Assembly at Vidhan Bhavan, Bombay, 3 September 1988) in *Rajiv Gandhi, Selected Speeches and Writings*, vol 4 (Publications Division, Ministry of Information and Broadcasting, Government of India 1989) 68–73.

²⁴ The Constitution (Sixty-fourth Amendment) Bill (Bill No 50 of 1989, as introduced in the Lok Sabha).

²⁵ Letters from the Chief Ministers of these States are on file with the author.

²⁶ On file with the author.

²⁷ Constitution of India 1950, arts 243L and 243ZB.

²⁸ Certain Scheduled Areas, listed in the Fifth and Sixth Schedules of the Constitution, are governed by Autonomous District Councils, created through State legislation. The Sixth Schedule provides for the creation of Autonomous District Councils, which have administrative, legislative, and judicial powers and administer traditional laws to tribal populations.

²⁹ Constitution of India 1950, arts 243M and 243ZC.

³⁰ Cantonments Act 1932.

³¹ See eg, *Bhanumati v State of Uttar Pradesh* (2010) 12 SCC 1; *Sharanjit Kaur v State of Punjab* (2013) 8 SCC 726.

³² Constitution of India 1950, art 243B (emphasis added).

³³ The Governor of a State, under art 243Q, is advised to take into account the following aspects when determining whether an area is in transition, a smaller urban area, or a larger urban area: the population of the area, the density of population, the revenue generated for local administration, the percentage of population engaged in non-agricultural activities, and the economic importance of the areas.

³⁴ All documents pertaining to this request, and all responses received are on file with the author.

³⁵ Copies of the Right to Information request and the documents received in response are on file with the author.

³⁶ These boards are constituted under the Special Economic Zones Act 2005, s 8(1).

³⁷ Development Commissioners are appointed under the Special Economic Zones Act 2005, ch 4.

³⁸ See generally, KC Sivaramakrishnan, *ReVisioning India’s Cities* (Sage Publications 2011) 171–74.

³⁹ Sivaramakrishnan (n 38) 57–58.

⁴⁰ *Jawaharlal Sharma v State of Jharkhand* AIR 2006 Jhar 135.

⁴¹ *Jawaharlal Sharma v State of Jharkhand*, Writ Petition No 4388/2003, Supreme Court of India.

⁴² Animesh Boisee, 'Thumbs up to Tata Township' *The Telegraph* (Jamshedpur, 11 September 2014) <http://www.telegraphindia.com/1140911/jsp/frontpage/story_18823246.jsp#.VD4skhZ8Cxc>, accessed November 2015.

⁴³ *Gandhinagar Saher Jagrut Nagrik Parishad v State of Gujarat* (2010) 51(1) GLR 1 (Gujarat High Court).

⁴⁴ *Gandhinagar Saher Jagrut Nagrik Parishad* ([n 43](#)) [9].

⁴⁵ (1999) 2 SCC 366.

⁴⁶ On 3 December 2014 the Government of India released a concept note proposing the establishing of 'smart cities'. This urban renewal project envisages significant involvement of the private sector, although the modalities of such involvement are yet to be established. Whether the proviso to art 243Q will be invoked is not clear; however, it is apparent that there is a pressing need to resolve this legal question. Ministry of Urban Development, Government of India, 'Draft Concept Note on Smart City Scheme' <http://indiansmartcities.in/downloads/CONCEPT_NOTE_-3.12.2014_REVISED_AND_LATEST_.pdf>, accessed November 2015.

⁴⁷ Art 243C provides this for *panchayats*, and art 243R for *nagarpalikas*.

⁴⁸ Sivaramakrishnan ([n 38](#)) 33.

⁴⁹ Constitution of India 1950, art 101. In pursuance of this provision and art 190, the President of India has framed the Prohibition of Simultaneous Membership Rules 1950, which provide for vacation of one post if an elected member holds both.

⁵⁰ Arts 243C(3)(c) (*panchayats*) and 243R(2)(iii) (municipalities).

⁵¹ See generally, AK Avasthi, 'Discouraging Multiple Memberships' (2002) 37(36) *Economic and Political Weekly* 3704.

⁵² See eg, the judgment of the Rajasthan High Court in *Babu Lal v State of Rajasthan* (2006) RLW 4 3121, in which it was held that a no-confidence motion was not invalidated simply because notice had not been supplied to a Member of Parliament, who was on the local body.

⁵³ In *Lakshmappa Kallappa v State of Karnataka* AIR 2000 Kar 61 (Karnataka High Court), the Court held that representatives of State and federal legislatures in *panchayats* had the right to vote for the removal of the head of the *panchayat*. The Gauhati High Court had a similar holding in *Batou v State of Nagaland* (2006) 1 GLR 382.

⁵⁴ *Bhim Singh v Union of India* (2010) 5 SCC 538.

⁵⁵ Art 243E provides this for *panchayats* and art 243U for *nagarpalikas*.

⁵⁶ Art 243K provides for the constitution of State Election Commission to conduct *panchayat* elections, and art 243ZA provides that it will conduct *nagarpalika* elections as well.

⁵⁷ Art 243I provides for the constitution of a State Finance Commissions to make recommendations regarding *panchayats* and art 243Y provides for similar powers regarding *nagarpalikas*.

⁵⁸ Art 243D provides for reservations in *panchayats* and art 243T for reservations in *nagarpalikas*.

⁵⁹ Art 243F provides this for *panchayats* and art 243V for *nagarpalikas*.

⁶⁰ Constitution (Seventy-fourth Amendment) Act 1992, Statement of Objects and Reasons.

⁶¹ *Kishansingh Tomar v Municipal Corporation of the City of Ahmedabad* (2006) 8 SCC 352; *RM Bagai v Union of India* AIR 1994 Del 173 (Delhi High Court); *Nandkishore Singh* ([n 21](#)). But see *State of Maharashtra v Jalgaon Municipal Council* (2003) 9 SCC 731; *Kamal Jora v State of Uttarakhand* (2013) 9 SCC 396.

⁶² *CK Ramamurthy v State of Karnataka*, Writ Petition No 7939/2015, Order dated 22 June 2015 (Karnataka High Court) (Justice BV Nagarathna).

⁶³ See eg, *Naresh Krishna Gaunekar v State of Goa* (2008) 3 Mah LJ 667 (Bombay High Court). For

further discussion, see Sivaramakrishnan ([n 38](#)) ch 4.

⁷² *Chand Kumar* ([n 71](#)) [20].

⁶⁴ Copies of the drafts bills are on file with the author.

⁶⁵ The Central Election Commission is a body with constitutional status, conducting elections to the two houses of the Central Legislature. See Constitution of India 1950, Part XV.

⁶⁶ See eg, *People's Union for Civil Liberties v Union of India* (2003) 4 SCC 399. See also *Chanigappa v State of Karnataka* (2000) 6 KLJ 163, in which the Karnataka High Court held that the State Government could take over some functions of the State Election Commission such as delimitation of constituencies, since these functions *preceded* the electoral process and were not a part of it.

⁶⁷ *Chanigappa* ([n 66](#)).

⁶⁸ I have previously analysed key cases on these several issues relating to local elections in Sivaramakrishnan ([n 38](#)) 38–42.

⁶⁹ Constitution of India 1950, arts 243ZG and 243O.

⁷⁰ *Anugrah Narain Singh v State of Uttar Pradesh* (1996) 6 SCC 303; *Jaspal Singh Arora v State of Madhya Pradesh* (1998) 9 SCC 594; *Gurdeep Singh Dhillon v Satpal* (2006) 10 SCC 616; *Kurapati Maria Das v Dr Ambedkar Seva Samajan* (2009) 7 SCC 387.

⁷¹ (1997) 40 DRJ 695 (DB) (Delhi High Court).

⁷⁸ *Ranga Reddy District Sarpanches Association* ([n 77](#)) [21]–[22].

⁸⁴ *Bondu Ramaswamy* ([n 83](#)) [42] (RV Raveendran J).

⁷³ Art 243G read with Schedule 11 provides this for *panchayats*, and art 243W read with Schedule 12 provides this for *nagarpalikas*.

⁷⁴ Sivaramakrishnan ([n 38](#)) 253–54.

⁷⁵ See eg, *Satbir Singh v Lt Governor of Delhi* (2003) 66 DRJ 775 (DB) (Delhi High Court).

⁷⁶ *Zila Panchayat, Ghaziabad v State of Uttar Pradesh* (2003) 5 AWC 3978 (Allahabad High Court); *Raja Ram Mohan Roy Children's Academy v State of West Bengal* (2001) 2 Cal LT 119 (Calcutta High Court); *Rama Aggarwal v Union of India* (2004) 78 DRJ 579 (DB) (Delhi High Court). See also Shraddha V Chigateri and Ashish A Ahuja, 'State Inaction Through Law—A Critique of the Constitution (Seventy-third) Amendment Act, 1992' (1995) 7 Student Advocate 73.

⁷⁷ (2004) 1 ALT 659 (Andhra Pradesh High Court).

⁷⁹ Eg, the Bengaluru Water Supply and Sewerage Act 1964; the Kerala Water Supply and Sewerage Act 1986, and the Delhi Water Board Act 1998.

⁸⁰ Constitution of India 1950, arts 243ZD and 243ZE.

⁸¹ Constitution of India 1950, Items 1 and 3, Schedule 12.

⁸² See eg, KC Sivaramakrishnan, 'Judicial Setback for Panchayats and Local Bodies' (2010) 45(32) Economic and Political Weekly 43.

⁸³ *Bondu Ramaswamy v Bangalore Development Authority* (2010) 7 SCC 129.

⁸⁵ *Bageshwari Kumar v The Chief Executive Officer (Administrator) Municipal Corporation, Gaya* (2007) 55(3) BLJR 2755 (Patna High Court).

⁸⁶ *Bimal Chandra Banerjee v State of Madhya Pradesh* (1970) 2 SCC 467; *Ahmedabad Urban Development Authority v Sharad Kumar Jayanti Kumar Pasawalla* (1992) 3 SCC 285.

⁸⁷ *Municipal Labour Union v The State of Maharashtra* AIR 2015 (NOC 162) 65.

⁸⁸ This is required under the constitutional procedure for amendment, specified in art 368 of the Constitution.

⁸⁹ The Sarkaria Commission was constituted in 1963 by the Government of India to examine the working of India's federal framework. It consisted of two members, B Sivaraman and Dr SR Sen. The Commission submitted a lengthy report in 1988, and its recommendations are reproduced by the InterState Council on its

website: http://interstatecouncil.nic.in/Sarkaria_Commission.html, accessed November 2015.

⁹⁰ Sarkaria Commission Report (n [89](#)) para 9.6.06
<<http://interstatecouncil.nic.in/Sarkaria/CHAPTERIX.pdf>>, accessed November 2015.

⁹¹ *Kesavananda Bharati v Union of India* (1973) 4 SCC 225 [54] (SM Sikri CJ).

⁹² Rajiv Gandhi, 'Democracy and Development' (Conference of Chief Ministers on Panchayati Raj, New Delhi, 5 May 1989) in *Rajiv Gandhi, Selected Speeches and Writings 1989*, vol 5 (Publications Division, Ministry of Information and Broadcasting, Government of India 1991) 155–66.

PART VI

RIGHTS—STRUCTURE AND SCOPE

CHAPTER 32

RIGHTS

breadth, scope, and applicability

ANANTH PADMANABHAN

I. INTRODUCTION

THE guarantee of fundamental rights in [Part III](#) of the Constitution represents a tectonic shift in constitutional philosophy from the Government of India Act 1935. The latter put in place a comprehensive governance structure, but with minimal protection to the governed. [Part III](#) replaces this notion of authority with a bidirectional vision of rights and duties. There are five issues raised by [Part III](#):

1. the actors which possess such rights, and the actors against which such rights apply (the ‘actor’ question);
2. the forms of state action that stand subject to scrutiny (the ‘form’ question);
3. the effect of unconstitutionality on the validity of a law (the ‘effect’ question);
4. the substantive rights and their respective limitations (the ‘content’ question); and
5. the remedies available for infraction of these rights (the ‘remedies’ question).

This chapter answers the first three, and the fourth and fifth are addressed in the chapters that follow. An important limb of the first question, being the application of fundamental rights to private actors, is addressed in the chapter titled ‘Horizontal Effect’. (This chapter will instead examine how the State is defined under the Constitution.) Likewise, two significant controversies relating to the second question, being the applicability of fundamental rights to personal laws and to constitutional amendments, are covered in the chapters on ‘Constitutional Amendment’ (chapter 14) and ‘Personal Laws’ (chapter 50).

This chapter addresses the three questions in its two separate parts. In defining the ‘State’, the Supreme Court has placed considerable emphasis on the structural aspects of the organisation in question, and the interpretive approach

can be characterised as structuralism as opposed to functionalism. Section II argues that because private bodies may, under certain specific circumstances, carry out actions *attributable* to the State, the Court has to appropriately modify the present structural test to bring such bodies within the ambit of ‘State’. At the same time, transitioning to an open-ended functionalist interpretive approach will introduce considerable uncertainty, simply because multiple conceptions of the State and its functions are possible at any given point in time. Section II then proceeds to discuss the contentious issue of treating the judiciary as ‘State’ for the purposes of [Part III](#) of the Constitution. The second limb of the first question, that is, the variance in the identity of rights holders based on the person–citizen distinction maintained throughout [Part III](#), is then discussed. Section III briefly discusses the meaning of ‘law’ in Article 13 of the Constitution. This section then proceeds to discuss the effect of unconstitutionality. The doctrine of severability, a mechanism by which an unconstitutional law is treated as void only to the extent of its unconstitutionality and no more, the technique of reading down a provision to keep it within permissible constitutional limits, and the doctrine of eclipse, which carries particular relevance in the case of pre-constitutional enactments, are discussed here.

II. THE ‘ACTOR’ QUESTION

1. Rights for Whom?

Before evaluating the actors against which a rights holder can assert his fundamental rights, it is important to ask who can qualify to be a rights holder. There are two words carefully chosen in respect of some rights and not others that capture the controversy here: ‘persons’ and ‘citizens’.¹ The first is wider, the second narrower. The first, defined in the General Clauses Act 1897,² covers artificial entities such as companies and associations. The second, governed by [Part II](#) of the Constitution and the Citizenship Act 1955, can only apply to natural persons.³ This makes it moot whether rights reserved for citizens can be availed by artificial persons. The Supreme Court in *State Trading Corporation v Commercial Tax Officer* (hereinafter *STC*) held that rights under Article 19, reserved for citizens, could not be availed by corporations.⁴ An attempt to circumvent this by impleading shareholders along with the corporation was

similarly scuppered in *Tata Engineering and Locomotive Co Ltd v State of Bihar*.⁵ The Court later watered down the absolutist framing of this bar in *Rustom Cavasjee Cooper v Union of India*,⁶ by permitting shareholders to agitate the corporation's cause. This precedent has been subsequently followed, leading to the prohibition in *STC* amounting to no more than a technical objection that can be overcome by way of impleading shareholders or other interested natural persons and sufficiently pleading personal injury caused to them in the writ petition.⁷

2. Who is the 'State'?

a. Structural Beginnings

We can now turn to the meaning of 'State'. Article 12 of the Constitution reads as follows:

In this Part, unless the context otherwise requires, 'the State' includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India.

The device of an inclusive definition makes it clear that the Constituent Assembly did not wish to fossilise the list of actors against whom fundamental rights could be claimed. This is made all the more evident by the expression 'other authorities'—one which, akin to an accordion, is capable of contextual stretches and compressions in meaning. Commenting on the draft Article 7, Dr BR Ambedkar clarified that the purpose of [Part III](#) was not only to bind the Central and State Governments but also every district local board, municipality, *panchayat*, *taluk* board, and every other authority created by law and vested with the authority to make laws, rules, or by-laws.⁸ At the time, local authorities issued by-laws to bind citizens.⁹ Ambedkar's reference to this mode of lawmaking reveals the distinctive governmental structure he had in mind when formulating the notion of State. This structuralist idea of 'State' did not, on its face, appear accommodating of broader functional considerations such as operational influence wielded over citizens, or State patronage. The earliest decision on Article 12, that of the Madras High Court in *University of Madras v Shantha Bai* (hereinafter *Shantha Bai*),¹⁰ reflected this by concluding that 'other authorities' would only include those exercising *governmental functions*, when

construed *ejusdem generis*.

For citizens, a narrow interpretation of Article 12 was unsatisfactory for three important reasons. First, there would be lesser actors against whom fundamental rights could be claimed. Secondly, an ordinary civil suit would take anywhere from five years to more than a decade to come to a final resolution, at the trial stage alone. Writ petitions, both under Articles 32 and 226 of the Constitution, have always consumed less time and seen higher disposal rates. Moreover, with less procedural and evidentiary constraints binding the Court, it would have greater flexibility to innovate as regards speed tracking the case and fashioning effective remedies. Thirdly, though Article 226 was not technically confined to ‘State’ actors, the fact that the body in question was ‘State’ under Article 12 would foreclose challenges to the maintainability of the writ petition. Non-State actors could, with relatively greater ease, challenge maintainability by contending that their actions were in the purely private realm.¹¹ These factors combined to drive the push for a functionalist approach to interpreting Article 12, the guiding principles of which are detailed below.

Before we proceed, it will be helpful to say a little about structuralism and functionalism. Structuralism, as a method of constitutional interpretation, attempts to derive constitutional rules from the relationships and interactions between various constitutional institutions or ‘structures’.¹² Structuralists conceptualise the Constitution as a document creating an overall structure of governance, with substructures therein, and devices such as checks and balances, separation of powers, and federalism, governing the relationship between these substructures.¹³ In the present context of individual rights, structuralism focuses on the structure of the government and the relationship between the government and the governed ‘individuals’.¹⁴ Structuralist modes of interpretation suffer from a major problem, this being their failure to factor in the possibility of redundancy of the structure, with efflux of time, to fulfil its intended objectives.¹⁵

Functionalism, in contrast, works inductively, shaping constitutional policy and practice through the case-by-case application of independent normative values that the law ought to promote.¹⁶ Pragmatic values, such as adaptability, efficacy, and justice in law can potentially tip the scales,¹⁷ with the judge eventually preferring one set of values over another and placing equal, if not greater, emphasis on the context as much as the text.¹⁸ Within the constitutional context, functionalist judges perceive the Constitution as an evolving document, and constantly refine established precedent to actualise preferred values.¹⁹ Due

to the extreme open-endedness in this method, functionalism suffers from higher indeterminacy than structuralism. This method of constitutional interpretation is more likely than structuralism to remain unmoored from the constitutional text,²⁰ and for this reason is often referred to as a non-interpretive method driven by the *consequences* of the construction placed on the text and the *socio-political predilections* of the judge.²¹

b. *The Functional Turn and the Agency or Instrumentality Doctrine*

Mathew J's concurring opinion in *Sukhdev Singh v Bhagat Ram* (hereinafter *Sukhdev*) sowed the seeds of functionalism in the Supreme Court's interpretive approach to Article 12.²² Previously, the Court had considered the meaning of 'State' in *Rajasthan State Electricity Board v Mohanlal* (hereinafter *RSEB*),²³ and found the Electricity Board to be within the scope of 'other authorities' due to the presence of a single structural characteristic—its creation by a statute. But for Mathew J's concurrence, *Sukhdev* would have ended up being a similar exercise in narrow structuralism. The facts here were simple. Two *statutory* corporations and a *statutory* commission had, in accordance with powers conferred by their respective statutes, framed regulations pertaining to removal of their employees from service. Contravening these regulations, they fired their employees, leading to writ petitions that averred violation of fundamental rights. The majority relied on the structural features of the three different bodies and their statutory character, to eventually conclude on their status as 'agencies' of the Union government.

Mathew J straddled a different path to reach the same destination. He propelled the discussion by presenting two conceptions of the State—one, a 'coercive machinery wielding the thunderbolt of authority', and the other, a 'service corporation'—and disclosed his preference for the latter in setting the boundaries of Article 12.²⁴ To him, even a body with no financial funding from the government could qualify as 'State' if its functions were of high public importance and closely related to, or allied with, those of the government.²⁵ Conversely, a body receiving financial support from the government could fall outside the purview of 'State' if its functions were purely private in character.²⁶

At the same time, Mathew J was conscious of the perpetration of power through private mechanisms such as standardised contracts, price fixation, and media control.²⁷ He unambiguously denounced a narrow structuralist

construction that cabined private and State action within separate chambers. Instead, he laid emphasis on the ‘agency or instrumentality’ character of the body in question, thereby factoring in financial support coupled with an unusual degree of control exercised by the government over a body’s management and policies. In this context, he referred to the State Action doctrine applied by courts in the United States. Though he did not, in the ultimate analysis, rely on this doctrine to formulate the boundaries of the ‘agency or instrumentality’ test, his conception of ‘State’ under Article 12 did extend to even pure private bodies whose actions could be ‘fairly attributed to the State’.²⁸ It is in this broader sense that he used the term ‘agency or instrumentality’.²⁹ He was, through this framework, advocating the sort of meta-analysis that factored in the ‘totality of the circumstances’ before branding an authority a ‘State actor’.³⁰

This novel framework of ‘agency or instrumentality’ guided the Court’s approach, by and large, to the definition of ‘State’ in subsequent decisions that set the trend of stretching the accordion to bellow the availability of fundamental rights protection. A more inflexible approach of narrow structuralism would, however, linger on in the background, and the root cause for this was another decision of the same bench, issued on the same day as *Sukhdev*. In *Sabhajit Tewary v Union of India*,³¹ the Court, in a poorly reasoned two-page order, held that the Council of Scientific and Industrial Research (CSIR) would not fall within the purview of ‘State’ simply because its legal form was that of a society registered under the Societies Registration Act, and thus lacking in ‘statutory character’. As examined in the subsequent parts of this chapter, this ghost of structuralism came to haunt the later jurisprudential growth of Article 12.

c. Conceptualising the State

Despite *Sabhajit Tewary*, the wider notion of ‘agency or instrumentality’ of the State became the judicially applicable standard to determine the ‘State’ character of a private body. In *Ramana Dayaram Shetty v International Airport Authority* (hereinafter *RD Shetty*),³² the Court categorically held that ‘agencies or instrumentalities’ of the State would be amenable to a fundamental rights-based review of their actions. *RD Shetty* also made clear references to the welfare state model and to Charles Reich’s seminal piece³³ on the growing influence of government through its regulatory power of licensing and conferment of economic largesse to private entities.³⁴ These, in turn, furnish a better sense of

the State and its functions, as conceived by the Court, when steering the transition to a functionalist interpretation of Article 12.

This conception was a product of its times, nurtured in its imagination by the philosophy of Nehruvian socialism and the welfare state model. The Court was fixing the reach of fundamental rights protection in an era of all-pervasive State presence, where the role of even private actors was dictated by the Planning Commission and regulated through a system of licences and permits. In this era, the Court naturally perceived the State–citizen interaction as one where the State, using its pervasive hold over all aspects of public life ranging from education to public health to plain commercial activities such as the running of banks and the management of airports, would be able to effectuate social change.

This conception of the State was in stark contrast with another possible model that a functionalist approach could equally accommodate—that of a neo-liberal State whose role was limited to guaranteeing wealth maximisation through more efficient and low-transaction cost interactions between private actors.³⁵ In *RD Shetty*, the Court could well have concluded that the Airports Authority of India, a statutory corporation mandated with the task of running airports efficiently, could never be saddled with additional procedural burdens when awarding contracts, bearing in mind the inordinate transaction costs tied in with such procedures. The Court refused to take this position, bearing in mind the pervasive influence that such statutory authorities had over the citizen, even when dealing with them as commercial entities at arm’s length. This conclusion paints for us the picture of an expansionary State, tasked with a higher responsibility of fairness in its dealings, sometimes even at the altar of efficiency.

Later decisions of the Court add colour to this canvas. In *Managing Director, Uttar Pradesh Warehousing Corporation v Vijay Narayan Vajpayee*, Chinnappa Reddy J, in his concurring decision, referenced the preamble to the Constitution to hold building, irrigation, and engineering projects, and trading, distribution, and purchase of goods and services as within ‘intense governmental activity’.³⁶ Similarly, the Central Inland Water Transport Corporation, a government company under Section 617 of the Companies Act 1956, was held to be ‘State’ under Article 12, despite its functions being completely outside the traditional domain of the government.³⁷ The Court here reasoned that even trading and business activities of the State would constitute ‘public enterprise’.³⁸ In a more recent case, the Court considered it material that a particular entity was incidentally tasked with the duty to sponsor rural development—an important public duty allied with duties of the State—for the purpose of holding it ‘State’

under Article 12.³⁹ These decisions point to an expansive conception of State functions too, one where almost any activity bearing some impact on public life would qualify as a State function.

This expansionary notion of what a State meant, and was meant to do, ultimately resulted in a strong doctrinal push back with strong structuralist undertones. The growing inconsistency between the functionalist model, as articulated in welfare state terms by the Court, and the economic changes that swept the nation post the early 1990s, leading it to embrace what could arguably be branded a neo-liberal form of government, plausibly contributed to the recoiling. But before concluding thus, it is important to realise that the Court, even at the peak of its functionalist phase, failed to provide the much-required doctrinal transition from a structuralist to a more expansive functionalist test. And this, above all, could have resulted in dislodging the functional flexibility in Article 12. The pathway to this realisation lies in a close reading of *RD Shetty's* successor, the much-lauded *Ajay Hasia v Khalid Mujib Sehravardi* (hereinafter *Ajay Hasia*).⁴⁰

d. *The Juristic Veil*

The Court in *Ajay Hasia* introduced the juristic veil principle, thus disclosing for the first time a conceptual rationale for the 'agency or instrumentality' approach. Specifically, the Court held that the juristic veil of corporate personality, worn only 'for the purpose of convenience of management and administration' could not be 'allowed to obliterate the true nature of the reality'.⁴¹ The reality was undoubtedly the 'deeply pervasive presence of the Government' behind the formal ownership cast in corporate mould.⁴² In this fashion, *Ajay Hasia* took the conversation to the purpose served, in law, by the 'agency or instrumentality' approach: disregard of the corporate structure.

Used frequently by courts in the United States, the 'agency or instrumentality' principle traces its origins to Cardozo J. In *Berkey v Third Avenue Railway Co.*,⁴³ when adjudicating whether the holding company could be held liable for the negligence of its subsidiary railroad company, the great judge held that '[D]ominion may be so complete, interference so obtrusive, that by *the general rules of agency* the parent will be a principal and the subsidiary an *agent*.'⁴⁴ Soon enough, this common law theory of agency made way for a more structured 'instrumentality' analysis, probably due to a more than optimal

imposition of liability on the parent corporation under the agency theory.⁴⁵ However, the use of the term ‘agency’ continued, resulting in interchangeable application of terms such as ‘agency’, ‘alter ego’, ‘mere instrumentality’, ‘sham corporation’, and ‘identity’.⁴⁶ Attempting to provide doctrines unique to the law of corporations that went beyond traditional common law concepts such as ‘agency’ and ‘trust’, courts in the United States formulated the ‘instrumentality’ and ‘alter ego’ doctrines to govern piercing of the corporate veil.⁴⁷

With regard to the ‘instrumentality’ doctrine, *Lowendahl v Baltimore & Ohio Railroad Co* laid down its basic three-pronged formulation, the first prong of which was insistence on the presence of ‘control, not mere majority or complete stock control, but complete domination, not only of finances, but of policy and business practice in respect to the transaction attacked so that the corporate entity as to this transaction had at the time no separate mind, will or existence of its own’.⁴⁸ Lending further structure to this first prong was Powell’s leading treatise of the day, which flagged the presence of eleven factors or circumstances to establish the presence of such control.⁴⁹

Even this brief examination of the ‘instrumentality’ doctrine discloses the extent of structuralist probing intrinsic to it. And this is precisely what set apart this doctrine from the State Action doctrine in constitutional law that seemingly ignited Mathew J’s functionalism. The notion of an ‘agency or instrumentality’, traditionally understood, addressed the actor and not the action, thus encompassing a minor part of the State Action doctrine’s much wider sweep. The State Action doctrine, on the other hand, extended to situations where purely private actors, with no structural presence of the State in their organisation or financing, could still commit to action that ended up being ‘attributed’ to the State. The US Supreme Court’s decision in *Lebron v National RR Passenger Corp*,⁵⁰ where Scalia J relied on this difference in scope to consider the State Action doctrine redundant when Amtrak, a leading railroad corporation, was already found to be an ‘agency or instrumentality’ of the State, makes this point clear. Therefore, Mathew J erred in using the ‘agency or instrumentality’ framework, because he did not intend the juristic veil principle to confine the scope of State under Article 12.

By using juristic veil as the conceptual basis for the ‘agency or instrumentality’ framework, *Ajay Hasia* replaced Mathew J’s functional approach to the meaning of ‘State’ with a structuralist approach that took into account a few more factors than the narrow one advocated in *RSEB*. Essentially, the Court continued to look at whether the relationship of the entity in question with the citizen extended the government’s relationship with the latter through

the presence of government in the former's structural setting. This is clear from the following six principles laid down by the Court,⁵¹ which have subsequently played a role in channelling judicial inquiry into the public nature of the authority:⁵²

1. If the entire share capital of the corporation is held by the government, it would go a long way towards indicating that it is an agency or instrumentality.
2. Where financial assistance from the State meets almost the entire expenditure of the corporation, it would indicate governmental character.
3. The corporation enjoying a monopoly status conferred or protected by the State, would be of relevance.
4. Existence of deep and pervasive State control indicated 'agency or instrumentality' character.
5. Functions of the corporation being of public importance and closely related to governmental functions would be relevant in classifying the corporation as an instrumentality or agency of government.
6. Specifically, if a governmental department was transferred to a corporation, it would strongly support an inference of its instrumentality or agency status.

Though the Court held the Regional Engineering College, Srinagar, to be 'State', the juristic veil rationale introduced to conceptually support the 'agency or instrumentality' framework facilitated the re-emergence of a narrow structuralist doctrine over time. Unfortunately, the juristic veil rationale provided little conceptual support for the third and fifth principles above. This would eventually push the Court to rein in the sweep of 'State' by introducing a narrow structural test of 'functional, financial *and* administrative' control, rendering these two principles obsolete in effect.

As Krishna Iyer J articulated with even greater precision in *Som Prakash Rekhi v Union of India*—a case that held Bharat Petroleum Corporation Ltd to be 'State'—the law had evolved to encompass a 'mere agent or surrogate of the State, in fact owned by the State, in truth controlled by the State and in effect an incarnation of the State' within the purview of 'State'.⁵³ Krishna Iyer J additionally, and incorrectly, held that an agency or instrumentality must also be vested with the authority, by or under law, to affect the legal relations of oneself or others.⁵⁴ The subsequent decision in *All India Sainik Schools Employees' Association v Sainik Schools Society*,⁵⁵ where the Sainik Schools Society was

determined ‘State’ under Article 12, makes clear that no such requirement exists.⁵⁶ The Court in *Manmohan Singh Jaitla v Comr, Union Territory of Chandigarh*,⁵⁷ went even further, to hold as ‘State’ an aided school that received 95 per cent of its expenses from the State Government.⁵⁸

e. *Post-Ajay Hasia*

Soon after *Ajay Hasia*, the Court held another registered society, the Indian Council of Agricultural Research (ICAR), to be ‘State’.⁵⁹ The Court observed that from its inception, the ICAR had been uninterruptedly supported and controlled by the government, rendering it an instrumentality of the State. The wider structuralist approach that *Ajay Hasia* had provided conceptual support for, under the veneer of an expansive functionalist approach,⁶⁰ has found expression in several subsequent decisions.⁶¹ In *BS Minhas v Indian Statistical Institute*,⁶² the Court conducted an almost perfunctory analysis of the respondent Institute’s structure to find deep and pervasive control by the government. A closer look would have thrown up a different outcome. Even structurally, only three of the twenty-five members in the governing council were nominated by the Union government, and the Institute was free to receive private funding. In similar vein, the Supreme Court considered the Uttar Pradesh State Land Development Bank as ‘State’, mainly because the relevant statute specifically provided for only one such bank in respect of the whole State, and exercised some controls over its functioning.⁶³ Here too, the Court used structuralism incorrectly.⁶⁴

The structuralism in the interpretive practice passed on from *Ajay Hasia* manifests itself on a close reading of the few decisions where the entities in question were not considered ‘State’. In *KM Thomas v Cochin Refineries Ltd*,⁶⁵ a decision of the Kerala High Court, the entity involved was a joint venture company, with State and State instrumentalities holding 74 per cent of the share capital and a foreign investor holding the rest. The investor also nominated two of the nine directors, while the State and its instrumentalities (the Life Insurance Corporation of India in this specific case) nominated the rest. Despite this, the Court held that the substantial shareholding in the hands of a single foreign investor, coupled with its reasonable representation in the board of directors, worked against a finding that the company was ‘an agent or surrogate of the State’ or a ‘limb of Government’.⁶⁶ Similarly, in *Tekraj Vasandi v Union of*

India,⁶⁷ the Supreme Court concluded that the Institute of Constitutional & Parliamentary Studies fell outside the purview of 'State'.

The Court, after closely evaluating the structural features of this Institute, considered it material that the Speaker of the Lok Sabha and Cabinet Ministers were involved in its administration in their *personal* capacity, and that external funding from private entities replenished the Institute financially, despite the government being the most significant source of funding. In *General Manager, Kisan Sahkari Chini Mills Ltd v Satrughan Nishad*,⁶⁸ a private mill, run by a registered society, was declared as falling outside the purview of 'State' because the government's shareholding was only 50 per cent, and its presence through nominees in the governing committee only 33 per cent. Moreover, the society's by-laws did not vest power with the State Government to issue directions to the Mill or determine its policy. Similar reasoning was instrumental in keeping the Punjab State Cooperative Land Mortgage Bank⁶⁹ and National Agricultural Cooperative Marketing Federation of India Ltd⁷⁰ outside the purview of 'State'.

Chander Mohan Khanna v National Council for Educational Research and Training involved another society, the National Council of Educational Research and Training (NCERT), which enjoyed wide advisory and policy implementation powers in the field of education.⁷¹ The Union government had fairly extensive supervisory authority over the NCERT's discharge of its functions. Various government officials were part of the Council and its executive committee. Yet, the Court held the NCERT to be an autonomous body, reasoning that governmental control existed merely to ensure proper utilisation of financial grants made by the government. Had the Court applied its functionalist conception, the contours of which have been outlined above, this was the prototypical authority to fall within the expanded definition of 'State'. Similarly, in *Ram Parshad v Indian Institute of Bankers*,⁷² performance in the examination conducted by the respondent Institute was, for all practical purposes, determinative of career advancement of bank employees because nationalised banks, as a practice, conferred pre-eminent recognition to this examination. The Institute may not have extended the government's relationship with the governed, but it wielded considerable authority due to State patronage, and yet was held to fall outside the purview of 'State'.

Regardless, the Court's doctrine probed beyond the legal form and status of the entity in question to the parallelism between its relationship with the citizen and the *government's* relationship with the latter. This caused much dissatisfaction in governmental circles, because the government desired blanket exclusion of certain forms of entities from the purview of 'State'. This desire led

to the One-hundred-and-forty-fifth Law Commission Report, which considered and rejected the proposed Explanation to Article 12: ‘A statutory corporation, a company formed and registered under the Companies Act, 1956, or a society registered under the Societies Registration Act shall not be considered as “State” for the purposes of this Part.’

The Law Commission concluded that neither was this proposal’s constitutional validity certain when held against the basic structure doctrine,⁷³ nor did it really address any of the causes advanced by the State for the malfunctioning of public service corporations.⁷⁴

Other than the above proposal, there was no substantive attempt on the part of any of the institutional actors to confine the scope of the ‘agency or instrumentality’ doctrine. In fact, in *Biman Krishna Bose v United India Insurance Co Ltd* (hereinafter *Biman Krishna Bose*),⁷⁵ the respondent insurer was held to fall within the ambit of ‘State’ because it was one of the acquiring companies *given the exclusive privilege* to carry on the business of general insurance in India. Unfortunately, the decision reveals no conceptual principle for this expansive understanding, except stray references to an unexplained ‘trappings of the State’ found present in the insurer. And the Court in any case soon moved to a narrow form of structuralism in *Pradeep Kumar Biswas v Indian Institute of Chemical Biology* (hereinafter *PK Biswas*)⁷⁶ and *Zee Telefilms Ltd v Union of India* (hereinafter *Zee Telefilms*).⁷⁷

f. *Structuralism Returns: ‘Functional, Financial, and Administrative Control’*

PK Biswas formally overruled *Sabhajit Tewary*, but more importantly, further narrowed the ‘agency or instrumentality’ test. Tracking the interpretation of ‘State’ from *RSEB* through *Sukhdev*, *Ajay Hasia*, and up until *Mysore Paper Mills*, the Court held that a body would qualify as ‘State’ under Article 12 where, in light of the cumulative facts, it was ‘financially, functionally, and administratively dominated by or under the control of the Government’.⁷⁸ Mere regulatory control over the body would not suffice.⁷⁹

Though apparently summing up the law, the majority decision in *PK Biswas* did much more.⁸⁰ It confirmed the Court’s preference for structuralism. Secondly, it imposed a more onerous standard than previously because the body had to now meet governmental domination on all three fronts: financially,

functionally, and administratively. Thirdly, it sealed the future of an open-ended functionalist inquiry by completely ignoring *Biman Krishna Bose* and the ‘trappings of the State’ framework applied there. Fourthly, it ignored the text of Article 12, which made a distinction between local or other authorities ‘within the territory of India’ on the one hand, and ‘under the control of the Government of India’ on the other. This distinction was explained early on by the Supreme Court in *KS Ramamurthy Reddiar v Chief Comr Pondicherry*,⁸¹ another constitutional bench decision. There, the Court held that the first category, that is, local or other authorities within the territory of India, ‘included all authorities within the territory of India whether under the control of the Government of India or the Governments of various States *and even autonomous authorities* which may not be under the control of the Government at all’.⁸² However, *PK Biswas* categorically ruled out attribution of ‘State’ character to autonomous authorities that did not satisfy its onerous three-pronged standard.

These concerns played out in *Zee Telefilms*, when a writ petition under Article 32 was filed against the Board of Control for Cricket in India (BCCI) due to a refusal on its part to deal with a television broadcaster for the live broadcast of games organised by the Board. BCCI, a registered society, enjoyed extensive powers in selecting cricketers to the national team representing India in international tournaments, and a virtual monopoly in organising major cricketing events in India. The broadcaster contended that BCCI, though an autonomous entity, received widespread State recognition, without which the team selected by it would not be able to represent itself as the Indian cricket team. BCCI countered that it did not satisfy the three conditions laid down in *PK Biswas*, and also took advantage of a major deficiency in the ‘all-or-nothing’ approach of characterising a body as State followed thus far by the Court. BCCI contended that were it to be held ‘State’ under Article 12, several other sporting and cultural bodies would also get caught within this net, opening the ‘floodgates’ and severely burdening the judiciary with writ petitions pertaining to any dispute involving these bodies.⁸³

The majority ruled in favour of BCCI because it did not fulfil the *PK Biswas* criteria, thus making the doctrinal inquiry close-ended. Paradoxically, the majority took note of two considerations that would typically present themselves in a functional approach, to fortify the structurally aligned ‘functional, financial and administrative control’ test laid down in *PK Biswas*. These considerations were (i) the ‘floodgates’ argument, explained above; and (ii) the shift in socioeconomic policy to usher in privatisation and the consequent distancing of the State from the commercial realm.⁸⁴ Realising that some of BCCI’s functions

significantly impacted the exercise of fundamental rights by citizens, the Court pointed to a writ petition under Article 226 as a possible safety valve.⁸⁵ Doing so, the Court conflated rights and remedies. Exclusion of BCCI from ‘State’ closed the door on fundamental rights review under Article 226 as well.

Sinha J, in a strong dissent, correctly pointed out that the majority was confining the meaning of ‘State’ to only those entities directly controlled by the government. He took note of a transmission of State power to autonomous bodies such as BCCI through indirect forms of patronage, thus placing them in a position of tremendous influence over citizens. Disfavouring the blanket exclusion of such autonomous entities from the purview of ‘State’, he enumerated seven additional criteria, influenced largely by functional norms, that could not be overlooked when deciding the issue.⁸⁶

Presently, the *PK Biswas* test of ‘functional, financial and administrative control’ has assumed overarching significance over all other tests in evaluating the ‘State’ character of all entities.⁸⁷ As a structural test, it has largely worked well, except where judicial discretion has played truant in reading the three prongs as disjunctive as opposed to conjunctive.⁸⁸ However, this begs the question: to what end? The test may be helpful in identifying the few situations today where an entity is in reality the government but cloaked with the juristic veil. But most authority over citizens is exercised by autonomous authorities with the benefit of State patronage or encouragement. This was Mathew J’s functional rationale for a transition to the ‘agency or instrumentality’ framework, but *Ajay Hasia* and then *PK Biswas* have built an overtly confining superstructure on this foundation.

g. The Path Forward

An all-or-nothing approach to Article 12, which focuses only on the narrow structural attributes of the organisation in question and ignores wholesale the nature of the action taken, can be both over-and under-inclusive. It is over-inclusive because it renders open to challenge any action taken by entities such as public sector undertakings, even if they be actions taken in the pure commercial realm.⁸⁹ It is under-inclusive because many actors without a formal ‘functional, financial and administrative control’ over them but wielding significant power over citizens due to direct or indirect State authorisation would be able to get away in respect of all their actions despite the public impact

caused by some of them.⁹⁰ At the same time, there is the strong possibility that a more open-ended functional approach will push us on the path of endless uncertainty. Because such an approach makes available for adoption by individual judges differing conceptions of State function, decisions on maintainability of writ petitions under Article 32 will be rendered hugely discretionary. In short, a tight doctrinal framework is as much difficult as it is the need of the hour. Below is outlined a sketchy travel plan for this arduous journey between Scylla and Charybdis.

The proposed solution is to let the concept of ‘agency’ in the ‘agency or instrumentality’ framework do more conceptual work than it does currently. Agency is broader than ‘juristic veil’ because it places emphasis on the ‘action’—an emphasis glaringly absent from the ‘juristic veil’ investigation. It is also more flexible than ‘juristic veil’, simply because the line between acts carried on for the principal and for oneself is fuzzy. This fuzziness assists the judiciary to redress both over-and under-inclusivity in a single stroke. Under an ‘agency’ investigation, the only significant question is whether a particular action has been authorised by, or actualised with the predominant support of, governmental authority, even when the actor in question is a wholly private body. This in turn signals a sliding-scale approach, where the deeper the pervasiveness of governmental control, the lesser the need to show specific governmental authorisation in respect of the action under challenge, and vice versa. So, instrumentality and its conceptual cousin, ‘juristic veil’, will continue playing their role, because in situations where the entity in question is ‘functionally, financially, and administratively’ controlled by the State, there would be no reason to look beyond to the ‘action’ in question. Such bodies would automatically qualify as ‘State’ under Article 12. In less striking instances, such as that of State-conferred monopolies or private actors carrying on a public duty, the sliding-scale approach can be suitably deployed to assess the presence or absence of a relationship of agency between the State and the entity in question.

A concrete example from one of the decided cases would help flesh out the details of such an inquiry. Assume that BCCI takes two unilateral decisions. The first is a decision to arbitrarily exclude cricketers from a particular State from playing for the ‘Indian’ cricket team, and the second a decision to award terrestrial rights to one broadcaster over all others despite significantly lower royalties being paid by the preferred broadcaster. BCCI will potentially be considered an agent of the State in respect of the first decision, because it is in a position to pick the ‘Indian’ cricket team largely by virtue of the implied authority conferred upon it by the Indian State. On the other hand, in respect of

its second decision, BCCI has to be treated on a par with any other private actor because the government has played no special role in helping BCCI actualise this decision. So, a writ under Article 32, and a challenge based on violation of the right to equality, will be maintainable only as regards the first decision.

h. *The Judiciary as ‘State’*

Concerns with the extension of fundamental rights to the judiciary arise only due to the unique nature of adjudicatory functions, and not because of any express limitations in Article 12. Administrative functions and procedural rules of the Court certainly open themselves up for challenge on the ground of fundamental rights violation, and attract the issuance of appropriate writs to remedy the same.⁹¹ Because the discharge of judicial functions, on the other hand, leads to no generally applicable action and only decides *lis inter partes*, there cannot be a violation of fundamental rights, goes the argument. This was broadly accepted by the Court in *Naresh Sridhar Mirajkar v State of Maharashtra* (hereinafter *Mirajkar*).⁹² The multiple views expressed in this case have been analytically dissected in Seervai’s leading treatise, and need no repetition. At the end of this incisive discussion, the learned jurist concludes that Hidayatullah J’s dissent, holding the judiciary ‘State’ for the purpose of enforcement of fundamental rights and a consequential writ under Article 32 issued by the Supreme Court to the High Court maintainable, is the correct view.⁹³

This question came up again for the Court’s consideration in *AR Antulay v RS Nayak* (hereinafter *Antulay*).⁹⁴ Here, the Court, in a peculiar and highly fractured verdict, held that a writ of certiorari would not issue to another bench of the Court under any circumstances. Yet, the Court arrogated wide powers to itself to remedy an earlier order that violated Article 14 and perpetrated grave illegality. Sourcing authority from its inherent powers under Article 142, the Court held that serious errors could be rectified *ex debito justitiae*, that is, as a matter of right, and in pursuance of the maxim *actus curiae neminem gravabit*—an act of the court shall prejudice no man. Despite all the fuzziness surrounding this decision, both in reasoning and conclusion, there is one proposition that emerges clearly. The judiciary could, when discharging its judicial functions in any given case, violate fundamental rights.⁹⁵ Unfortunately, the Court in its subsequent decision in *Triveniben v State of Gujarat*⁹⁶ misconstrued the holding in *Antulay* that a writ of certiorari under Article 32 was unavailable against the order of an

earlier bench, to support the proposition that the judgment of a court can never be challenged under Article 14 or 21. This observation is incorrect. *Antulay* proceeded to grant relief to the appellant largely on the basis of infraction of these rights by the earlier set of directions by the Supreme Court that diverted trial from the Special Judge to the High Court and in the process deprived the appellant of a statutory appeal he would otherwise have had to the High Court.

The Supreme Court has in its later decision in *Rupa Ashok Hurra v Ashok Hurra* (hereinafter *Hurra*)⁹⁷ built on *Antulay*, a one-off case where the Court corrected an earlier error, to fashion the institutional remedy of a curative petition in all cases where the petitioner has been denied a hearing or the judge is biased. The Court here clarified that a writ under Article 32 shall not lie from the Supreme Court to the High Court, or from one High Court to another, because ‘no judicial order passed by any superior court in judicial proceedings can be said to violate any of the fundamental rights enshrined in [Part III](#)’.⁹⁸ The Court added that superior courts of justice fell outside the ambit of State under Article 12.⁹⁹ While the conclusion of the Court on non-maintainability of the writ petitions may be correct as a technical matter, its reasoning is inconsistent with *Antulay*, though an affirmation of the majority ruling in *Mirajkar*.

In effect, the Court has confined the scope of errors that could potentially violate fundamental rights while in the discharge of judicial functions to the two tenets of natural justice: no man shall be condemned unheard, and no man shall be a judge in his own cause. Though the Court was careful to qualify that all the grounds on which a curative petition was maintainable could not be possibly enumerated, such petitions have definitely been very restrictive in their scope. In the single instance where a curative petition has, out of the thousands of such petitions filed since *Hurra*, been allowed, it was for violation of the first tenet of natural justice.¹⁰⁰ The Court has also made it amply clear in decisions post *Hurra* that it should be entertained only within the narrow parameters set forth therein.¹⁰¹ Though the Court has recently identified another circumstance, a scenario where public confidence in the integrity of administration of justice is shaken, as inviting appropriate intervention through a review petition under Article 137 or a subsequent curative petition,¹⁰² there has been no mention of violation of fundamental rights as an express ground for reconsideration post *Hurra*.

An important development since the *Mirajkar* era has been the exponential growth of public interest litigation and consequential judicial activism. In many such cases, the judiciary, even while discharging judicial functions, goes about its role more like the legislature or the executive, framing directions and

guidelines and overseeing their enforcement. There is no longer an easy, or strict, separation between these functions, and no longer is the judicial function merely restricted to *lis inter partes*. Unfortunately, the decisions in *Antulay* and *Hurra* have not even considered this strong additional reason to formally overrule *Mirajkar*. The curative petition does not seem to achieve any more than a writ petition. Arguably, it does a lot less, but at higher cost to the Court's resources and time. It also stands on weak foundations, being carved out from a very expansive reading of the Court's inherent power to do complete justice. Instead, the right course of action would be to overrule *Mirajkar*, accept the judiciary to be 'State' for all purposes and in respect of all its functions, and quash judicial orders that violate fundamental rights by issuing a writ of certiorari.

III. THE 'FORM' AND 'EFFECT' QUESTIONS

This section briefly considers two questions: the forms of State action that are subject to fundamental rights scrutiny, and the effect of such actions being declared as unconstitutional.

1. The Meaning of 'Law'

Unlike the American Constitution, the Indian Constitution contains an express provision conferring power on the Court to strike down a 'law' inconsistent with fundamental rights as being void. Article 13(2) reads in this connection as follows: 'The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.' Article 13(3)(a) defines 'law' to include 'any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law'. As Seervai notes, this is a very broad definition that covers subordinate delegated legislation as well as law that has not been enacted by the legislature, that is, long-held customs.¹⁰³ On the strength of this provision, almost all orders passed by the legislature and the executive that affect the rights of citizens are today caught within the ambit of Article 13(2), paving the way for the Court to issue appropriate writs of declaration of nullity when they violate fundamental rights.¹⁰⁴

Pre-constitutional enactments are also affected by the vice of unconstitutionality. Article 13(1) provides that all laws in force in the territory of India immediately before the commencement of the Constitution shall be void to the extent of their inconsistency with fundamental rights. In *John Vallamattom v Union of India*,¹⁰⁵ the Supreme Court, on the strength of this provision, struck down as unconstitutional Section 118 of the Indian Succession Act 1925, which restricted the rights of Christians to bequeath their property for religious or charitable purposes, for being in violation of Article 14. Whether the law under scrutiny be pre-or post-constitutional legislation, a common question that arises is as to the effect of unconstitutionality on such law. The doctrines of severability, reading down, and eclipse thus assume significance.

2. Doctrines of Severability and Reading Down

Both pre-and post-constitutional legislation are only declared void to the extent of their inconsistency with any of the fundamental rights. The rest of the law can be saved using the doctrine of severability. This doctrine, as explained in *RMD Chamarbaugwalla v Union of India*,¹⁰⁶ entails probing into multiple factors such as the legislative intent, semantic structure, scheme of the Act, and substantiality of truncation, to determine whether the valid provisions of a legislation ought to be enforced despite the finding of invalidity in respect of its other provisions.

The decision in *Delhi Transport Corporation v DTC Mazdoor Congress*¹⁰⁷ reveals how the technique of reading down avoids unconstitutionality by internally addressing the scope and coverage of the statutory provision.¹⁰⁸ Severance, on the other hand, mitigates the effect of unconstitutionality by saving those provisions that fall outside its vice. Therefore, sequentially, the latter follows the former, and the Court proceeds to sever only in cases where a reading down is not possible.¹⁰⁹

3. Doctrine of Eclipse

The doctrine of eclipse goes to the specific manner in which the nullification of a provision operates, and has been explained in *Bhikaji Narain Dhakras v State of Madhya Pradesh*.^{[110](#)} There, the Court explained that the operation of fundamental rights eclipses a law that has been validly enacted otherwise. As a consequence, if the constitutional bar is removed by way of a subsequent amendment, the law would be automatically revived without any further legislative intervention. This doctrine is of limited relevance today because the Supreme Court has categorically held it inapplicable to post-constitutional legislation that was invalid at the time it was passed. No subsequent action can revive such legislation, except where the initial invalidity of the provision was due to a procedural lapse—such as failure to take prior Presidential assent—rather than a substantive bar such as [Part III](#) or legislative incompetence.^{[111](#)}

IV. CONCLUSION

The Supreme Court's understanding of Article 12 displays considerable incoherence, the primary reason for which is the shift between versions of structuralist and functionalist interpretation without much regard for the over- and under-inclusiveness that mars its doctrine. Mathew J's concurrence in *Sukhdev* has been praised for its willingness to explore the 'reality' of the State, but unfortunately the decision reads more like an open-ended essay on the nature of the State than a doctrinal framework that produces some certainty in outcomes. This explains the structuralist pushback over the years, especially when Mathew J's conceptions of the State and its descriptive role were found inconsistent with the newly liberalised India of the 1990s and the twenty-first century. This chapter has attempted to emphasise the 'agency or instrumentality' framework by stressing the long-forgotten 'agency' relationship that may potentially exist between the State and the authority in question, and advocates a 'sliding-scale' approach that takes account of both the pervasiveness of State control and the public nature of the role performed by the entity in question.

The Court's doctrinal confusion has also extended to the understanding of its own functions, as seen from the constant flip-flops when it comes to recognising its status as 'State' under Article 12. The current system of curative petitions has

merely added one more round of review, in an altered format. It is both impractical and devoid of any constitutional sanctity. Seervai's reasons for considering the judiciary 'State' under Article 12 carry considerable intellectual force. It is time the Court recognises this, does away with curative petitions, and begins to entertain writ petitions against its own orders in the most exceptional of cases.

¹ For an overview of the different rights available to persons, and those confined to citizens, see *State Trading Corporation v Commercial Tax Officer* AIR 1963 SC 1811.

² Incorporated by reference vide Constitution of India 1950, art 367(1), the General Clauses Act 1897, s 3(42), defines 'person' to *include* 'any company or association or body of individuals, whether incorporated or not'.

³ The Citizenship Act 1955, s 2(f): "person" *does not include* any company or association or body of individuals, whether incorporated or not'.

⁴ AIR 1963 SC 1811.

⁵ AIR 1965 SC 40.

⁶ (1970) 1 SCC 248.

⁷ *Bennett Coleman & Co v Union of India* (1972) 2 SCC 788; *Delhi Cloth & General Mills Co Ltd v Union of India* (1983) 4 SCC 166.

⁸ *Constituent Assembly Debates*, vol 7 (Lok Sabha Secretariat 1986) 610, 25 November 1948.

⁹ *Sri Konaseema Cooperative Central Bank Ltd v N Seetharama Raju* AIR 1990 AP 171 [17].

¹⁰ AIR 1954 Mad 67.

¹¹ *Supriyo Basu v West Bengal Housing Board* (2005) 6 SCC 289; *G Basi Reddy v International Crops Research Institute* (2003) 4 SCC 225.

¹² Casey L Westover, 'Structural Interpretation and the New Federalism: Finding the Proper Balance Between State Sovereignty and Federal Supremacy' (2005) 88 *Marquette Law Review* 693, 695. The author also points out a more modern version of structuralism that attempts to derive inferences or principles from the structure of the constitutional text, concluding, however, that there is no real difference between these two versions.

¹³ Kimberly N Brown, 'Government by Contract and the Structural Constitution' (2011) 87 *Notre Dam Law Review* 491, 496.

¹⁴ Michael C Dorf, 'Interpretive Holism and the Structural Method, Or how Charles Black Might Have Thought About Campaign Finance Reform and Congressional Timidity' (2004) 92 *Georgetown Law Journal* 833, 835–36.

¹⁵ Louis Michael Seldman, 'The Poverty of Structuralism' (1995) 4 *Cornell Journal of Law and Public Policy* 547, 549.

¹⁶ William N Eskridge, Jr, 'Relationships between Formalism and Functionalism in Separation of Powers Cases' (1999) 22 *Harvard Journal of Law and Public Policy* 21.

¹⁷ Eskridge ([n 16](#)) 22.

¹⁸ R Randall Kelso, 'Styles of Constitutional Interpretation and the Four Main Approaches to Constitutional Interpretation in American Legal History' (1994) 29 *Valparaiso University Law Review* 121, 213–14.

¹⁹ Kelso ([n 18](#)) 217.

²⁰ For the same criticism levelled against structuralism and a possible solution in the form of the more

modern version of structuralism, that is, one based on the derivation of principles from the text, see Dorf ([n 14](#)) 830–44. See also Westover ([n 12](#)) 713–15 (‘Only themes and principles that can be fairly derived from the text are available to the conscientious structuralist’).

²¹ Kelso ([n 18](#)) 145–46.

²² (1975) 1 SCC 421.

²³ AIR 1967 SC 1857.

²⁴ *Sukhdev Singh* ([n 22](#)) [80].

²⁵ *Sukhdev Singh* ([n 22](#)) [97].

²⁶ *Sukhdev Singh* ([n 22](#)) [97].

²⁷ *Sukhdev Singh* ([n 22](#)) [91].

²⁸ *Lugar v Edmondson Oil Co* 457 US 922, 937 (1982).

²⁹ As evident from the decision in *Lebron v National RR Passenger Corp* 513 US 374 (1995), the internal discipline of the State Action doctrine confined ‘agency or instrumentality’ to the narrower idea of private actors that were in reality the government. For non-governmental entities encompassed within Mathew J’s conception of ‘agency or instrumentality’, the State Action doctrine applied only when they satisfied either of the three tests applied to determine whether actions of such purely private actors could be attributed to the State. These tests were: (1) the exclusive government function test; (2) the symbiotic relationship test; and (3) the nexus test. See Ronald J Krotoszynski, Jr, ‘Back to the Briarpatch: An Argument in Favor of Constitutional Meta-Analysis in State Action Determinations’ (1995) 94 Michigan Law Review 302, 314.

³⁰ Krotoszynski ([n 29](#)) 338.

³¹ (1975) 1 SCC 485.

³² (1979) 3 SCC 489.

³³ Charles A Reich, ‘The New Property’ (1964) 73 Yale Law Journal 733.

³⁴ *Ramana Dayaram Shetty* ([n 32](#)) [11].

³⁵ Martha T McCluskey, ‘Efficiency and Social Citizenship: Challenging the Neoliberal Attack on the Welfare State’ (2003) 78 Indiana Law Journal 783, 786.

³⁶ (1980) 3 SCC 459 [22].

³⁷ *Central Inland Water Transport Corp v Brojo Nath Ganguly* (1986) 3 SCC 156.

³⁸ *Central Inland Water Transport Corp* ([n 37](#)) [40].

³⁹ *Mysore Paper Mills Ltd v Mysore Paper Mills Officers’ Association* (2002) 2 SCC 167 (hereinafter *Mysore Paper Mills*).

⁴⁰ (1981) 1 SCC 722.

⁴¹ *Ajay Hasia* ([n 40](#)) [7].

⁴² *Ajay Hasia* ([n 40](#)) [7].

⁴³ 155 NE 58 (NY 1926).

⁴⁴ *Berkey* ([n 43](#)) (emphasis added).

⁴⁵ Erika Clarke Birg, ‘Redefining “Owner or Operator” Under CERCLA to Preserve Traditional Notions of Corporate Law’ (1994) 43 Emory Law Journal 771, 788.

⁴⁶ *Weisser v Mursam Shoe Corporation* 127 F 2d 344, 348 (2d Cir 1942); *House of Koscot Development Corp v American Line Cosmetics Inc* 468 F 2d 64, 67 (5th Cir 1972); *Lubrizol Corp v Cardinal Construction Co* 868 F 2d 767, 769 (5th Cir 1989).

⁴⁷ Thomas K Cheng, ‘The Corporate Veil Doctrine Revisited: A Comparative Study of the English and the U.S. Corporate Veil Doctrines’ (2011) 34 Boston College International and Comparative Law Review 329, 346.

⁴⁸ 247 AD 144, 156 (NY App Div 1936).

⁴⁹ Dante Figueroa, 'Comparative Aspects of Piercing the Corporate Veil in the United States and Latin America' (2012) 50 *Duquesne Law Review* 683, 722.

⁵⁰ 513 US 374 (1995).

⁵¹ *Ajay Hasia* (n 40) [9].

⁵² See *Federal Bank Ltd v Sagar Thomas* (2003) 10 SCC 733; *Sri Konaseema Cooperative Central Bank Ltd* (n 9); *Ram Parshad v Indian Institute of Bankers* AIR 1992 P&H 1 (applying all six factors in structured fashion to the respective entities at hand).

⁵³ (1981) 1 SCC 449 [26].

⁵⁴ *Som Prakash Rekhi* (n 53) [27].

⁵⁵ (1989) Supp (1) SCC 205.

⁵⁶ See also *School of Buddhist Philosophy v Makhan Lal Mattoo* (1990) 4 SCC 6.

⁵⁷ 1984 Supp SCC 540.

⁵⁸ See also *Prathama Bank v Vijay Kumar Goel* (1989) 4 SCC 441, holding a regional rural bank to be 'State' under Article 12.

⁵⁹ *PK Ramachandra Iyer v Union of India* (1984) 2 SCC 141.

⁶⁰ The Court in *Ajay Hasia* (n 40) [7] was keen to proclaim that '[W]here constitutional fundamentals vital to the maintenance of human rights are at stake, *functional realism* and not facial cosmetics must be the diagnostic tool, for constitutional law must seek the substance and not the form' (emphasis added).

⁶¹ *KC Sharma v Delhi Stock Exchange* (2005) 4 SCC 4; *Everest Wools Pvt Ltd v UP Financial Corp* (2008) 1 SCC 643; *Punjab Water Supply & Sewerage Board v Ranjodh Singh* (2007) 2 SCC 491; *Hyderabad Commercial v Indian Bank* 1991 Supp (2) SCC 340; *Delhi Transport Corporation v DTC Mazdoor Congress* 1991 Supp (1) SCC 600; *Sheela Barse v Secretary, Children Aid Society* (1987) 3 SCC 50; *Prathama Bank* (n 58); *Mahabir Auto Stores v Indian Oil Corp* (1990) 3 SCC 752; *Star Enterprises v City & Industrial Development Corp of Maharashtra Ltd* (1990) 3 SCC 280; *M Kumar v Bharath Earth Movers Ltd* AIR 1999 Kar 343; *AL Kalra v Project & Equipment Corp of India Ltd* (1984) 3 SCC 316; *Re ML Shaw* AIR 1984 Cal 22; *Premji Bhai Parmar v Delhi Development Authority* (1980) 2 SCC 129; *Jamshed Hormusji Wadia v Board of Trustees, Port of Mumbai* (2004) 3 SCC 214; *Indian Banks Association v Devkala Consultancy Service* (2004) 11 SCC 1.

⁶² (1983) 4 SCC 582.

⁶³ *UP State Cooperative Land Development Bank Ltd v Chandra Bhan Dubey* (1999) 1 SCC 741.

⁶⁴ For a functionalist interpretation of 'State' under similar circumstances, see *infra* the discussion on *Biman Krishna Bose v United India Insurance Co Ltd* (2001) 6 SCC 477.

⁶⁵ AIR 1982 Ker 248.

⁶⁶ *KM Thomas* (n 65) [12].

⁶⁷ (1988) 1 SCC 236.

⁶⁸ (2003) 8 SCC 639.

⁶⁹ *Pritam Singh Gill v State of Punjab* AIR 1982 P&H 228.

⁷⁰ *National Agricultural CoOperative Marketing Federation of India Ltd v NAFED Employees Union* (2001) 90 DLT 754. See also *Jitendra Srivastava v National Horticultural Research and Development Foundation* 2011 (3) Mah LJ 151; *Chakradhar v Sama Singha Service Cooperative Society* AIR 1982 Ori 38; *Sri Konaseema Cooperative Central Bank Ltd* (n 9); *Baroda Cotton Co v Andhra Pradesh State Federation of Cooperative Spinning Mills Ltd* AIR 1991 AP 320.

⁷¹ (1991) 4 SCC 578.

⁷² *Ram Parshad* (n 52).

⁷³ For more on this doctrine, see *Kesavananda Bharati v State of Kerala* (1973) 4 SCC 225.

⁷⁴ Law Commission of India, *Article 12 of the Constitution and Public Sector Undertakings* (Law Com No 145, 1992) paras 5.21–5.22 <<http://lawcommissionofindia.nic.in/101-169/Report145.pdf>>, accessed November 2015.

⁷⁵ (2001) 6 SCC 477.

⁷⁶ (2002) 5 SCC 111.

⁷⁷ (2005) 4 SCC 649.

⁷⁸ *PK Biswas* ([n 76](#)) [40].

⁷⁹ *PK Biswas* ([n 76](#)) [40].

⁸⁰ Lahoti J authored a dissent on behalf of himself and Raju J. The dissent reverberated with the undertones of a narrow structuralist reasoning, akin to that applied by Krishna Iyer J in *Som Prakash Rekhi*, where he emphasised that an ‘authority’ would mean only those bodies wielding the power to affect legal obligations and rights. The dissent distinguished between ‘agencies or instrumentalities’ and ‘authorities’ and held that while the latter would fit within the former category, the former would not necessarily fit within the latter. Interestingly, the dissent relied on Dr Ambedkar’s structuralist take on the expression ‘other authorities’. See *PK Biswas* ([n 76](#)) [70].

⁸¹ AIR 1963 SC 1464.

⁸² *KS Ramamurthy Reddiar v Chief Comr Pondicherry* AIR 1963 SC 1464 [11] (emphasis added).

⁸³ *Zee Telefilms* ([n 77](#)) [34].

⁸⁴ *Zee Telefilms* ([n 77](#)) [34]–[35].

⁸⁵ *Zee Telefilms* ([n 77](#)) [31]–[33].

⁸⁶ *Zee Telefilms* ([n 77](#)) [172].

⁸⁷ See *Jatya Pal Singh v Union of India* (2013) 6 SCC 452; *MP State Cooperative Dairy Federation Ltd v Rajnesh Kumar Jamindar* (2009) 15 SCC 221; *Lt Governor Delhi v VK Sodhi* (2007) 15 SCC 136; *Chain Singh v Mata Vaishno Devi Shrine Board* (2004) 12 SCC 634; *Virendra Kumar Srivastava v UP Rajya Karmachari Kalyan Nigam* (2005) 1 SCC 149; *Sindhi Educational Society v Chief Secretary, Government of NCT of Dehli* (2010) 8 SCC 49; *SS Rana v Registrar, Cooperative Societies* (2006) 11 SCC 634; *G Basi Reddy v International Crops Research Institute* (2003) 4 SCC 225; *State of Uttar Pradesh v Radhey Shyam Rai* (2009) 5 SCC 577; *AR Abdul Gaffar v Union of India* (2013) ILR 1 Del 494.

⁸⁸ *Balmer Lawrie and Co Ltd v Partha Sarathi Sen Roy* (2013) 8 SCC 345.

⁸⁹ *Central Inland Water Transport Corp* ([n 37](#)).

⁹⁰ *Zee Telefilms* ([n 77](#)).

⁹¹ *Premchand Garg v Excise Comr Allahabad* AIR 1963 SC 996.

⁹² AIR 1967 SC 1.

⁹³ HM Seervai, *Constitutional Law of India*, vol 1 (4th edn, Universal Book Traders 2002) 390–99.

⁹⁴ (1988) 2 SCC 602.

⁹⁵ The specific authority for this proposition can be found in the following paragraphs of the decision in *AR Antulay v RS Nayak* (1988) 2 SCC 602 [41]–[42], [47], [58], [59] (Mukharji J), [212] (Ranganathan J).

⁹⁶ (1989) 1 SCC 678.

⁹⁷ (2002) 4 SCC 388.

⁹⁸ *Rupa Ashok Hurra* ([n 97](#)) [7].

⁹⁹ *Rupa Ashok Hurra* ([n 97](#)) [7].

¹⁰⁰ *State of Madhya Pradesh v Sughar Singh* (2010) 15 SCC 96, revising the earlier order in *State of Madhya Pradesh v Sughar Singh* (2010) 3 SCC 719.

¹⁰¹ *Sumer v State of Uttar Pradesh* (2005) 7 SCC 220; *Central Bureau of Investigation v Keshub Mahindra* (2011) 6 SCC 216.

¹⁰² *Indian Council for Enviro-Legal Action v Union of India* (2011) 8 SCC 161 [196].

¹⁰³ Seervai ([n 93](#)) 400.

¹⁰⁴ For an illustrative list of various kinds of orders held to be within the purview of 'law' under Article 13(2), see MP Jain, *Indian Constitutional Law*, eds Justice Ruma Pal and Samaraditya Pal (updated 6th edn, LexisNexis Butterworths Wadhwa 2013) 2200.

¹⁰⁵ (2003) 6 SCC 611.

¹⁰⁶ AIR 1957 SC 628.

¹⁰⁷ 1991 Supp (1) SCC 600.

¹⁰⁸ As was rightly done by the Court in *Indra Das v State of Assam* (2011) 3 SCC 380, where it read down a provision criminalising membership of a banned organisation under any circumstances and without a showing of specific intent in respect of its activities.

¹⁰⁹ *Indra Das* ([n 108](#)).

¹¹⁰ AIR 1955 SC 781. For a detailed discussion of this case and the doctrine, see Seervai ([n 93](#)) 412.

¹¹¹ *KK Poonacha v State of Karnataka* (2010) 9 SCC 671; *Mahendra Lal Jaini v State of Uttar Pradesh* AIR 1963 SC 1019; *State of Gujarat v Manoharsinhji Jadeja* (2013) 2 SCC 300.

CHAPTER 33

HORIZONTAL EFFECT

STEPHEN GARDBAUM^{*}

I. INTRODUCTION

THIS chapter addresses the question of the applicability of [Part III](#) of the Constitution to non-State actors. With respect to private individuals and entities deemed not to be ‘the State’ for purposes of Article 12,^{[1](#)} to what extent, if any, are their actions subject to the Constitution’s fundamental rights provisions?

Let me begin by setting out the general framework for analysing this issue within comparative constitutional law, as it explains why a simple, one-syllable answer is usually not the full one and provides some useful concepts for determining the latter. In terms of whom a bill of rights binds or constrains, the most basic distinction is between ‘vertical’ and ‘horizontal’ effect. Rights with vertical effect apply only against the government, whereas horizontal rights also apply against private actors. For several well-known reasons that need not be rehearsed here, most rights in most constitutions—whether more traditional civil and political rights or less traditional economic, social, and cultural ones—are and have been vertical in nature, with at a maximum only a few exceptional ones being understood as horizontal in application.

Although this distinction drawn in terms of who has constitutional duties to comply with a bill of rights remains a useful starting point, its yes–no answer significantly oversimplifies the reality. For constitutional rights can impact and effectively regulate private actors even in systems that adhere to the basic vertical position. To take a well-known example from Germany, although the Basic Law’s right to free expression applies only to the legislative, executive, and judicial branches of government and not to private persons like the plaintiff, the Constitutional Court overturned on free speech grounds an injunction awarded to a Nazi-era film director against the boycott of his new film organised by another citizen.^{[2](#)}

Accordingly, a second distinction has been introduced that emphasises this latter way in which constitutional rights may impact non-State actors: the distinction between their direct and *indirect* horizontal effect. ‘Direct horizontal

effect’ is the position within the basic dichotomy in which constitutional rights bind private actors. Where it applies, individuals can be sued by their fellow citizens for violating their constitutional rights, as for example under the writ of *tutela* in Colombia or constitutional tort actions in Ireland. By contrast, ‘indirect horizontal effect’ means that although constitutional rights do not directly regulate and impose duties on private actors, they may nonetheless impact and indirectly regulate them. What is ‘indirect’ in the concept is the effect of a constitutional right on an individual, by comparison with the immediate, unmediated, or direct application under the fully horizontal position.

Indirect horizontality typically occurs in one of two general ways. The first is where vertical rights impose an affirmative constitutional duty on the government to protect individuals from certain actions by other private actors; for example, deprivations of their lives or property, or destruction of the environment. Here, constitutional rights indirectly impact private individuals and entities by mandating that the government enact and enforce measures against certain of their conduct that is not itself directly regulated by the constitution. This technique has been prominently employed under the European Convention on Human Rights.³

The second way is through the application of constitutional rights to private law, the rules and standards that structure the legal relationships of individuals inter se. Indirect horizontal effect occurs via the impact of a bill of rights on the law that individuals invoke and rely on in civil disputes, thereby limiting what they can be authorised to do and which of their interests, choices, and actions may be protected by law. So whereas under direct horizontal effect a bill of rights governs all *actions*, under indirect horizontal effect it governs all *laws*. By subjecting the provisions of private law to the requirements of a bill of rights, a constitutional system narrows the public–private gap in the scope of those rights. This general technique, as well as the important point that indirect horizontal effect is perfectly consistent with taking a vertical position within the basic dichotomy, is also illustrated by the famous US Supreme Court decision in *New York Times v Sullivan* invalidating on free speech grounds part of the private law of defamation within a constitutional system well known for its threshold ‘State Action’ requirement.⁴ As a result, the losing plaintiff was adversely affected by the First Amendment that was deemed to govern his legal relations with the newspaper, even though he was not bound by its provisions.

Indeed, here a further distinction has been suggested in the literature between ‘strong’ and ‘weak’ indirect horizontal effect.⁵ The former is where all private law is fully and equally subject to a bill of rights, regardless of type (common

law versus statute, or subject matter) and the nature of the litigation in which it is relied upon (including ‘purely private litigation’ between individuals). By contrast, ‘weak’ indirect horizontal effect means that some or all private law is not fully and equally subject to a bill of rights as compared with other types of government action. An example of weak indirect effect is the situation in Canada, where the Charter of Fundamental Rights and Freedoms does not apply to the common law at issue in private litigation—unlike a statute—although courts are supposed to take its values into account in developing the common law.⁶ By contrast, the common law at issue in private litigation in *New York Times* was fully and equally subject to the First Amendment (and held to violate it), and in the United States statutes and common law provisions would be treated identically.

In sum, constitutional rights that bind only the government (or some part of it) may have minimal regulatory impact on private individuals: where such rights do not impose protective duties and where they apply only to public law plus private law actions by the government alone—for example, in its capacity as employer or landlord. Here, constitutional rights have little or no horizontal effect at all, indirect or direct. More commonly, such vertical rights can have varying degrees of reach into the private sphere and indirect impact on private individuals, depending on the nature and number of affirmative protective duties and whether the stronger or weaker version of indirect horizontal effect is adopted. And of course, part or parts of a bill of rights may be given direct horizontal effect. Given the development and availability of these various possibilities, analysing the scope of application of a bill of rights only under the rubric of vertical versus horizontal effect, whilst obviously still important, does not provide the full picture of their impact. Accordingly, in discussing the application of [Part III](#) to non-State actors in this chapter, I aim to provide this more comprehensive account of the horizontal effect of fundamental rights in India by considering both the traditional dichotomy and the two main techniques of indirect effect in turn.

II. DIRECT HORIZONTAL EFFECT

The Supreme Court has consistently adhered to the *general* position that the fundamental rights contained in [Part III](#) of the Constitution apply only against the government and not against private individuals.⁷ This position is based on the original understanding of the Constituent Assembly,⁸ the text of the two

‘general’ or definitional articles at the beginning of [Part III](#), Articles 12 and 13,⁹ as well as those of several specific rights provisions that expressly identify ‘the State’ as the addressee. These include Article 14, prohibiting the State from denying to any person equality before the law/equal protection of the laws; Article 15(1), prohibiting it from discriminating on specified grounds; and Article 16, mandating equality of opportunity in public employment. As the leading treatise writer HM Seervai puts it, ‘Under Art. 13(2) it is State action of a particular kind that is prohibited. Individual invasion of individual rights is not, generally speaking, covered by Art. 13(2).’¹⁰

At the same time, the Supreme Court has found several exceptions to this general position, holding that the subject-less—although not expressly horizontal—provisions of Articles 17 (abolishing ‘untouchability’), 23 (prohibiting human traffic and forced labour), and 24 (prohibiting employment of children below fourteen years of age in factories, mines, or other hazardous occupations) are ‘plainly and indubitably enforceable against everyone’.¹¹ Articles 17 and 23 combined are perhaps the functional equivalent of the sole exception in the US Constitution to its general rule for constitutional rights of the need for ‘State Action’: the Thirteenth Amendment’s prohibition of slavery or involuntary servitude ‘anywhere in the United States’. In addition, both the text and the Constituent Assembly debates of 1947–48 make clear that Article 15(2) prohibits certain types of *private* discrimination on the basis of religion, caste, race, sex, or place of birth; namely by licensed individuals regarding ‘access to shops, public restaurants, hotels and places of public entertainment’.¹²

Beyond the text, a small part of the broad modern understanding of the right to life under Article 21 has also been given direct horizontal effect.¹³ In *Consumer Education and Research Centre v Union of India*,¹⁴ a three-judge bench held that Article 21 not only includes the right to health of employees but also applies against private employers in the context of the occupational health hazards caused by the asbestos industry. As the Court put it, under Article 21:

The State, be it Union or State government or an industry, public or private, is enjoined to take all such action which will promote health, strength and vigour of the workman during the period of employment and leisure and health even after retirement as basic essentials to live the life with health and happiness.¹⁵

Further, it stated that:

[I]n an appropriate case, the court would give appropriate directions to the employer, be it the State or its undertaking or private employer to make the right to life meaningful; to prevent pollution of the workplace ... The authorities or even private persons are bound by the directions issued by this Court under Article 32 [available only for violations of fundamental rights] and Article 142 of the

The Court deemed this to be such a case, and issued a set of three directions to ‘all the industries’ and three separate ones to the Union and State Governments. In another Article 21 case, the Court suggested in dicta that the right to privacy it had also implied into the right to life may apply against private actors, although the sole defendant was the State police authority.¹⁷

Two additional cases that might be thought to involve application of [Part III](#) to private actors do not do so on closer inspection. The 2012 decision in *Society for Unaided Private Schools of Rajasthan v Union of India* upheld the constitutional validity of the Right of Children to Free and Compulsory Education Act 2009 (RTE), which in relevant part required every school, including unaided private schools, to admit 25 per cent of its class from children belonging to disadvantaged groups and provide free education to them between the ages of 6 and 14, subject to reimbursement at the government school level.¹⁸ The RTE was enacted to implement the new Article 21A of the Constitution, which reads: ‘The State shall provide free and compulsory education to all children of the age of six to fourteen in such manner as the State, may by law, determine.’ By two votes to one, the majority upheld the statute as it applied to unaided non-minority schools, but unanimously invalidated it with respect to unaided minority schools for violating the special right afforded to minorities ‘to establish and administer educational institutions of their choice’ under Article 30(1).

Because the result of the case is that non-minority unaided private schools are required to admit ‘free seat’ children, it might seem as if they are rendered subject to Article 21A. But in fact there is no suggestion in the majority opinion that this recent constitutional amendment itself applies directly to private schools, or indeed any discussion of horizontality at all. Rather, the sole issue was whether the RTE, as a statute, imposes ‘reasonable restrictions’ under Article 19(6) on the right ‘to practise any profession or to carry on any occupation, trade or business’ contained in Article 19(1)(g). In other words, the case was analysed as one about justified limits of a fundamental right and not about horizontal effect. This is confirmed by the long (partial) dissent of Radhakrishnan J, whose argument in essence is that, as a statute, the RTE purports to overrule two prior Supreme Court decisions holding it unconstitutional under Article 19(1)(g) for the State to require unaided private schools to admit certain students, whereas only a properly worded constitutional amendment can do so. Article 21A, however, does not impose the requisite constitutional duties on private schools but only on the State, leaving it to fulfil

its obligation by an otherwise constitutional measure, which the RTE is not.

Somewhat less clearly, in the well-known and controversial case of *Vishaka v State of Rajasthan* (hereinafter *Vishaka*),¹⁹ the Supreme Court might be understood to have held that Articles 14, 15(1), 19(1)(g), and 21 apply horizontally in finding that they are violated by every incident of serious sexual harassment that undermines a ‘safe working environment’ and the dignity of the victim. It is less clear because, although there is no doubt that the Court found these constitutional rights had been infringed, both the identity of the infringer and the nature of the infringement are somewhat ambiguous in the judgment. First, because the case involved the brutal gang rape of a public employee, it is conceivable that the State employer—rather than the rapists—was the infringer of her constitutional rights, by failing to protect her from them. Secondly, the infringement may have been less the rape itself than the State’s more general failure to protect female employees from sexual harassment in its various forms, about which I will have more to say in the following section.

Whether or not it was a key factor in *Vishaka*, the ubiquity of public employment contexts for the various sex equality claims decided by the Supreme Court under Articles 14–16, as well as Article 19 claims, underscores the general rule rejecting direct horizontal effect. From Air India female flight attendants to redundancy-threatened employees of public corporations, it is only ‘persons in public employment, to whom the constitutional protection of Articles 14, 15, 16 and 311 is available’.²⁰

Turning from horizontal rights themselves to remedies for their breach, there have been too few instances of found violations by private actors to draw any firm conclusions. In *People’s Union for Democratic Rights v Union of India* (hereinafter *People’s Union*),²¹ having discussed at length the direct horizontality of Articles 23 and 24 in the context of responding to preliminary objections to the Court’s jurisdiction under Article 32—for the former because paying less than the statutory minimum wage may be a form of forced labour—the Court’s analysis on the merits of both whether these rights were violated and the remedies ordered was far more perfunctory. To the extent the statutory minimum wage had not been paid because the *jamadar* middlemen deducted a cut, the Court ordered the contractors to pay the workmen directly. Otherwise, it ordered the government entities to ensure that the various labour laws at issue were properly enforced and appointed three ombudsmen to inspect and oversee the employment.²² As for the Article 24 claim, the Court made no specific findings or orders. In *MC Mehta v State of Tamil Nadu*,²³ the Court found that the employment of children under the age of fourteen in the matchmaking

industry in Sivakasi violated Article 24, as well as several statutory prohibitions on child labour, and ordered the offending employers to pay compensation of Rs 20,000 for every child, the statutory fine, to be deposited into a ‘Child Labour Rehabilitation-cum-Welfare Fund’. Because the small sums involved would likely be insufficient to dissuade poor parents from continuing to seek employment of their children, the Court provided a series of ten directions to the State in fulfilment of its combined constitutional duties under Article 24 and Articles 39, 41, 45, and 47 of the Directive Principles of [Part IV](#). These included State-arranged alternative employment for parents and, otherwise, State payments to parents in lieu of income, as well as enforcing the compulsory education mandated by Article 45.

III. INDIRECT HORIZONTAL EFFECT: PROTECTIVE DUTIES

As discussed in the introduction, the indirect horizontal effect of constitutional rights may result from imposing affirmative duties on the State to protect individuals from certain types of private conduct. Such protective duties are a subset of all positive constitutional duties, as the latter by no means generally require the State to regulate private individuals. So, for example, the positive dimension of the rights to health care and education—which the Supreme Court read into Article 21 even before enactment of the express obligation to provide free and compulsory schooling under Article 21A²⁴—creates entitlements against the State, but does not require it to regulate private conduct.

In *People’s Union*, having found that Articles 23 and 24 applied against everyone, the Court continued:

Before leaving this subject, we may point out with all the emphasis at our command that whenever any fundamental right, which is enforceable against private individuals as such ... is being violated, it is the constitutional obligation of the State to take necessary steps for the purpose of interdicting such violation and ensuring observance of the fundamental right by the private individual who is transgressing the same.²⁵

In fashioning a remedy in that case, the Court relied primarily upon specifying the content of this State obligation. In this way, the affirmative duty can be viewed as a remedial alternative to imposing sanctions on the infringing private actors. But the interesting question for present purposes is whether and when such a protective duty exists *even in the absence* of the direct horizontal effect of that right. That is, is such a duty, resulting in the indirect horizontal effect of

constitutional rights, an attribute of some—or even all—other fundamental rights?

The Supreme Court has not provided a general answer to this question, or even a general criterion, but has imposed particular protective duties primarily in situations engaging the right to life under Article 21, as interpreted to include health and human dignity. In the *Consumer Education and Research Centre* case discussed above, the Court held that, as supplemented by several of the Directive Principles of State Policy, Article 21 includes the right to be free from a work environment that poses serious health risks and imposed a positive duty on the State ‘to take all such actions which will promote health, strength and vigour of the workman during the period of employment’.²⁶ This duty required it to take action against private employers in the asbestos industry. It is true, as we have seen, that the court also applied Article 21 directly against the employers in this respect—and indeed placed the same duty on them—but this duty on the State appears to be an independent one,²⁷ and may well be more extensive than the one imposed on private actors. In some other environmental cases decided around the same time, the court stopped just short of this step and issued a more conventional decision based on the violation of statutory laws by private companies and the failure of the State to properly enforce them, although the strong implication was that such omission amounted to a violation of its duty under Article 21.²⁸

Similarly, in the context of a writ petition under Article 226 seeking damages for a fire in a cinema that killed fifty-nine people, the Delhi High Court held that Article 21 imposes an affirmative duty on the State to protect the lives of individuals, obliging it to properly and effectively regulate the private property owners. This duty was breached where the various public authorities disregarded—through corruption and otherwise—the statutory requirements for public safety in cinemas, resulting in the devastating fire. By failing to protect life and provide safe premises, the State was liable to pay compensation to the victims for its violation of their Article 21 right.²⁹

In *Vishaka*, it will be recalled that it is not entirely clear from the judgment whether or not the Court held that the rights to equality, to pursue a profession, and to life/dignity applied against private actors such as the rapists in the case or non-State employers. The Court was far clearer about whether a violation of the victim’s rights had occurred than about who had violated them or what precisely the violation consisted in. A better reading of the decision, I suggest, is not that these rights have direct horizontal effect, but rather that they impose a constitutional duty on the State to protect individuals from sexual harassment in

the workplace regardless of source, a duty that renders effective laws against sexual harassment mandatory and not a matter of legislative choice. This is what the constitutional violation by the State amounted to. In the absence of such legislation, the Court, as a branch of the State for Article 12 purposes, filled the gap in the law on a temporary basis employing the broad powers granted to it by Article 142. In this way, once again, at least some of the fundamental rights that are not directly applicable to private individuals do not simply impose on the State the negative duty to refrain from acting in the specified way. They also create a positive duty to protect the right against deprivations by other individuals, who are in turn legally regulated by the resulting required measures. Thus, following *Vishaka*, all private employers—as well as public—are subject to the new, constitutionally mandated sexual harassment regime. Were the State not to adequately enforce the law, that would amount to a separate violation of its duty.

IV. INDIRECT HORIZONTAL EFFECT: PRIVATE LAW

The second way that fundamental rights may have indirect effect on non-State actors is via their impact on private law and ordinary private litigation. To the extent that such rights govern the private law that structures their legal relations with one another, they constrain what non-State actors can lawfully be authorised to do and which of their interests, preferences, and actions may be protected by law. Such indirect horizontal effect may be ‘strong’—where all private law and litigation is equally and fully subject to the fundamental rights—or ‘weak’—where at least some part of it is not fully governed by fundamental rights. Indirect horizontal effect thus expands the reach of fundamental rights into the private legal sphere and reduces the public-private division in their scope, although of course not by as much as direct horizontal effect.

As to the reach of [Part III](#) into private law, there has been little general discussion and few general principles established. Rather, the topic has been treated in more or less piecemeal, almost case-by-case, manner. Overall, while there are some areas and contexts in which fundamental rights fully apply to private law and litigation, there are others in which their impact is far less, creating significant pockets that retain a fairly sharp public-private division in the scope of [Part III](#).

As a starting point, it would seem that all law—including all private, common, and customary law—is subject and subordinate to the fundamental rights. If it

cannot be interpreted consistently with [Part III](#), then it is void to the extent of the inconsistency. This appears to be the clear meaning of Article 13,³⁰ which defines ‘law’ broadly, and also the general practice of the Supreme Court, as exemplified by two cases from the early 1960s, in which first a statute and then a local custom mandating pre-emption in land sales on the ground of vicinage were equally held to be violations of the right to equality under Article 15 and the (subsequently repealed) right to acquire, hold, and dispose of property under Article 19(1)(f).³¹ These decisions based on two fundamental rights applying to the State alone obviously had economic consequences for all the relevant potential buyers and sellers.

Although reaching the Supreme Court via writ petition rather than appeal in the context of private litigation, the decision in *Mohini Jain v State of Karnataka*,³² the case that established both a right to education as part of Article 21 and the obligation of the State to provide it, can also be seen as a case in which [Part III](#) applies to the private law of contracts and impacts private universities. This is because in holding that it was wholly arbitrary under Article 14 and a violation of its duty under Article 21 for the State to permit such universities to charge a capitation fee in consideration of admissions, the Constitution indirectly constrains their freedom of contract to charge what the market will bear.

An example of interpreting a private law statute consistently with [Part III](#) rather than invalidating it is *Githa Hariharan v Reserve Bank of India* (hereinafter *Hariharan*).³³ Here the Supreme Court held that Section 6 of the Hindu Minority and Guardianship Act 1956, which stated that ‘[t]he natural guardians of a Hindu minor ... are—(a) in the case of a boy or an unmarried girl—the father, and after him, the mother ...’³⁴ was ‘capable’ of being interpreted to mean that the mother becomes the guardian not only following the death of the father—the most obvious meaning—but also in the father’s absence or as the result of his indifference or mutual understanding between the father and mother. The alternative, said the Court, was to strike down the (private law) statute as an obvious instance of State sex discrimination under Article 15(1). Once again, although this fundamental right does not have direct horizontal effect, its application to this provision of private law undoubtedly impacts and effectively regulates many parents and children.

On the other hand, the nature of the Supreme Court’s writ petition jurisdiction under Article 32 (and to a lesser extent that of the High Courts under Article 226³⁵) as fundamentally a public law remedy serves to reinforce the general public–private division and limit the impact of [Part III](#) on private law and private

litigation. Because jurisdiction is granted solely for ‘the enforcement of the rights conferred’ by [Part III](#), it would seem that writ petitions must be brought against entities capable of violating them; that is, a ‘State’ under Article 12 or private individuals in the case of the few directly horizontal provisions.³⁶ Although the common practice of naming both State and non-State actors as defendants means the distinction between public and private litigation is not watertight, it is still the State action or omission that is the central prerequisite and focus, and the only normal basis for finding a constitutional violation.³⁷ This limitation, however, still in principle leaves the ordinary appellate jurisdiction of the Supreme Court (and High Courts) available for fundamental rights claims arising in the context of private litigation.

In addition, it seems somewhat uncertain whether courts are ‘the State’ for purposes of Article 12, so that their official actions must be consistent with [Part III](#). This is important because subjecting the actions of courts to constitutional rights appears to be a necessary, if not sufficient, condition of at least the strong version of indirect horizontal effect.³⁸ In both Germany and the United States, as discussed below, it is to a large extent through the constitutional rights obligations of the courts that this second technique of indirect horizontal effect operates. Seervai argues that the better position in India is that courts are the State for Article 12 purposes, although he acknowledges that the leading case on the subject does not squarely answer the question.³⁹ As mentioned above, this position also appears to underlie the Supreme Court’s gap-filling function in cases such as *Vishaka*.

This jurisdictional constraint is partly responsible for one notable area in which [Part III](#) has had limited impact on the rules of private law and the conduct of private litigation. In the field of tort law, the development in recent decades of parallel systems of public law tort actions in the Supreme Court and High Courts under their Articles 32 and 226 jurisdictions on the one hand, and ordinary private law tort actions commenced in the lower courts on the other,⁴⁰ has left the latter largely untouched by [Part III](#). The public or constitutional tort action against the State for violation of fundamental rights was first expanded to permit damage awards against it, then to cover various types of State inaction, especially under Article 21, and finally to incorporate looser or more flexible substantive standards of liability.⁴¹ It is true that in one sense this action breaches the public–private division and undermines the autonomy of this area of private law, but it does so in a very specific way. It treats the government’s liability for acts and omissions—and also that of private actors joined as co-defendants—separately, under public law principles, rather than the general

private law rules applying to individuals. In this way, it effectively moves the State's liability into the sphere of administrative law, as in many civil law systems. So although the public law tort action reduces their range, it does not *alter or affect the private law rules themselves*, but leaves them largely autonomous and uninfluenced by [Part III](#).

The reasons for this bifurcation undoubtedly lie in the combination of (i) the nature and limits of Articles 32 and 226 as public law remedies requiring State action or omission as an essential prerequisite; and (ii) the desire of claimants and proactive members of the higher judiciary alike to bypass the weaknesses and inefficiencies of the ordinary civil litigation system in the lower courts, with their massive backlogs, personnel shortages, and lack of funding.⁴² But the result is to create a fairly sharp public–private divide in the scope of [Part III](#), and hence a limited regulatory impact of fundamental rights on private individuals outside the public law tort regime.

A second important area of private law/private litigation in which [Part III](#) sometimes appears to play relatively little role is the ordinary contract scenario in which courts are requested by the non-breaching party to enforce the terms of an agreement.⁴³ The 2005 decision in *Zoroastrian Cooperative Housing Society v District Registrar* (hereinafter *Zoroastrian Cooperative*)⁴⁴ suggests that there are wholly substantive (and not only jurisdictional) limits to the impact of fundamental rights in this area of private law. In this case, which involved private litigation concerning the buying and selling of land subject to a restrictive covenant heard on appeal, the Court upheld the enforceability of the Zoroastrian Cooperative Housing Society's by-law preventing the sale of the respondent's land to a non-member of the Parsi religion against a claim that this violated Articles 14 and 15. More specifically, the Court rejected the claim that the relevant private law—the Gujarat Cooperative Societies Act 1961 and, in particular, its provision in Section 4—that a cooperative society shall not be registered if, in the opinion of the Registrar, its working is likely to be in contravention of 'public policy', must be interpreted in light of the constitutional values of equality contained in Article 14 and non-discrimination on the ground of religion contained in Article 15. According to Balasubramanyan J's judgment for the Court:

So long as there is no legislative intervention of that nature [to eliminate a qualification for membership in the cooperative society based on sex or religion], it is not open to the court to coin a theory that a particular by-law is not desirable and would be opposed to public policy as indicated by the Constitution. The Constitution no doubt provides that in any State action there shall be no discrimination based either on religion or sex. But [Part III](#) of the Constitution has not interfered with the right of a citizen to enter into a contract for his own benefit and at the same time incurring a

certain liability arising out of the contract.⁴⁵

And a little later:

The expression ‘public policy’ in the context of Section 4 of the Act can be understood only as being opposed to the policy reflected by the Cooperative Societies Act ... It is true that our Constitution has set goals for ourselves and one such goal is the doing away with discrimination based on religion or sex. But that goal has to be achieved by legislative action and not by the court coining a theory that whatever is not consistent with the scheme or a provision of the Constitution, be it under [Part III](#) or [Part IV](#) thereof, could be declared to be opposed to public policy by the court.⁴⁶

The judgment in this case therefore appears to reject the influential and widely copied approach of the German Constitutional Court that constitutional rights form an ‘objective order of values’ radiating throughout the legal system and that general statutory provisions such as public policy clauses are the specific mechanism by which ordinary courts must permit these values to penetrate and influence private law.⁴⁷ In contrast to the German approach of a unified legal system resulting from the equal subjection of all private law to constitutional values, the Supreme Court judgment can be read to suggest that constitutional and private law remain importantly separate spheres, with fundamental rights not merely applying for the most part only to the State (as also, for example, in Germany), but also primarily limited to public law and the public sphere without significant penetration into the law governing interpersonal relations.

This contrast is well illustrated by comparing the approach of the Israeli Supreme Court, which has adopted the German model, as set out in Aharon Barak J’s concurring opinion in *Burial Society of the Jerusalem Community v Kastenbaum*.⁴⁸ For him, the provision of the general contracts statute declaring contracts contrary to public policy void is the ‘channel’ into which basic human rights are brought into private law, requiring courts to balance freedom of contract and individual autonomy against relevant fundamental rights, such as equality and dignity. On the facts, Barak J determined that the private law values underpinning the Burial Society’s contract term requiring Hebrew-language-only inscriptions on gravestones were outweighed by the right to human dignity of the deceased and her family that this term denied. Accordingly, the contract was contrary to public policy conceived in this way, and the Burial Society (deemed a private actor for the purpose of this analysis) indirectly affected by the fundamental rights to which it was not formally bound.

The judgment in *Zoroastrian Cooperative* also appears to reject the specific decision in the well-known US case of *Shelley v Kraemer*,⁴⁹ which held on broadly similar facts that judicial enforcement of a discriminatory restrictive

covenant on the sale of land against a willing buyer and seller violates the equal protection clause, the equality provision of the Constitution. It did so, according to the US Supreme Court, because such enforcement amounts to active participation by the State in racial discrimination, although, in light of the perceived controversial implications of this reasoning, alternative, narrower theories have been canvassed. These include the *existence* of the court-made common law of racially restrictive covenants as a discriminatory exception to the usual rule of free alienability of land and the necessity of race-conscious application of this law by a court.

In seemingly holding that the Constitution and its fundamental rights provisions are not engaged by, or relevant to, all private law relationships and agreements—in effect that not all private law is subject to the Constitution—the Court carves out a certain autonomy or separateness for the former that is arguably hard to square with Article 13.

One question that arises is whether *Zoroastrian Cooperative* is inconsistent with *Hariharan*. For if the former suggests that private law need not be interpreted and applied in line with constitutional values in general and the value of equality and non-discrimination in particular, the latter, it will be recalled, is an instance of the opposite position. In *Hariharan*, the Court did bring the constitutional value of equality and non-discrimination on the grounds of sex to bear on the interpretation of the relevant provision of private law, finding a ‘capable’ meaning that was consistent with the right.

There are at least two possible ways of viewing the cases as compatible with each other. The first is that *Hariharan* concerns a ‘mandatory’ law in that the State is prescribing the compulsory terms of private legal relationships; here, who is a minor’s guardian. By contrast, the cooperative society case concerns a ‘permissive’ law, in that individuals set the terms of their private legal relationships and the State enforces them whatever they are.⁵⁰ In this latter type of case, the role of private autonomy rather than the government in norm creation is more pronounced and so, arguably, the impact of (non-horizontal) constitutional rights should be more attenuated. On this reading, juxtaposing the two cases, the Court appears to hold that although legislatures are free to ban private discrimination based on sex or religion, the Constitution does not require them to do so. At the same time, legislatures are not free to impose or require such discrimination. If so, the absence of such a positive constitutional obligation of course creates less impact of fundamental rights on, and greater autonomy for, individuals.

The second way is to question the reading of the *Zoroastrian Cooperative* decision as denying an interpretive role for constitutional values. Although there

is no real suggestion of this in the Court's judgment, an alternative reading of the case is that, far from holding the Constitution and its values not to be engaged at all, the Court did take the various relevant constitutional values into account, and that its narrow conception of public policy was the *conclusion* and not the premise of its analysis. To clarify, on this interpretation the Court found that the society's by-law and actions were protected exercises of both the fundamental right to form associations and unions under Article 19(1)(c) and of a religious minority to preserve its culture under Article 29(1), as well as instantiations of the private law values of freedom of contract and autonomy. Moreover, this combination of public and private law values outweighed the particular non-discrimination claim of the respondent/seller who, as a Parsi, had voluntarily become a member of the cooperative on the death of his father and agreed to its by-law at that time, perhaps having inherited land purchased at below market value due to the restriction. In other words, the Court engaged, at least in sub rosa fashion, in Barak-style balancing. For these fairly specific contextual reasons, the Court may plausibly be understood to have held that the public policy exception in the statute need not incorporate the constitutional value of equality, without necessarily implying that this would also be the case for every contractual restriction or private agreement.

All this said, a single case decided by a two-judge bench on relatively unsympathetic facts for the seller should probably not be taken to establish the general position of the Court on this broad issue. On the other hand, there is not much else to go on.

V. CONCLUSION

Through the use of its writ petition jurisdiction, the Supreme Court has in several well-known areas taken a pioneering and innovative approach to fundamental rights under [Part III](#). These include the development of public interest litigation, with its loosening of standing rules and (sometimes) substantive legal requirements; interpreting [Part III](#)—and especially the right to life in Article 21—expansively in light of the Directive Principles of State Policy in [Part IV](#); and finding some of these implied rights to impose judicially enforceable affirmative duties on the State, including welfare obligations and responsibilities to protect. As we have seen, the Court has also interpreted Article 21 to apply to private actors in the context of occupational health hazards, and perhaps also the right to privacy. These last two developments in particular produce indirect and direct

horizontal effect, respectively.

Somewhat ironically, however, the very success of the writ petition/public interest lawsuit has also limited the reach of fundamental rights into the private sphere. This is because as a public law remedy requiring a State defendant and primarily premised on its acts or omissions, Article 32 tends to reinforce rather than undermine the autonomy or separateness of private law, restricting the opportunities for interaction and influence. Accordingly, there are areas in which the Supreme Court has maintained more of a public–private division in the scope of fundamental rights than some other influential constitutional courts.

The major example of this is the relatively limited impact that [Part III](#) plays in ordinary private litigation, especially in tort and contract cases. There is no general principle that the fundamental rights or the values they represent must be brought to bear by courts in adjudicating such lawsuits, as in Germany and Israel—no general requirement that they take into account and balance constitutional values against the relevant private law ones. And although the same is mostly true in the United States, the *Zoroastrian Cooperative* case also seems to reject the specific decision in *Shelley v Kraemer* on the constitutionality of court enforcement of discriminatory restrictive covenants, which effectively covers some of the same ground as such a general requirement. For this reason, and notwithstanding the relatively little private liability that is pushed into the public law regime via co-defendancy, the indirect horizontal effect of [Part III](#) as it relates to private law is in practice weak rather than strong.

* Thanks to Arudra Burra, Tarun Khaitan, and Arun Kumar Thiruvengadam for valuable aid in identifying sources, and to Varun Srikanth for outstanding research assistance. In writing this chapter, I have found the following helpful: Ashish Chugh, ‘Fundamental Rights—Vertical or Horizontal?’ (2005) 7 SCC J-9; Sudhir Krishnaswamy, ‘Horizontal Application of Fundamental Rights and State Action in India’ in C Raj Kumar and K Chockalingam (eds) *Human Rights, Justice, and Constitutional Empowerment* (2nd edn, Oxford University Press 2007) 47–73; Madhav Khosla, *The Indian Constitution* (Oxford University Press 2012).

¹ On who is ‘the State’ under Article 12, see [Ananth Padmanabhan, ‘Rights: Breadth, Scope, and Applicability’](#) (chapter 32, this volume).

² *Lüth*, BVerfGE 7, 198 (1958).

³ Especially under Article 8’s right to respect for family and private life. See eg, *Storck v Germany* 61603/00 (2005) ECHR 406 (Germany violated positive obligation under Article 8(1) to protect applicant against interferences with her private life by private individuals).

⁴ 376 US 254 (1964).

⁵ See Stephen Gardbaum, ‘The “Horizontal Effect” of Constitutional Rights’ (2003) 102 Michigan Law Review 387; Gavin Phillipson, ‘The Human Rights Act, “Horizontal Effect” and the Common Law: A Bang or a Whimper?’ (1999) 62 MLR 824, 830.

⁶ *Retail, Wholesale & Department Store Union v Dolphin Delivery Ltd* [1986] 2 SCR 573.

⁷ *Zoroastrian Cooperative Housing Society v District Registrar* (2005) 5 SCC 632 ('The Fundamental Rights in [Part III](#) of the Constitution are normally enforced against State action or action by other authorities who may come within the provision of Article 12 of the Constitution').

⁸ See eg, the Statement of Dr BR Ambedkar that '[t]he object of the fundamental rights is twofold. First, that every citizen must be in a position to claim these rights. Second, they must be binding upon every authority ... which has got either the power to make laws or the power to have discretion vested in it.' *Constituent Assembly Debates*, vol 7 (Lok Sabha Secretariat 1986) 610, 25 November 1948 (BR Ambedkar).

⁹ Article 12 states that, unless otherwise specified, [Part III](#) binds 'the State', as therein defined. Article 13 states that 'the law' must be consistent with [Part III](#).

¹⁰ HM Seervai, *Constitutional Law of India*, vol 1 (4th edn, Universal Book Traders 1991) 374.

¹¹ *People's Union for Democratic Rights v Union of India* (1982) 3 SCC 235.

¹² The relevant Constituent Assembly debates were those of 29 April 1947 and 29 November 1948. 'The first clause [of Article 15] is about the State obligation; the second clause deals with many matters which have nothing to do with the State—such as public restaurants—they are not run by States; and hotels—they are not run by States. It is an entirely different idea, and therefore, it is absolutely essential.' *Constituent Assembly Debates*, vol 3 (Lok Sabha Secretariat 1986) 426, 29 April 1947 (Sardar Vallabhbhai Patel).

¹³ 'No person shall be deprived of his life or personal liberty except according to procedure established by law.'

¹⁴ (1995) 3 SCC 42.

¹⁵ *Consumer Education and Research Centre* ([n 14](#)) [24] (emphasis added).

¹⁶ *Consumer Education and Research Centre* ([n 14](#)) [28].

¹⁷ *R Rajagopal v State of Tamil Nadu* (1994) 6 SCC 632 ('A citizen has the right to safeguard his privacy ... None can publish anything concerning the above matters without his consent ... If he does, he would be violating the right to privacy of the person concerned and would be liable in an action for damages').

¹⁸ (2012) 6 SCC 1.

¹⁹ (1997) 6 SCC 241.

²⁰ *Government Branch Press v DB Belliapa* (1979) 1 SCC 477. Note that it is not only art 16 which expressly guarantees equality of opportunity in public employment.

²¹ *People's Union* ([n 11](#)).

²² *People's Union* ([n 11](#)) [16].

²³ (1996) 6 SCC 756.

²⁵ *People's Union* ([n 11](#)) [15].

²⁴ *Mohini Jain v State of Karnataka* (1992) 3 SCC 666.

²⁶ (1995) 3 SCC 42 [24].

²⁷ As distinct from being triggered by a private violation of the Constitution, as in *People's Union* ([n 11](#)).

²⁸ See *Indian Council for Enviro-Legal Action v Union of India & Others* (1996) 3 SCC 212 (in the context of leak of oleum, the failure of State to perform statutory duties under the Environmental (Protection) Act 1986 undermines right to life); *MC Mehta v Union of India* (1996) 4 SCC 750 (ordering the Central Pollution Control Board to issue notices closing polluting industries operating in violation of the Delhi Master Plan formulated under various laws).

²⁹ *Ass'n of Victims of Uphar Tragedy v Union of India* (2003) 2 ACC 114 (the cinema owners were also ordered to pay compensation on a strict liability tort theory).

⁴⁵ *Zoroastrian Cooperative* ([n 7](#)) [22].

⁴⁶ *Zoroastrian Cooperative* ([n 7](#)) [26], [38].

³⁰ ‘The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void ... 3(a) “Law” includes any ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law.’

³¹ *Bhau Ram v Baijnath Singh* AIR 1962 SC 1476; *Sant Ram v Labh Singh* AIR 1965 SC 166.

³² *Mohini Jain* ([n 24](#)).

³³ (1999) 2 SCC 228.

³⁴ Emphasis added.

³⁵ The High Courts have more extensive jurisdiction under Article 226 because, unlike the Supreme Court under Article 32, they are empowered to issue writs ‘to any person’ for enforcement of [Part III](#) ‘and for any other purpose’.

³⁶ On the exception for directly horizontal rights, see Seervai ([n 10](#)) para 7.54.

³⁷ *Indian Council for Enviro-Legal Action* ([n 28](#)) (‘this writ petition is not really [directed] against the [private] respondents but ... against the Union of India ... to compel them to perform their statutory duties ... on the ground that their failure ... is seriously undermining the right to life under Article 21’).

³⁸ As in Canada. For this reason, in an attempt to prevent such indirect effect, recent human rights statutes in the Australian Capital Territory and State of Victoria expressly exclude courts from being bound by their bills of rights.

³⁹ Seervai ([n 10](#)) 300–99, discussing the case of *Naresh Sridhar Mirajkar v State of Maharashtra* AIR 1967 SC 1.

⁴⁰ For an incisive and critical account of this development, see [Shyamkrishna Balganes, ‘The Constitutionalisation of Indian Private Law’](#) (chapter 38, this volume).

⁴¹ [Shyamkrishna Balganes, ‘The Constitutionalisation of Indian Private Law’](#) (chapter 38, this volume).

⁴² As of June 2012, the Indian judiciary faced a backlog of approximately 32 million cases and approximately 24 per cent of cases had been pending for at least five years. The vacancy rates of the High Courts and District Courts were 29 and 21 per cent, respectively, with 12 judges per million citizens compared to 108 in the United States. Devesh Kapur and Milan Vaishnav, ‘Strengthening Rule of Law’ in Bibek Debroy, Ashley Tellis, and Reece Trevor (eds) *Getting India Back on Track: An Agenda for Reform* (Carnegie Endowment for International Peace 2014) 243–67.

⁴³ This ‘ordinary’ contract scenario differs from the one in *Mohini Jain v State of Karnataka* (1992) 3 SCC 666, where the capitation fee charged by a private college was authorised by the government.

⁴⁴ *Zoroastrian Cooperative* ([n 7](#)).

⁴⁷ *Lüth*, BVerfGE 7, 198 (1958).

⁴⁸ Supreme Court of Israel, Civil Appeal 294/91.

⁴⁹ 334 US 1 (1948).

⁵⁰ This distinction is suggested by the German Constitutional Court in *Lüth*, BVerfGE 7, 198 (1958) and discussed in Peter Quint, ‘Free Speech and Private Law in German Constitutional Theory’ (1989) 48 Maryland Law Review 247.

CHAPTER 34

WRITS AND REMEDIES

GOPAL SUBRAMANIAM

I. INTRODUCTION

Ubi jus ibi remedium—where there is a right, there is a remedy—is a defining principle of the common law. In *Ashby v White*, Holt CJ of the King’s Bench famously observed that ‘If the plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it; and indeed it is a vain thing to imagine a right without a remedy.’¹ Unlike the American Constitution, where the power of judicial review emerged after the Supreme Court’s decision in *Marbury v Madison*,² the Indian Constitution explicitly provides courts with the power to issue writs and grant remedies. It would be meaningless, the Indian founders believed, to confer rights without providing effective remedies for their enforcement. Articles 32 and 226 were and continue to be regarded as integral to the Constitution. Indeed, for BR Ambedkar, Article 32 was ‘the very soul of the Constitution and the very heart of it ...’³ Gajendragadkar J expressed a similar sentiment when he observed:

The fundamental right to move this Court can ... be appropriately described as the cornerstone of the democratic edifice raised by the Constitution... The key role assigned to the right guaranteed by Article 32 and the width of its content are writ large on the face of its provisions, and so, it is in our opinion unnecessary and even inappropriate to employ hyperboles or use superlatives to emphasise its significance or importance.⁴

This chapter focuses on Articles 32 and 226. Both these provisions have been held to be part of the basic structure of the Constitution—they cannot be taken away, even by way of a constitutional amendment.⁵ It is through these provisions that rights are protected under the Indian Constitution, and it is ultimately through them that the Supreme Court has come to acquire the role it has within Indian democracy.

II. JURISDICTION

An important feature of Article 32 is that it does not merely guarantee the protection of fundamental rights, but it is itself located in [Part III](#) of the Constitution. In other words, it is not found alongside other Articles of the Constitution that define the general jurisdiction of the Supreme Court. Further, it is also clear from the expression ‘in the nature of’ employed in clause (2) of Article 32 that the power conferred by the said clause is in the widest terms and is not confined to issuing the high-prerogative writs specified in the said clause, but includes within its ambit the power to issue any directions or orders or writs which may be appropriate for enforcement of fundamental rights.⁶ Therefore, even when the conditions for issue of any of these writs are not fulfilled, the Supreme Court would not be constrained to ‘fold its hands in despair and plead its inability to help the citizen who has come before it for judicial redress ...’⁷

The Supreme Court’s powers were clarified by its decision in *Nilabati Behera*.⁸ Here, the Court affirmed its previous decisions in *Khatri (II) v State of Bihar*⁹ and *Khatri (IV) v State of Bihar*,¹⁰ wherein the Court had held that it was not helpless to grant relief in a case of violation of the right to life and personal liberty, and it should be prepared ‘to forge new tools and devise new remedies for the purpose of vindicating the most ... precious fundamental right ...’¹¹ It was also indicated that the procedure suitable in the facts of the case must be adopted for conducting the inquiry needed to ascertain the necessary facts, for granting relief for enforcement of the guaranteed fundamental rights. In his concurring judgment in *Nilabati Behera*, Anand J made the following observations with regard to Articles 32 and 226:

This Court and the High Courts, being the protectors of the civil liberties of the citizen, have not only the power and jurisdiction but also an obligation to grant relief in exercise of its jurisdiction under Articles 32 and 226 of the Constitution to the victim or the heir of the victim whose fundamental rights under Article 21 of the Constitution of India are established to have been flagrantly infringed by calling upon the State to repair the damage done by its officers to the fundamental rights of the citizen, notwithstanding the right of the citizen to the remedy by way of a civil suit or criminal proceedings. The State of course has the right to be indemnified by and take such action as may be available to it against the wrongdoer in accordance with law—through appropriate proceedings.¹²

Article 226 is wider in scope than Article 32. The High Courts are authorised under Article 226 to issue directions, orders, or writs to any person or authority, including any government to enforce fundamental rights and ‘for any other purpose’. The difference in the language of Articles 32 and 226 gives a clear indication that their nature and purpose are different. The right guaranteed by Article 32 can be exercised only and only for the enforcement of fundamental rights conferred by [Part III](#) of the Constitution, and the same must also be

evident from the pleadings. On the other hand, the right conferred by Article 226 can be exercised not only for the enforcement of fundamental rights, but ‘for any other purpose’ as well, that is, for enforcement of any legal right conferred by a statute, *etc.*¹³ The differing jurisdiction of the Supreme Court and High Courts was recently noted in the following terms by the Supreme Court:

Under the constitutional scheme as framed for the judiciary, the Supreme Court and the High Courts both are courts of record. The High Court is not a court ‘subordinate’ to the Supreme Court. In a way the canvas of judicial powers vesting in the High Court is wider inasmuch as it has jurisdiction to issue all prerogative writs conferred by Article 226 of the Constitution for the enforcement of any of the rights conferred by [Part III](#) of the Constitution and *for any other purpose* while the original jurisdiction of the Supreme Court to issue prerogative writs remains confined to the enforcement of fundamental rights and to deal with some such matters such as Presidential elections or interState disputes which the Constitution does not envisage being heard and determined by High Courts.¹⁴

Wide as the High Court’s power might be under Article 226, it can only be deployed in cases where there is a pre-existing right. As the Supreme Court recently observed:

The primary purpose of the writ is to protect and establish rights, and to impose a corresponding imperative duty existing in law. It is designed to promote justice (*ex debito justitiae*) and its grant or refusal is at the discretion of the court. The writ cannot be granted unless it is established that there is an existing legal right of the applicant, or an existing duty of the respondent. Thus, the writ does not lie to create or establish a legal right but to enforce one that stood already established.¹⁵

The Supreme Court and the High Courts have concurrent jurisdiction for enforcement of the fundamental rights. An important question in this context is whether a petitioner must approach the High Court under Article 226 before he can approach the Supreme Court in Article 32. This has been the view taken by some decisions of the Supreme Court.¹⁶ For instance, in *Kanubhai Brahmabhatt v State of Gujarat*,¹⁷ the Court argued that if it ‘[took] upon itself to do everything which even the High Courts can do, this Court will not be able to do what this Court alone can do under Article 136 of the Constitution, and other provisions conferring exclusive jurisdiction on this Court’.¹⁸ In addition, it also cited fears of a growing backlog of cases: ‘If this Court entertains writ petitions at the instance of parties who approach this Court directly instead of approaching the concerned High Court ... the arrears pertaining to matters in respect of which this Court exercises exclusive jurisdiction ... will assume more alarming proportions.’¹⁹ Finally, it also pointed to the need to inspire institutional confidence in the judiciary as a whole: ‘Faith must be inspired in the hierarchy of courts and the institution as a whole, not only in this Court alone.’²⁰ Such an interpretation, however, possibly detracts from the Supreme Court’s role in

protecting the rights guaranteed by [Part III](#) of the Constitution.^{[21](#)}

A second important question that arises is whether Article 226 might be read as not merely confined to governmental institutions and statutory public bodies. The text of the entire provision read alongside Article 12, however, makes it clear that writs and directions under Article 226 can be issued only against authorities and persons having ‘authority of the State’. Over time, however, the judicial approach has replaced the focus these provisions place on the body performing the functions with the kind of functions that are being performed. That is to say, the question has become, and increasingly so with the rise of public–private partnerships, whether the function being performed is of a public nature. As early as the decision in *Praga Tools Corporation v CA Imanuel*, the Court noted that ‘it is, however, not necessary that the person or the authority on whom the statutory duty is imposed need be a public official or an official body’.^{[22](#)} In *Andi Mukta Sadguru*, the Court clarified that ‘the form of the body concerned is not very much relevant. What is relevant is the nature of the duty imposed on the body ... judged in the light of positive obligation owed by the person or authority to the affected party.’^{[23](#)} The law was summarised by the Supreme Court in *G Bassi Reddy v International Crops Research Institute*: ‘A writ under Article 226 can lie against a “person” if it is a statutory body or performs a public function or discharges a public or statutory duty.’^{[24](#)} The Court, however, has not provided much elaboration upon what a public function or public duty is, though the language used typically focuses upon whether the functions are similar to those performable by the State in its sovereign capacity.

An important recent decision in this respect is *Board of Control for Cricket in India v Cricket Association of Bihar*,^{[25](#)} where the Court cited its decision in *Zee Telefilms Ltd v Union of India*^{[26](#)} with approval to hold that the Board of Control for Cricket in India (BCCI) was amenable to writ jurisdiction under Article 226. Specifically, the Court examined the ‘nature of duties and functions’ which the BCCI performed and found that they were ‘clearly public functions ...’ since the State ‘not only [allowed] an autonomous/private body to discharge functions which it could in law take over or regulate but even lends its assistance to such a non-government body to undertake such functions which by their very nature are public functions ...’^{[27](#)}

The final issue relating to Article 226 is that of cause of action and territoriality. Article 226 as it originally stood did not make reference to cause of action. It was amended by the Constitution (Fifteenth Amendment) Act 1963 and after Clause (1), a new Clause (1-A) was inserted:

226. (1-A) The power conferred by clause (1) to issue directions, orders or writs to any Government, authority or person may also be exercised by any High Court exercising jurisdiction in relation to the territories within which the cause of action, wholly or in part, arises for the exercise of such power, notwithstanding that the seat of such Government or authority or the residence of such person is not within those territories.

By the Constitution (Forty-second Amendment) Act 1976, Clause (1-A) was renumbered as Clause (2). As per this amendment, the High Court within whose jurisdiction the cause of action arises would also have the power to issue relevant directions, orders, or writs. Thus, cause of action was made an additional ground to confer jurisdiction on a High Court under Article 226. For a cause of action claim to succeed, the facts disclosed must bear a nexus to the relief that is sought.²⁸ The Supreme Court has held that the seat of the government or authority will not interfere with a High Court's powers so long as the cause of action arises within the territory in which its jurisdiction applies.²⁹ For instance, in *Om Prakash Srivastava v Union of India*, the Court phrased the test as follows: 'in order to maintain a writ petition, a writ petitioner has to establish that a legal right claimed by him has prima facie either been infringed or is threatened to be infringed by the respondent within the territorial limits of the Court's jurisdiction ...'³⁰ However, in *Kusum Ignots*, the Supreme Court observed that:

We must, however, remind ourselves that even if a small part of cause of action arises within the territorial jurisdiction of the High Court, the same by itself may not be considered to be a determinative factor compelling the High Court to decide the matter on merit. In appropriate cases, the Court may refuse to exercise its discretionary jurisdiction by invoking the doctrine of forum conveniens.³¹

This paragraph was reiterated in *Ambica Industries*, and the Court observed: 'indisputably even if a small fraction thereof accrues within the jurisdiction of the Court, the Court will have jurisdiction in the matter though the doctrine of *forum conveniens* may also have to be considered'.³² This observation leaves some doubt and ambiguity relating to the powers of the High Court. The rule of forum conveniens is not to be found as part of the text of Article 226(2). Mere convenience to prosecute in another forum ought not to oust the jurisdiction of another forum that is otherwise competent.

III. WRITS

The Supreme Court in *Rupa Ashok Hurra v Ashok Hurra*³³ clarified the nature of writ jurisdiction in India and its differences with English law. It noted that there were ‘two types of writs’ in English Law.³⁴ The first, ‘judicial procedural writs ... issued as a matter of course’ (a writ of summons, for example), were not in use in India.³⁵ The second, ‘substantive writs’ (*quo warranto*, *habeas corpus*, *mandamus*, *certiorari*, and *prohibition*), ‘were frequently resorted to in Indian High Courts and the Supreme Court’.³⁶ Delving further into the history of writs in English law, the Court noted that they were ‘discretionary ... but the principles for issuing such writs are well defined’.³⁷ The three ‘prerogative writs’ of *certiorari*, *mandamus*, and *prohibition* were succinctly summarised:

Historically, prohibition was a writ whereby the royal courts of common law prohibited other courts from entertaining matters falling within the exclusive jurisdiction of the common law courts; *certiorari* was issued to bring the record of an inferior court into the King’s Bench for review or to remove indictments for trial in that court; *mandamus* was directed to inferior courts and tribunals and to public officers and bodies, to order the performance of a public duty.³⁸

Noting the expansion of writ jurisdiction under the Constitution to all the High Courts and the Supreme Court from just the three Chartered High Courts³⁹ in the colonial era, the Court clarified that while the High Courts in India were ‘placed virtually in the same position as the Courts of King’s Bench in England’, it was a ‘well-settled principle that the technicalities associated with the prerogative writs in English law have no role to play under our constitutional scheme’.⁴⁰

The first writ we shall examine, the writ of *mandamus*, has historically been understood as a writ that can be employed to safeguard justice in a wide variety of cases. The Indian Supreme Court has taken a very broad view of this writ. In *Comptroller and Auditor-General of India v KS Jagannathan*,⁴¹ the Court referred to Halsbury’s *Laws of England* to affirm the writ’s wide applicability.⁴² It observed that ‘in a proper case, in order to prevent injustice resulting to the parties concerned, the court may itself pass an order or give directions which the government or the public authority should have passed or given had it properly and lawfully exercised its discretion’.⁴³ In a later decision, the Court held that *mandamus* is a very wide remedy, which must be easily available ‘to reach injustice wherever it is found’.⁴⁴ Technicalities should not come in the way of granting that relief under Article 226.⁴⁵ One innovative use of the writ of *mandamus* has been the idea of ‘continuing *mandamus*’, through which the Court, often in public interest litigation cases, decides to monitor a case or investigation and passes orders and directions from time to time.⁴⁶ It was first

used in *Vineet Narain v Union of India*,⁴⁷ where the Court considered a writ petition that alleged a failure on the part of investigative agencies in a case involving prominent politicians and bureaucrats. The Court described its response to the petition as a ‘continuing mandamus’: ‘[keeping] the matter pending while the investigations were being carried on, ensuring that this was done by monitoring them from time to time and issuing orders in this behalf’.⁴⁸ In *Manohar Lal Sharma v Principal Secretary*, the Court considered whether Section 6-A of the Delhi Special Police Establishment Act, which required the approval of the Union government before an investigation under the Prevention of Corruption Act, could ‘bind the exercise of plenary power by this Court of issuing orders in the nature of a continuing mandamus under Article 32 of the Constitution ...’⁴⁹ Rejecting this construction, the Court held that Section 6-A had to be ‘meaningfully and realistically read, only as an injunction to the executive and not as an injunction to a constitutional court monitoring an investigation under Article 32 ...’⁵⁰

Since a writ of mandamus lies only when the person entrusted with a duty has failed to perform his duty, it is a requirement in law that, prior to approaching the Court, the petitioner must make an unambiguous demand that the authority must perform its duty. The chief function of the writ of mandamus is to compel the performance of public duties prescribed by statute and to keep statutory authorities and officers exercising public functions within their jurisdictions. The writ can even be issued against a private person so long as the duty sought to be enforced is a statutory duty. In order to obtain a writ or order in the nature of mandamus, the applicant has to satisfy that he has a legal right to the performance of a legal duty by the party against whom the writ is sought. Finally, a writ of mandamus cannot be issued to the legislature to enact a particular legislation. The same is true as regards the executive when it exercises the power to make rules which are in the nature of subordinate legislation.

Habeas corpus, by contrast, is a writ against illegal detention: ‘The principal aim of the writ is to ensure swift judicial review of alleged unlawful detention on liberty or freedom of the prisoner or detenu.’⁵¹ The underlying objective of the writ was expressed in the following terms by the Supreme Court in *Sapmawia v Deputy Commissioner*:

The writ of *habeas corpus* is a prerogative writ by which the causes and validity of detention of a person are investigated by summary procedure and if the authority having his custody does not satisfy the court that the deprivation of his personal liberty is according to the procedure established by law, the person is entitled to his liberty. The order of release in the case of a person suspected of or charged with the commission of an offence does not per se amount to his acquittal or discharge and the authorities are not, by virtue of the release only on *habeas corpus*, deprived of the power to

arrest and keep him in custody in accordance with law for this writ is not designed to interrupt the ordinary administration of criminal law.⁵²

The third writ to be examined, certiorari, is a call by a superior court to an inferior court for records of its proceedings. A notable test for when certiorari may be issued was posited by Atkin LJ in *R v Electricity Commissioners*, in which he observed that ‘wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority they are subject to the controlling jurisdiction of the King’s Bench Division exercised in these writs’.⁵³ In *R v London County Council*, Scrutton LJ separated the four independent conditions in this text, and the existence of each condition was held as necessary to determine the nature of the act in question.⁵⁴

One important consideration in the exercise of certiorari jurisdiction is the existence of a finality clause that seeks to bar the jurisdiction of an appellate court. In *Kihoto Hollohan v Zachillhu*,⁵⁵ the Court, referring to Wade’s *Administrative Law*,⁵⁶ clarified the scope of certiorari in such cases. The test was ‘whether the impugned action falls within the jurisdiction of the authority taking the action or it falls outside such jurisdiction’.⁵⁷ A finality clause, or ‘ouster clause’ as the Court preferred, would limit judicial review to ‘actions falling outside the jurisdiction of the authority taking such action’ but would ‘[preclude] challenge to such action on the ground of an error committed in the exercise of jurisdiction vested in the authority because such an action cannot be said to be an action without jurisdiction’.⁵⁸ In other words, an ouster clause would ‘oust certiorari to some extent’, ‘if the inferior tribunal has not acted without jurisdiction and has merely made an error of law which does not affect its jurisdiction and if its decision is not a nullity for some reason such as breach of rule of natural justice’.⁵⁹

Another important issue is the limit on certiorari jurisdiction: can it be issued to coordinate or superior courts? This was answered concisely by the Court in *Rupa Ashok Hurra*:

A High Court cannot issue a writ to another High Court. One Bench of a High Court cannot issue a writ to another Bench of the same High Court. The writ jurisdiction of a High Court cannot be invoked to seek issuance of a writ of certiorari to the Supreme Court. Although, the judgments/orders of High Courts are liable to be corrected by the Supreme Court in its appellate jurisdiction, the High Courts are not constituted as inferior courts. Even the Supreme Court would not issue a writ under Article 32 to a High Court. Similarly, neither a smaller Bench nor a larger Bench of the Supreme Court can issue a writ under Article 32 of the Constitution to any other Bench of the Supreme

Court.⁶⁰

The next writ under consideration is prohibition, whose origins lie in common law courts prohibiting other courts from entertaining matters that fall within their jurisdiction. The Indian Supreme Court has held that this writ will be issued ‘to prevent a tribunal or authority from proceeding further when the authority proceeds to act without or in excess of jurisdiction; proceeds to act in violation of the rules of natural justice; or proceeds to act under a law which is itself *ultra vires* or unconstitutional’.⁶¹ A writ of prohibition will not lie unless there is an error of jurisdiction as opposed to an error of law. In practice, however, courts are less willing to grant writ of prohibition unless the exercise of jurisdiction is grossly exceeded, and prefer to relinquish the jurisdiction in favour of appellate proceedings rather than exercising writ jurisdiction.⁶²

It is important to note that prohibition restrains a tribunal or court from continuing ahead in excess of jurisdiction, whereas certiorari requires the record or the order of the court to be sent up to the High Court to have its legality inquired into, and if necessary to have the order quashed. The scope of prohibition was clarified by the Supreme Court in *Isha Beevi v Tax Recovery Officer*: ‘in order to substantiate a right to obtain a writ of prohibition from a High Court or from the Supreme Court, an applicant has to demonstrate total absence of jurisdiction to proceed on the part of the officer or authority complained against’.⁶³ In *S Govinda Menon v Union of India*,⁶⁴ it has been held that ‘If there is a want of jurisdiction, then the matter is *coram non jure* and a writ of prohibition will lie to the Court or inferior Tribunal forbidding it to continue proceedings therein in excess of its jurisdiction.’⁶⁵ In addition:

The jurisdiction for grant of a writ of prohibition is primarily supervisory and the object of that writ is to restrain courts or inferior tribunals from exercising a jurisdiction which they do not possess at all or else to prevent them from exceeding the limits of their jurisdiction. In other words, the object is to confine courts or tribunals of inferior or limited jurisdiction within their bounds. It is well settled that the writ of prohibition lies not only for excess of jurisdiction or for absence of jurisdiction but the writ also lies in a case of departure from the rules of natural justice.⁶⁶

The final writ is *quo warranto* and involves the usurpation of a public office. The Supreme Court has held that this writ can only be issued when the person holding the public office lacks the eligibility criteria or when the appointment is contrary to the statutory rules.⁶⁷ The law distinguishes between eligibility and suitability, and the writ of *quo warranto* is available when a person who is ineligible is appointed to a public office.⁶⁸ There is a major distinction between *quo warranto* and the other substantive writs. This distinction lies in the

requirement of standing to sue.⁶⁹ The concept of locus standi is not applicable to the petitioner approaching the court for issuance of a writ of *quo warranto*. The basic purpose of a writ of *quo warranto* is to confer jurisdiction on the constitutional courts to see that a public office is not held by a usurper without any legal authority, and therefore, the same can be brought to the court's notice by any person. 'The procedure of *quo warranto* confers jurisdiction and authority on the judiciary to control executive action in the matter of making appointments to public offices against the relevant statutory provisions; it also protects a citizen from being deprived of public office to which he may have a right.'⁷⁰ Even the doctrine of laches has no application against a person seeking a writ of *quo warranto*.⁷¹

IV. CONSTITUTIONAL REMEDIES: PROCEDURAL ASPECTS

1. *Res Judicata*

A decision on an issue raised in a writ petition under Article 226 or Article 32 of the Constitution would also operate as *res judicata* between the same parties in subsequent judicial proceedings.⁷² The only exception is that the rule of *res judicata* would not operate to the detriment or impairment of a fundamental right.⁷³ Founded in public policy,⁷⁴ a general principle of *res judicata* applies to writ petitions filed under Article 32 or Article 226.⁷⁵ It is necessary to emphasise that the application of the doctrine of *res judicata* to the petitions filed under Article 32 does not in any way impair or affect the content of the fundamental rights guaranteed to the citizens of India. It is relevant to note that the Supreme Court has permitted a party to pursue one of the two parallel remedies, provided that both are not being pursued at the same time.⁷⁶

2. Questions of Fact

In *Gunwant Kaur v Municipal Committee, Bhatinda*, the Supreme Court held that, in a petition under Article 226:

Merely because a question of fact is raised, the High Court will not be justified in requiring the party to seek relief by the somewhat lengthy, dilatory and expensive process by a civil suit against a public body. The questions of fact raised by the petition in this case are elementary.⁷⁷

When a manifest error has resulted in the failure of justice or there has been a miscarriage of justice, interference under Article 226 would be called for.⁷⁸ In *Sant Lal Gupta v Modern Cooperative Group Housing Society Ltd*,⁷⁹ the Court elaborated on this when considering the exercise of certiorari jurisdiction by the Delhi High Court: ‘The writ of certiorari under Article 226 ... can be issued only when there is a failure of justice and it cannot be issued merely because it may be legally permissible to do so.’⁸⁰ In the interest of justice, the power can also be exercised to summon a deponent for cross-examination where a conclusion cannot be arrived at on the basis of affidavits.⁸¹ In *ABL International v Export Credit Guarantee Corporation of India Ltd*, the Supreme Court held that ‘when an instrumentality of the State acts contrary to public good and public interest, unfairly, unjustly and unreasonably, in its contractual, constitutional or statutory obligations, it really acts contrary to the constitutional guarantee found in Article 14 of the Constitution’,⁸² and therefore, it was not necessary to relegate a party to the civil courts. The tenor of the Court’s judgment emphasises that it was necessary to examine whether the claim of ‘disputed question’ is a bona fide dispute or was it being raised to avoid judicial scrutiny.

3. Political Questions

Taking note of *R (Bancoult) v Secretary of State for Foreign & Commonwealth Affairs (No 2)*,⁸³ the Supreme Court has held that ‘the contemporary English view is that in principle even such “political questions” and exercise of prerogative power will be subject to judicial review on principles of legality, rationality or procedural impropriety’ is applicable in India as well.⁸⁴ In *State of Rajasthan v Union of India*,⁸⁵ Bhagwati J has summarised the legal position as under:

[M]erely because a question has a political complexion, that by itself is no ground why the Court should shrink from performing its duty under the Constitution if it raises an issue of constitutional determination... So long as a question arises whether an authority under the Constitution has acted within the limits of its power or exceeded it, it can certainly be decided by the Court. Indeed it would be its constitutional obligation to do so.⁸⁶

However, the jurisdiction of a court may not be available in purely political questions⁸⁷ such as those involving the continuation of a state of emergency.⁸⁸

V. CONCLUSION

An important development relating to constitutional remedies in India that has not been explored by this chapter is public interest litigation. This development has both procedural aspects—that is, the dilution of the principle of locus standi and increased access to justice—and substantive features, such as the recognition of a range of enumerated rights within the right to life in Article 21. The developments have been covered elsewhere in this Handbook, but it is important to note that the liberal interpretation given to the standing requirements in Articles 32 and 226 have been the central medium through which this development has occurred.

One question which often arises in the context of the Court’s power is what remedies might be issued with respect to the legislature. The expansion of the meanings of statutory or constitutional provisions by judicial interpretation is a legitimate judicial function; the making of a new law, which the courts in this country have sometimes done, may not be a perfectly legitimate judicial function

unless it aims to fill a legal vacuum.⁸⁹ The courts have acknowledged that they are not equipped with the skills, expertise, or resources to discharge the functions that belong to the other coordinate organs of the government (the legislature and the executive). Their institutional equipment is wholly inadequate for undertaking legislation or administrative functions. The courts have held that they cannot issue writs against the legislature.⁹⁰ In *Union of India v Association for Democratic Reforms*, the Supreme Court observed that:

At the outset, we would say that it is not possible for this Court to give any directions for amending the Act or the statutory Rules. It is for Parliament to amend the Act and the Rules. It is also established law that no direction can be given, which would be contrary to the Act and the Rules.⁹¹

In *Supreme Court Employees' Welfare Association v Union of India*,⁹² it was held that no court can direct a legislature to enact a particular law. Similarly, when an executive authority exercises a legislative power by way of a subordinate legislation pursuant to the delegated authority of a legislature, such executive authority cannot be asked to enact a law that it has been empowered to do under the delegated legislative authority.

Over time, two features of the Indian legal system have played a key role in the weakening of constitutional remedies in India. First, the growth of tribunals in India has seriously impacted the traditional writ jurisdiction of the High Courts. While the Supreme Court rightly observed, in *Union of India v R Gandhi*, that if tribunals are vested with the powers of High Courts they must also be given the same degree of independence and capacity as such courts, this is yet to be realised in practice.⁹³ The second important feature that has plagued the realisation of remedies is the very capacity of the judicial system. With a judicial system burdened by backlogs, delays, and inefficiency, the timely recognition of rights violations, the awarding of remedies, and above all their enforcement, all remain a major challenge in India.

¹ (1703) 2 Ld Raym 938, 953.

² 5 US 137 (1803).

³ *Constituent Assembly Debates*, vol 7 (Lok Sabha Secretariat 1986) 953, 9 December 1948.

⁴ *Prem Chand Garg v The Excise Commissioner* AIR 1963 SC 996 [2].

⁵ *Raja Ram Pal v Speaker, Lok Sabha* (2007) 3 SCC 184 [413].

⁶ *TC Basappa v T Nagappa* AIR 1954 SC 440.

⁷ *Bandhua Mukti Morcha v Union of India* (1984) 3 SCC 161 [13].

- ⁸ *Nilabati Behera v State of Orissa* (1993) 2 SCC 746.
- ⁹ (1981) 1 SCC 627.
- ¹⁰ (1981) 2 SCC 493.
- ¹¹ *Khattri (II)* ([n 9](#)) [4].
- ¹² *Nilabati Behera* ([n 8](#)).
- ¹⁴ *Tirupati Balaji Developers (P) Ltd v State of Bihar* (2004) 5 SCC 1 [8].
- ¹⁵ *Rajasthan State Industrial Development & Investment Corporation v Subhash Sindhi Cooperative Housing Society* (2013) 5 SCC 427 [24].
- ¹⁶ *PN Kumar v Municipal Corporation of Delhi* (1987) 4 SCC 609; *Louise Fernandes v Union of India* (1988) 1 SCC 201; *Confederation of All Nagaland State Services Employees' Association v State of Nagaland* (2006) 1 SCC 496; *Central Bank Retirees' Association v Union of India* (2006) 1 SCC 497.
- ¹⁷ (1989) Supp (2) SCC 310.
- ¹⁸ *Kanubhai Brahmbhatt* ([n 17](#)) [3].
- ¹⁹ *Kanubhai Brahmbhatt* ([n 17](#)) [3].
- ²⁰ *Kanubhai Brahmbhatt* ([n 17](#)) [3].
- ²¹ *Daryao v State of Uttar Pradesh* AIR 1961 SC 1457 [8]; *Prem Chand Garg* ([n 4](#)) [12]–[15]; *Raja Ram Pal* ([n 5](#)) [651].
- ²² *Praga Tools Corporation v Shri CA Imanual* (1969) 1 SCC 585 [6].
- ²³ *Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust v VR Rudani* (1989) 2 SCC 691 [20].
- ²⁴ (2003) 4 SCC 225 [28]. See also *VST Industries Ltd v VST Industries Workers' Union* (2001) 1 SCC 298.
- ²⁵ (2015) 3 SCC 251.
- ²⁶ (2005) 4 SCC 649.
- ²⁷ *Board of Control for Cricket in India* ([n 25](#)) [34].
- ²⁸ *Union of India v Adani Exports Ltd* (2002) 1 SCC 567; *National Textile Corpn Ltd v Haribox Swalram* (2004) 9 SCC 786.
- ²⁹ *Oil and Natural Gas Commission v Utpal Kumar Basu* (1994) 4 SCC 711 [5]; *Navinchandra N Majithia v State of Maharashtra* (2000) 7 SCC 640; *Mosaraf Hossain Khan v Bhagheeratha Engg Ltd* (2006) 3 SCC 658.
- ¹³ *State of West Bengal v Committee for Protection of Democratic Rights* (2010) 3 SCC 571 [57]. See also *Dwarka Nath v Income Tax Officer* AIR 1966 SC 81.
- ³⁰ (2006) 6 SCC 207 [8].
- ³¹ *Kusum Ingots & Alloys Ltd v Union of India* (2004) 6 SCC 254 [30].
- ³² *Ambica Industries v Commissioner of Central Excise* (2007) 6 SCC 769 [41].
- ³⁸ *Rupa Ashok Hurra* ([n 33](#)) [6] citing *Halsbury's Laws* (4th edn, 1998) vol 1, para 109.
- ⁵² (1970) 2 SCC 399 [11].
- ⁶⁰ *Rupa Ashok Hurra* ([n 33](#)) [7].
- ⁶⁶ *S Govinda Menon* ([n 64](#)) [5].
- ³³ (2002) 4 SCC 388.
- ³⁴ *Rupa Ashok Hurra* ([n 33](#)) [6].
- ³⁵ *Rupa Ashok Hurra* ([n 33](#)) [6].

- ³⁶ *Rupa Ashok Hurra* ([n 33](#)) [6].
- ³⁷ *Rupa Ashok Hurra* ([n 33](#)) [6].
- ³⁹ The High Courts of Bombay, Calcutta, and Madras.
- ⁴⁰ *Rupa Ashok Hurra* ([n 33](#)) [6].
- ⁴¹ (1986) 2 SCC 679.
- ⁴² *Comptroller and Auditor-General of India* ([n 41](#)) [19].
- ⁴³ *Comptroller and Auditor-General of India* ([n 41](#)) [20].
- ⁴⁴ *Sasi Thomas v State* (2006) 12 SCC 421 [26]; See also *Secretary, ONGC Ltd v VU Warriar* (2005) 5 SCC 245.
- ⁴⁵ *Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust* ([n 23](#)) [22].
- ⁴⁶ *Vineet Narain v Union of India* (1998) 1 SCC 226. See also *Research Foundation for Science, Technology and Natural Resource Policy v Union of India* (2012) 7 SCC 769.
- ⁴⁷ *Vineet Narain* ([n 46](#)).
- ⁴⁸ *Vineet Narain* ([n 46](#)) [7].
- ⁴⁹ (2014) 2 SCC 532 [95].
- ⁵⁰ *Manohar Lal Sharma* ([n 49](#)) [98].
- ⁵¹ *State of Maharashtra v Bhaurao Punjabrao Gawande* (2008) 3 SCC 613 [25].
- ⁵³ [1924] 1 KB 171, 205.
- ⁵⁴ [1931] 2 KB 215.
- ⁵⁵ (1992) Supp (2) SCC 651.
- ⁵⁶ HWR Wade, *Administrative Law* (6th edn, Oxford University Press 1988) 720–21.
- ⁵⁷ *Kihoto Hollohan* ([n 55](#)) [101].
- ⁵⁸ *Kihoto Hollohan* ([n 55](#)) [101].
- ⁵⁹ *Kihoto Hollohan* ([n 55](#)) [101].
- ⁶¹ *Standard Chartered Bank v Directorate of Enforcement* (2006) 4 SCC 278 [25].
- ⁶² *Thirumala Tirupati Devasthanams v Thallappaka Ananthacharyulu* (2003) 8 SCC 134 [14]: ‘A writ of prohibition must be issued only in rarest of rare cases. Judicial discipline of the highest order has to be exercised whilst issuing such writs. It must be remembered that the writ jurisdiction is original jurisdiction distinct from appellate jurisdiction. An appeal cannot be allowed to be disguised in the form of a writ.’
- ⁶³ (1976) 1 SCC 70 [5].
- ⁶⁴ AIR 1967 SC 1274.
- ⁶⁵ *S Govinda Menon* ([n 64](#)) [5].
- ⁶⁷ *Rajesh Awasthi v Nand Lal Jaiswal* (2013) 1 SCC 501 [31]. It was held that ‘a citizen can claim a writ of *quo warranto* and he stands in the position of a relater. He need not have any special interest or personal interest. The real test is to see whether the person holding the office is authorized to hold the same as per law.’
- ⁶⁸ In *Mahesh Chandra Gupta v Union of India* (2009) 8 SCC 273 [71], it has been held that ‘In cases involving lack of “eligibility” writ of *quo warranto* would certainly lie. One reason being that “eligibility” is not a matter of subjectivity. However, “suitability” or “fitness” of a person to be appointed a High Court Judge: his character, his integrity, his competence and the like are matters of opinion.’
- ⁶⁹ *State of Punjab v Salil Sabhlok* (2013) 5 SCC 1 [88] held that a public internet litigation for a writ of *quo warranto* in respect of an appointment to a constitutional position would not be barred.

⁷⁰ *University of Mysore v CD Govinda Rao* AIR 1965 SC 491 [6]. See also *BR Kapur v State of Tamil Nadu* (2001) 7 SCC 231.

⁷¹ *Central Electricity Supply Utility of Odisha v Dhobei Sahoo* (2014) 1 SCC 161 [22].

⁷² *Ishwar Dutt v Land Acquisition Collector* (2005) 7 SCC 190

⁷³ *Ashok Kumar Srivastav v National Insurance Company Ltd* (1998) 4 SCC 361 [11].

⁷⁴ The basic idea in the rule of *res judicata* has sprouted from the maxim *nemo debet bis vexari pro una et eadem causa* (no man should be vexed twice over for the same cause).

⁷⁵ *Amalgamated Coalfields Ltd v Janapada Sabha Chhindwara* AIR 1964 SC 1013.

⁷⁶ *Orissa Power Transmission Corporation Limited v Asian School of Business and Management Trust* (2013) 8 SCC 738.

⁷⁷ (1969) 3 SCC 769 [14].

⁷⁸ *DN Banerjee v PR Mukherjee* AIR 1953 SC 58 [5]; *Bijili Cotton Mills (P) Ltd v Presiding Officer, Industrial Tribunal II* (1972) 1 SCC 840 [21]; *Sawarn Singh v State of Punjab* (1976) 2 SCC 868 [13]; *Kartar Singh v State of Punjab* (1994) 3 SCC 569 [459]; *Air India Statutory Corporation v United Labour Union* (1997) 9 SCC 377 [59]; *Roshan Deen v Preeti Lal* (2002) 1 SCC 100 [12]; *Union of India v SB Vohra* (2004) 2 SCC 150 [13]; *Govt of AP v Mohd. Nasrullah Khan* (2006) 2 SCC 373 [11]; *State of Uttar Pradesh v Rakesh Kumar Keshari* (2011) 5 SCC 341 [29].

⁷⁹ (2010) 13 SCC 336.

⁸⁰ *Sant Lal Gupta* ([n 79](#)) [28].

⁸¹ *Barium Chemicals Ltd v Company Law Board* AIR 1967 SC 295 [26]; *Babubhai Muljibhai Patel v Nandlal Khodidas Barot* (1974) 2 SCC 706 [11].

⁸² (2004) 3 SCC 553 [53].

⁸⁶ *State of Rajasthan* ([n 85](#)) [149].

⁸³ [2008] UKHL 61.

⁸⁴ *BP Singhal v Union of India* (2010) 6 SCC 331.

⁸⁵ (1977) 3 SCC 592.

⁸⁷ *SR Bommai v Union of India* (1994) 3 SCC 1 [258]:

Justiciability is not a legal concept with a fixed content, nor is it susceptible of scientific verification. Its use is the result of many pressures or variegated reasons. Justiciability may be looked at from the point of view of common sense limitation. Judicial review may be avoided on questions of purely political nature, though pure legal questions camouflaged by the political questions are always justiciable. The courts must have judicially manageable standards to decide a particular controversy. Justiciability on a subjective satisfaction conferred in the widest terms to the political coordinate executive branch created by the constitutional scheme itself is one of the considerations to be kept in view in exercising judicial review. There is an initial presumption that the acts have been regularly performed by the President.

⁸⁸ *Bhut Nath Mete v State of West Bengal* (1974) 1 SCC 645.

⁹¹ *Union of India v Association for Democratic Reforms* (2002) 5 SCC 294 [19].

⁸⁹ See *Common Cause v Union of India* (2008) 5 SCC 511.

⁹⁰ *Union of India v Deoki Nandan Aggarwal* (1992) Supp (1) SCC 323; *Union of India v Prakash P Hinduja* (2003) 6 SCC 195.

⁹² *Supreme Court Employees' Welfare Association v Union of India* (1989) 4 SCC 187.

⁹³ *Union of India v R Gandhi* (2010) 11 SCC 1 [106].

CHAPTER 35

SAVING CLAUSES

the Ninth Schedule and Articles 31A–C

SURYA DEVA^{*}

I. INTRODUCTION

THIS chapter seeks to examine critically the drafting history, nature, scope, (mis)use, and relevance of a unique and exceptional set of provisions of the Indian Constitution: Article 31A, Article 31B read with the Ninth Schedule, and Article 31C. For the sake of convenience, these provisions will be referred to as ‘saving clauses’ in this chapter.

The saving clauses were not part of the original constitutional text. Whereas Article 31A and Article 31B read with the Ninth Schedule were inserted with retrospective effect by the Constitution (First Amendment) Act 1951, Article 31C was inserted by the Constitution (Twenty-fifth Amendment) Act 1971. Although the scope and ambit of the three provisions vary, they basically seek to protect laws aimed at agrarian reforms or implementing certain Directive Principles of State Policy (DPSPs) from a potential constitutional challenge on the ground of violating fundamental rights (FRs). The saving clauses are unique because similar provisions might not be present in any other liberal constitution of the world. They are also exceptional in that they expressly permit certain types of laws to override FRs.

I advance three claims in relation to the saving clauses. First, I offer an alternative reading of the saving clauses by positing that they should be seen as a legislative reaction to judicial overreach reflected in an overzealous protection of the erstwhile FR to property against legislation aimed at securing socioeconomic justice.

Secondly, while the Ninth Schedule has been misused in the past, especially during the brief national emergency, there are reasons suggesting that this exceptional constitutional device might not be abused in future. I also contend that courts should play a limited role and that the basic structure doctrine is inappropriate to test the validity of laws inserted in the Ninth Schedule.

Thirdly, it appears that the judiciary misunderstood the dominant vision of the

Constitution makers as to the place of the right to property as an FR as well as the value of DPSPs *vis-à-vis* FRs. Courts also misconstrued their role in relation to DPSPs by not according adequate deference to legislative measures that sought to establish an egalitarian society. In hindsight, it would have been more appropriate if the courts had shared the constitutional space of understanding the constitutional vision with the other two government branches. Doing so might have pre-empted the need for the saving clauses and their subsequent misuse.

II. ORIGIN OF SAVING CLAUSES: AN ALTERNATIVE READING

Although the saving clauses are found in [Part III](#) dealing with FRs, they basically impose restriction on FRs.¹ The dominant discourse perceives the insertion of these saving provisions (Articles 31A–31C and the Ninth Schedule) as an abuse of power by a dominant Parliament coupled with strong Prime Ministers.² However, I will suggest the origin of these provisions could also be understood as a parliamentary reaction to judicial overreach in giving the then FR to property an overzealous protection against legislative measures aimed at securing socioeconomic justice—a constitutional goal regarded as ‘fundamental in the governance’ of the country.

Constitutions perform, among others, a guidance role:³ they prod all the relevant stakeholders to behave in a particular manner. This dynamic creates mutual expectations amongst different constitutional functionaries as to how others will behave. However, if one organ (say X) deviates from a given understanding of its role by other organs (say Y and Z), this may trigger reactions from Y and Z. The consequent cycle of actions and reactions dents trust among peer institutions, destroys the fine balance of power, and in turn leads to a battle of supremacy.

Against this analytical matrix, I argue that the origin of the saving clauses lies in the tussle between the judiciary and the executive–legislature over the right to property.⁴ This tussle started just after the promulgation of the Constitution, when the Patna High Court declared unconstitutional a land reform law on the ground that it violated the right to equality under Article 14.⁵ The Constituent Assembly—acting as provisional legislature—did not waste much time in responding by inserting Articles 31A and 31B by the Constitution (First Amendment) Act 1951.⁶ It is quite significant that the need to insert these provisions was felt by the same people who had drafted the Constitution with a

particular vision for the society that a free India should have.⁷

These two provisions sought to protect agrarian reform and *zamindari*⁸ abolition laws from any constitutional challenge on the ground of violation of FRs,⁹ because ‘dilatory litigation’ was holding up these ‘important measures affecting large numbers of people’.¹⁰ Nehru also felt that the responsibility for the economic and social welfare policies of the nation should lie with Parliament and not with the courts.¹¹ Article 31A, therefore, provided that no law dealing with certain proprietary interests—such as the acquisition of estate, taking over of the management of any property for a limited period, the amalgamation of two or more corporations and extinguishment of mineral leases—shall be deemed to be void on the ground that it takes away or abridges any FR under Article 14 or Article 19.¹² Article 31B, on the other hand, crafted a unique protective umbrella¹³ for legislation by providing that no law included in the Ninth Schedule shall be deemed to be void on the ground of being inconsistent with any of the FRs.¹⁴ As compared to Article 31A, the ambit of Article 31B is wider because the latter renders inoperative all FRs for laws listed in the Ninth Schedule.

Soon thereafter, the battle for supremacy shifted to the quantum of compensation to be paid for acquiring private property for public purposes. The Constitution framers did not consciously qualify the term ‘compensation’ in Article 31 by any adjective such as ‘fair’, ‘just’, or ‘reasonable’.¹⁵ Nevertheless, the Supreme Court in *State of West Bengal v Bela Banerjee* held that a provision that fixed the compensation without reference to the value of the land was arbitrary and breached the protection afforded to the right to property under Article 31(2).¹⁶ In other words, the compensation should be a ‘just equivalent’ of what the owner has been deprived of. In some other cases dealing with regulation of industry, the Court held that the payment of compensation could be necessary even for restricting the exercise of property rights.¹⁷ These judicial decisions provided impetus for Parliament to amend the Constitution again in 1955.¹⁸ This amendment of Article 31 made the adequacy of compensation non-justiciable and also laid down that no acquisition or requisition of property takes place unless there is a transfer of ownership or the right to possession. So, compensation will not be required if property rights are limited by ways other than acquisition or requisition.

Despite these amendments, the Supreme Court continued with its ‘private property-protecting’ interpretations and decisions. For example, it held that although Compensation is not required by law to be adequate, it must yet not be

‘illusory’.¹⁹ The Court also struck down the bank nationalisation law for not providing compensation as per the relevant principles.²⁰ The Court in *IC Golak Nath v State of Punjab* went a step further and held that Parliament cannot amend FRs, even while exercising its constituent power to amend the Constitution.²¹

Parliament was not, however, willing to accept this judicial position easily. It restored Parliament’s power to amend FRs by revising the text of Article 368 by the Twenty-fourth Amendment. Moreover, a new saving provision, Article 31C, was inserted by the Twenty-fifth Amendment. Article 31C was of far-reaching importance as it provided that no law giving effect to certain DPSPs—Article 39(b)/(c)—shall be declared void by the courts on the ground of being inconsistent with FRs under Article 14 or Article 19. If such a law contained a declaration that it is for giving effect to such policy, courts will be barred from reviewing whether the law seeks to further the said DPSPs or not. The original text of Article 31C was amended further by the Forty-second Amendment: the scope of the provision was extended to cover all DPSPs.

The constitutional validity of Article 31C was challenged in *Kesavananda Bharati v State of Kerala*.²² The majority held that Parliament has the power to amend FRs as long as they are not part of the ‘basic structure’ of the Constitution, which cannot be amended. The Court thus overruled *Golak Nath* on this point, but at the same time put an implied and open-ended limitation on the power of Parliament to amend the Constitution. The Supreme Court also declared invalid that part of Article 31C which sought to exclude judicial review.²³ The battle of supremacy between the Supreme Court and Parliament by and large came to an end with the deletion of the right to property (Article 31) as an FR by the Forty-fourth Amendment and the Court in *Minerva Mills* declaring the balance between FRs and DPSPs to be a basic feature of the Constitution.²⁴

III. TAXONOMY OF THE NINTH SCHEDULE’S (MIS)USE

It is largely uncontroversial that the Ninth Schedule has been used for purposes other than for which it was conceived by the Constituent Assembly acting as the provisional legislature for an independent India. The misuse of the Ninth Schedule concerns both the *process* by which laws are included and the *outcome* of inclusion (how many and what types of laws are included in the Ninth

Schedule). As far as the process of inclusion is concerned, one may notice non-application of mind before inserting laws in the Ninth Schedule and the lack of subsequent supervision of the included laws.

On the other hand, in terms of the outcome, a statistical analysis of the laws inserted in the Ninth Schedule reveals two interrelated types of misuse: excessive use and colourable use.²⁵ Excessive use is problematic because if too many laws are included in the Ninth Schedule over the years, then the exception might become the general norm, thus creating a constitutional black hole. On the other hand, colourable use is problematic simply because the power under Article 31B is exercised for the wrong purposes by making a departure from the original intent.

1. Lack of Application of Mind and Oversight

Considering the exceptional nature of the power under Article 31B, it should be incumbent on Parliament to apply its mind carefully before including a law in the Ninth Schedule and then continuously monitor the status of included laws. However, it seems that Parliament has not been able to discharge either of these responsibilities.

The process of en masse inclusion of laws²⁶ indicates that Parliament might not be applying its mind before inserting each law in the Ninth Schedule. Moreover, since it is only the title of laws, rather than the entire text of laws, that is included in the Ninth Schedule, it is very likely that members may not even read the legal provisions receiving the unique constitutional protection. Non-application of mind is especially worrisome because insertion of a law in the Ninth Schedule will result in a very limited judicial scrutiny of the constitutionality of such law.

It also seems that Parliament does not monitor the status of laws subsequent to their insertion in the Ninth Schedule.²⁷ An overwhelming number of the current Ninth Schedule laws (250 out of 282) are State laws, which can be amended or even repealed by the respective State legislatures. Consequently, if a Ninth Schedule law is amended by a State legislature after its insertion in the Schedule, this will deprive Parliament the power to review the text and its potential impact on FRs before inserting such a law in the Ninth Schedule. Lack of any post-insertion oversight will provide an opportunity for misuse of the Ninth Schedule.

It is worth noting that Articles 31A and 31C have an inbuilt check to prevent such an abuse: a State law will get the protection of these special provisions only

after such law is reserved for consideration by the President and receives his assent. Article 31B does not, however, have any comparable safeguard.

2. Excessive Use

[Figure 35.1](#) shows the number of laws inserted in the Ninth Schedule during the tenure of different Prime Ministers. It is clear that almost half of the laws were inserted during Indira Gandhi's tenure as Prime Minister—138 laws out of a total number of 285 laws.²⁸ Fifty-five laws were inserted during the tenure of VP Singh, while forty-four were inserted during the Lal Bahadur Shastri's tenure.²⁹ It is significant that no laws were inserted in the Ninth Schedule during the tenure of several Prime Ministers: Morarji Desai, Charan Singh, Rajiv Gandhi, Chandra Shekhar, Atal Bihari Vajpayee, HD Deve Gowda, IK Gujral, and Manmohan Singh. With the exception of Rajiv Gandhi, the rest of these Prime Ministers led a coalition government with no strong majority in the Lok Sabha, Parliament's Lower House. Several of these Prime Ministers were also at the helm for a short duration (less than one year). This may suggest that the Ninth Schedule was (mis)used more when Prime Ministers enjoyed a stable majority in the Lok Sabha.³⁰

As compared to Indira Gandhi, the relative number of laws inserted in the Ninth Schedule is much smaller for VP Singh and Shastri. However, if we take into account the very short stint enjoyed by both Shastri and VP Singh, the yearly average of laws inserted in the Ninth Schedule during the tenure of Shastri and VP Singh is much higher than that of Indira Gandhi. As [Figure 35.2](#) shows, the average for Shastri and VP Singh was 27.5 and 53.9, respectively. The yearly average for Indira Gandhi was merely 11.1 (during her first stint, including when Emergency was imposed) and 3.4 (during her second stint). One may then conclude that Indira Gandhi was perhaps not that big a user of the Ninth Schedule as she has been perceived to be, especially if we take out the Emergency period.

Nevertheless, the excessive use of the Ninth Schedule runs counter to the idea of constitutionalism, because an exception should not be allowed to become the general norm, otherwise it will result in creating a constitutional black hole. The mere presence of close to 300 laws in the Ninth Schedule raises this concern.

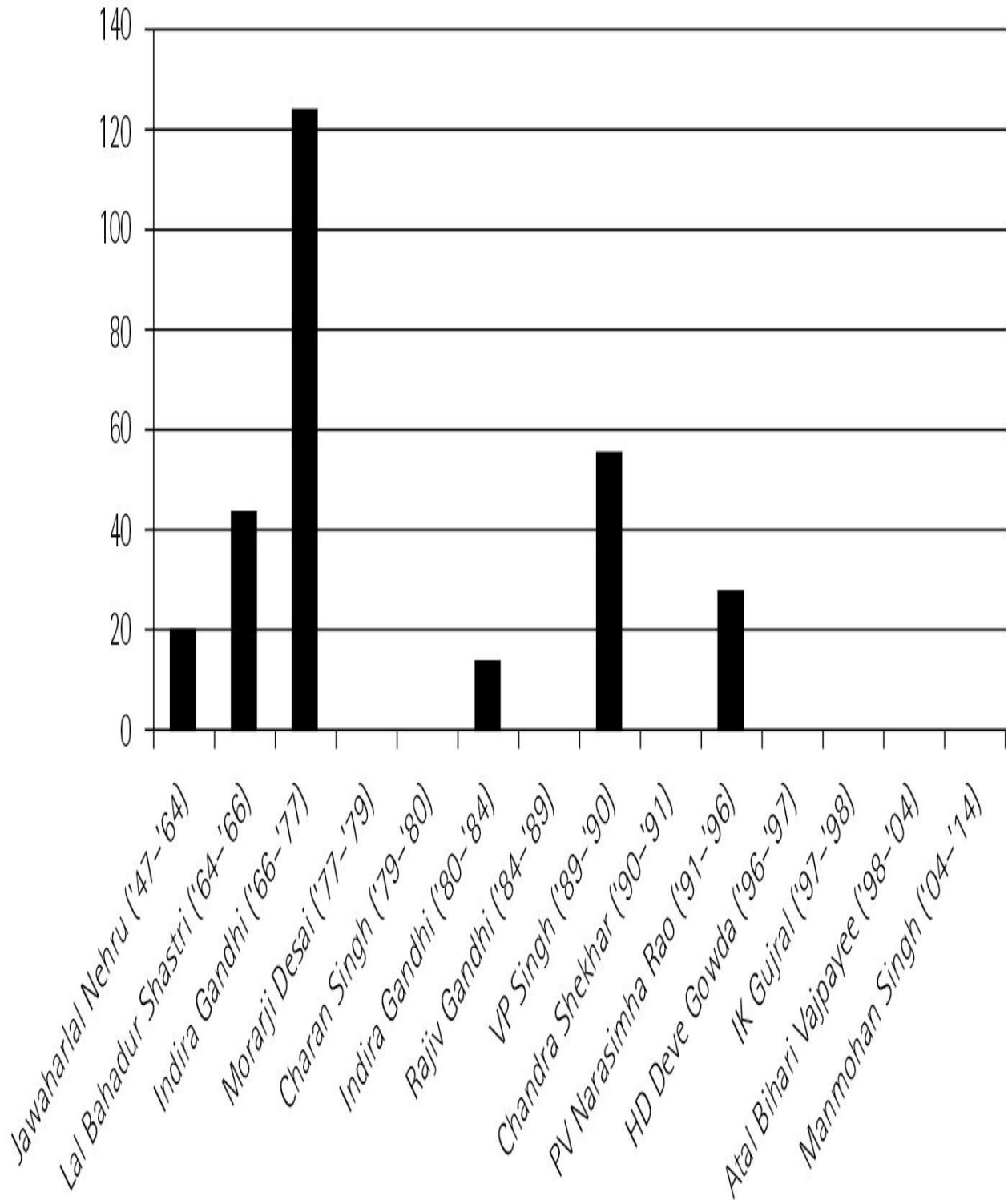


FIGURE 35.1 Number of Laws Added to the Ninth Schedule During Each PM's Tenure

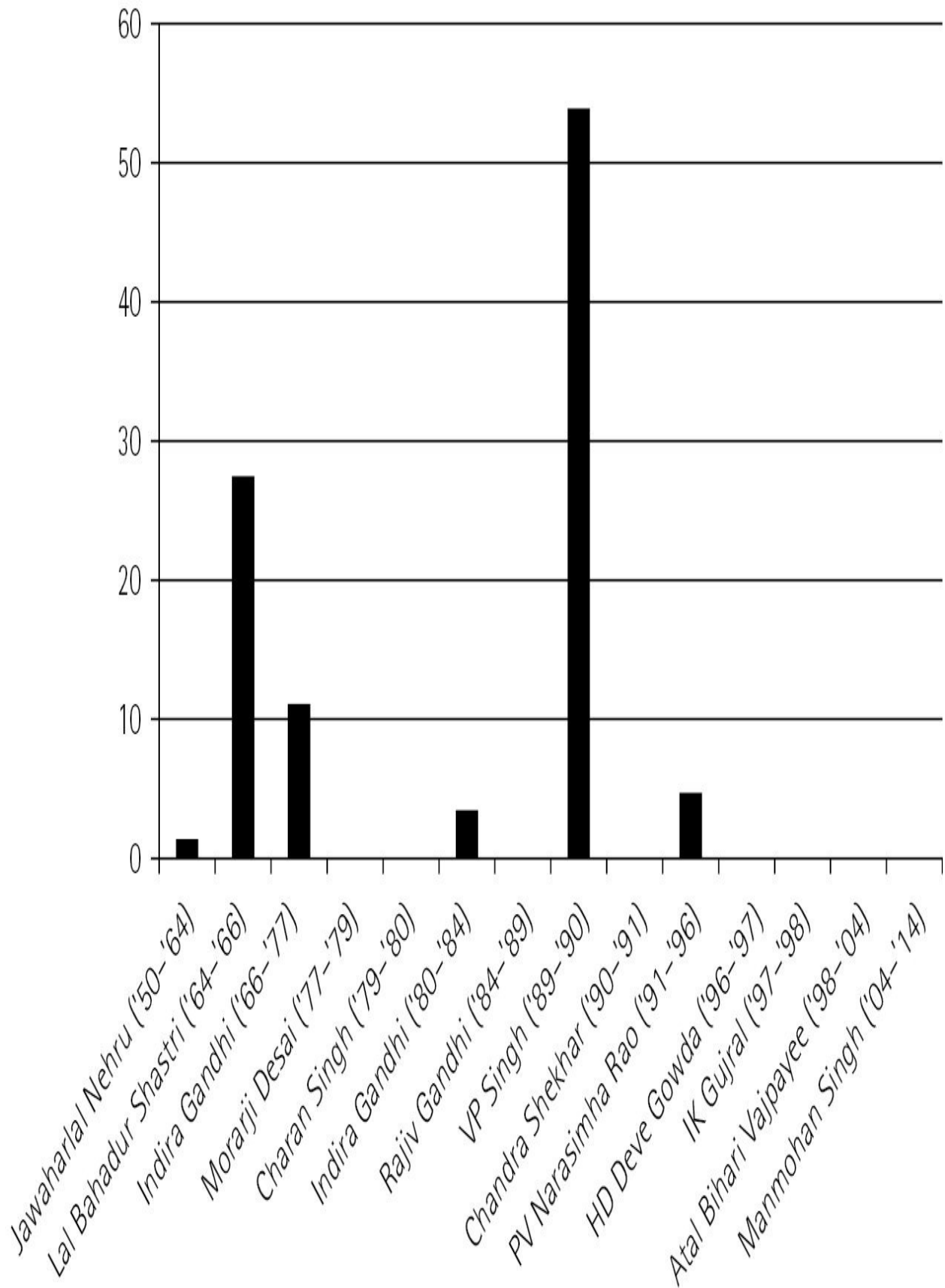


FIGURE 35.2 Yearly Average of Laws Added to the Ninth Schedule During Each PM's Tenure

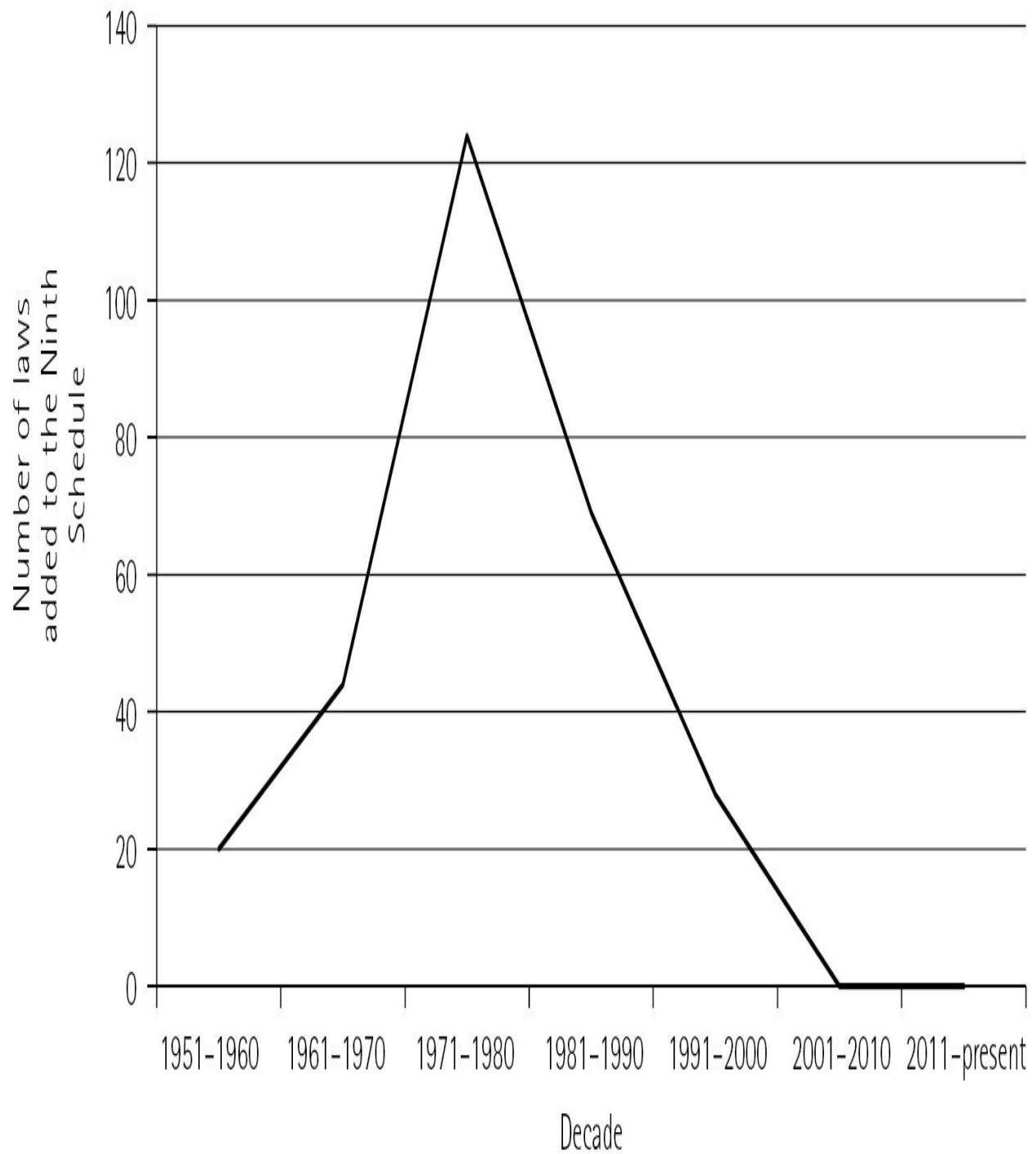


FIGURE 35.3 Number of Laws Added to the Ninth Schedule During Different Decades

3. Colourable Use

Perhaps the more problematic misuse of the Ninth Schedule concerns the colourable exercise of power under Article 31B. There is no express requirement in Article 31B that the laws inserted in the Ninth Schedule should be related to agrarian reforms or the right to property. However, taking into account the drafting history of Article 31B³¹ and its wide protective ambit,³² it is appropriate to construe the scope of this provision narrowly. I will suggest that the power under Article 31B should be limited to the original intent behind this provision (ie, saving agrarian reforms or the *zamindari* abolition laws from challenge on the touchstone of FRs), rather than for achieving ‘unrelated’ objectives.

In practice, however, the Ninth Schedule has been used to shield laws concerning a wide range of subject matters—from land reforms to bonded labour, price of essential goods, trade monopoly, election, internal security, and foreign exchange. Out of 282 laws in the Ninth Schedule currently, the majority of laws (253 in total) deal with various types of agrarian reforms or the abolition of the *zamindari* system. The remaining twenty-nine laws deal with diverse ‘unrelated’ aspects,³³ and a few of them have no relation with even the right to property; for example, the Representation of the People Act 1951 or the Maintenance of Internal Security Act 1971.³⁴ It is crucial to note that out of these twenty-nine ‘unrelated’ laws, twenty-five were enacted during the period when Indira Gandhi had imposed National Emergency. This seems to indicate that the Ninth Schedule has not generally been misused to shield ‘unrelated’ laws during normal times.

Since 1995, no new law has been included in the Ninth Schedule. But could this situation change in the future and result in a revival of the twofold misuse? In view of a number of reasons, it is unlikely that the Ninth Schedule would be misused in the future to the same extent or frequency as has happened in the past. First of all, many of the laws had to be inserted in the Ninth Schedule because of a *reaction* to overzealous judicial protection of the right to property and/or its non-sympathetic attitude towards socioeconomic reforms aimed at implementing DPSPs. This phase is arguably over now, so in the future we might not see any wholesale importation of laws into the Ninth Schedule.

Secondly, the advent of the free market economy since the early 1990s should also limit significantly the incentives for the government to insert laws into the Ninth Schedule.³⁵ As [Figure 35.3](#) depicts, we are well past the peak (from the mid-1960s to the mid-1990s) with a sharp high point during the Emergency in

the mid-1970s. The non-inclusion of any law in the post-1995 period may be explained by the fact that, as opposed to the past push for nationalisation, the Indian government in the past two decades has been pushing for privatisation and disinvestment. The government has also exercised its power to acquire land for business projects of corporate actors with no clear or immediate public interest advantage—thus, land redistribution to landless poor people is being replaced with land accumulation for rich business interests.

Thirdly, the judicial decisions holding that the constitutional validity of laws inserted in the Ninth Schedule could be tested on the touchstone of the basic structure doctrine should caution Parliament to be more careful and selective in inserting laws in the Ninth Schedule. This aspect is discussed further below.

IV. MISUSE OF THE NINTH SCHEDULE AND THE JUDICIARY

What should be the role of the Indian judiciary in pre-empting or redressing the misuse of the Ninth Schedule? Considering the exceptional nature of the Article 31B power, the temptation of constitutional lawyers would be to insist on rigorous judicial scrutiny of the parliamentary exercise of power in this area. However, I contend that the judiciary should show adequate deference to Parliament in implementing the constitutional vision behind the Ninth Schedule.

1. Sharing of Constitutional Space

In most of the common law jurisdictions, it is widely accepted that courts have the final say in interpreting what the Constitution means.³⁶ However, relying on the work of Waldron canvassing for limited judicial review³⁷ and Tushnet cautioning against judicial supremacy,³⁸ I propose the idea of a ‘shared constitutional space’ in understanding constitutional values underpinning given provisions of the Constitution. Instead of either the judiciary or the legislature having an exclusive say in unpacking the constitutional vision and applying it, this space should be shared amongst all three branches of the government, with each branch showing some deference to the other branches. In fact, lack of such mutual deference is likely to result in battles of supremacy between different government organs and the creation of new constitutional *defensive devices* (eg, the Ninth Schedule) or *attacking devices* (eg, the basic structure doctrine).

Consistent with the ‘shared constitutional space’ idea, I will argue below that courts should only have a limited judicial review power in relation to laws inserted in the Ninth Schedule. Apart from ensuring compliance with procedural safeguards governing the exercise of amendment power and the provisions concerning legislative competence, the Supreme Court should merely ensure that Parliament does not use its power in a colourable manner. In other words, all laws inserted in the Ninth Schedule must be directed at achieving the original purpose behind the First Constitutional Amendment, otherwise they should lose the protective umbrella of the Ninth Schedule. By the same logic, the court should not allow Parliament to expand its power under Article 31B beyond the original intent of this provision.

If the Supreme Court could show deference to Parliament in other matters which impinge upon core human rights,³⁹ there is no reason why the Court should be overly worried about certain legislative measures that seek to accomplish core constitutional goals of securing socioeconomic justice and equality to all citizens.

I examine below the suitability of the basic structure doctrine in testing the constitutional validity of laws inserted in the Ninth Schedule. But in the context of the idea of ‘shared constitutional space’ advanced here, it is arguable that Article 31B read with the Ninth Schedule itself should be regarded as a basic feature of the Constitution. They are legislative counterparts to subsequent judicial crystallisation of core values in the form of the basic structure doctrine. If there are certain basic features of the Constitution beyond the purview of the

amendment power, why should the judiciary be the sole judge in determining the contours of these features? In fact, the Constituent Assembly should be in a better position to take this call, as reflected expressly in the text of many constitutions from all over the world.⁴⁰

It is worth remembering that Article 31B read with the Ninth Schedule was inserted by the then Constituent Assembly acting as the provisional Parliament soon after the Constitution was adopted. If the Constitution makers (albeit acting as legislators) considered the need for taking such exceptional measures to achieve certain constitutional goals, these saving provisions should be treated as basic features of the Indian Constitution. As compared to a handful of judges who were not involved in drafting the Constitution, several hundred drafters of the Constitution acting together as a body should not only be in a much better position, but also have more legitimacy to distil what amounts to the core fundamental tenets of the Constitution.

2. Ninth Schedule and the Basic Structure Doctrine

After the judgment in *Kesavananda*, a key issue is whether the basic structure doctrine controls Parliament's power to insert laws into the Ninth Schedule or not.⁴¹ In the early 1980s, the Supreme Court in *Waman Rao v Union of India*⁴² and *Minerva Mills v Union of India*⁴³ held that laws included in the Ninth Schedule after the date of decision in *Kesavananda* (ie, 24 April 1973) will be subject to judicial scrutiny on the ground that they damage the basic structure of the Constitution.

More recently, a nine-judge bench of the Court in *IR Coelho v State of Tamil Nadu*,⁴⁴ considered the question whether, in light of the basic structure doctrine, legislation inserted by Parliament into the Ninth Schedule would be immune automatically from judicial review. Emphasising the nature of 'fictional immunity' granted by Article 31B to laws placed in the Ninth Schedule,⁴⁵ the Court unanimously held that the validity of any law placed in the Ninth Schedule after 24 April 1973 may still be tested by courts against the basic structure doctrine. The Court reasoned that if the amendment power under Article 368 is not unlimited, the power to amend the Ninth Schedule—which flows from Article 368—can also not confer 'unlimited or unregulated immunity'.⁴⁶

In determining the validity of a law in relation to the basic structure doctrine, reference must be had to the actual effect and impact of the law on FRs.⁴⁷ If the

law infringes the ‘essence of any of the fundamental rights or any other aspect of the basic structure’,⁴⁸ it should be struck down, with the extent of abrogation and limit of abridgement to be determined on a case-by-case basis. The Court ruled that it has the power to look at ‘the terms of the statute’ in question to determine whether the statute violates certain basic features or not.⁴⁹

The Court in *Coelho* also opined that the original intent of Article 31B to protect a limited number of laws had been overlooked and that there had been ‘unchecked and rampant exercise’ of the power granted therein by Parliament.⁵⁰ The ‘absence of guidelines for exercise of such power’ and the resultant absence of constitutional control may result in the ‘destruction of constitutional supremacy and the creation of parliamentary hegemony’.⁵¹

Although the Court in *Coelho* at times observed that the validity of any Ninth Schedule law can be tested on the touchstone of the basic structure, it seems that the intent is to limit the ground of challenge only to those FRs that are part of the basic structure.⁵² This is clear from the two-stage validity test laid down by the Court.⁵³ The same inference could be drawn from a rule stipulated in *Coelho*—which was confirmed later in *Dropti Devi v Union of India*⁵⁴—that once the validity of any Ninth Schedule law has been upheld by the apex court, it will not be permitted to challenge again the constitutional validity of such law on the ground of the principles laid down in the *Coelho* judgment. In other words, if a Ninth Schedule law violated a basic feature of the Constitution (such as separation of powers or democracy) but not any of the FRs, it will be safe.⁵⁵

It also appears that the Supreme Court is drawing a distinction between the specific text of certain FRs and the principles underlying them, which could be part of the basic structure. While testing the validity of a Ninth Schedule law, regard should be made to the broad underlying principles, thus giving courts greater flexibility in upholding the validity of such laws. In *Glanrock Estate Pvt Ltd v State of Tamil Nadu*, the Court observed:

[I]t is only that breach of the principle of equality which is of the character of destroying the basic framework of the Constitution which will not be protected by Article 31B. If every breach of Article 14, however egregious, is held to be unprotected by Article 31B, there would be no purpose in protection by Article 31B.⁵⁶

This again indicates that the grounds of judicial review to challenge the constitutional validity of a Ninth Schedule law are quite narrow.

The above judicial position canvassed in *Coelho* and other earlier cases prima facie looks uncontroversial because laws could be introduced in the Ninth

Schedule only by a constitutional amendment, which post-*Kesavananda* must not destroy the basic features of the Constitution. However, if one scratches the surface, a technical difficulty arises. A constitutional amendment that inserts laws in the Ninth Schedule has hardly any substantive content (apart from listing titles of laws) which courts can look into and then determine whether the amendment violates certain basic features or not.⁵⁷

Relying on this logic, MP Singh argues that since legislation cannot be challenged on the ground of violating the basic structure, ‘it is inconceivable that an amendment which introduces a legislation in the Ninth Schedule could be challenged’.⁵⁸ This argument has some logic because the basic structure doctrine limits only the amendment power of Parliament and not its ordinary lawmaking power.⁵⁹ While interpreting *Coelho*, the then Chief justice Kapadia in *Glanrock Estate Ltd* drew a clearer distinction between testing the validity of an ‘ordinary law’ and a ‘constitutional amendment’.⁶⁰

Moreover, it can be contended that if we allow the constitutional validity of all laws to be tested with reference to an open-ended list of abstract overarching constitutional principles (ie, basic features), then this will introduce a significant amount of uncertainty and unpredictability into the ordinary lawmaking process. Considering that the Indian Supreme Court operates in multiple benches, different benches may interpret even the same principles variedly and thus send mixed signals to Parliament, as well as people affected by such laws.⁶¹

On the other hand, it can be said that the judiciary—as the Court reasoned in *Coelho*—should be able to look at the content of laws included in a constitutional amendment, for the form of the amendment does not really matter and the content of such laws is as good as part of the amendment text. Alternatively, there is nothing that prevents courts from ruling in future that the validity of even ordinary laws could be tested with reference to the basic features of the Constitution. After all, the ‘basic structure could not be violated indirectly by inserting unconstitutional laws in the Ninth Schedule’.⁶²

How to resolve this question then about the relationship between the Ninth Schedule and the basic structure doctrine? While it is outside the purview of this chapter to examine the merits of the basic structure doctrine,⁶³ I suggest that courts should not employ the basic structure doctrine to test the validity of laws inserted in the Ninth Schedule. As I have indicated before and will show below in greater detail, Parliament felt the need to introduce the protective umbrella of the Ninth Schedule simply because courts were not showing adequate deference to the executive-cum-legislature’s understanding of a constitutional vision of creating an egalitarian society. If courts rely on the basic structure doctrine to

scuttle the effect of the Ninth Schedule, this would bring us back to a battle of supremacy, something that should be avoided.

V. JUDGING THE CONSTITUTIONAL VISION

This part provides a brief mapping of the constitutional vision concerning two aspects—the relation to the right to property with other FRs, and the status of FRs *vis-à-vis* DPSPs—which are relevant to the origin, scope, and (mis)use of the saving clauses. Like courts elsewhere, the Indian Supreme Court too has a legitimate role in interpreting the constitutional vision. However, the Indian experience shows that courts do not always capture well the vision espoused by the Constitution framers, leading to a clash with the other two organs of the government. Had the Court shared the space of judging the constitutional vision with the other two branches, we might have not seen the birth of the saving clauses and the Ninth Schedule's misuse.

1. Right to Property versus Other Fundamental Rights

The saving clauses operate as an exception, among others, to the constitutional protection of the right to property.⁶⁴ Jain has rightly described the FR to property as 'the most controversial aspect of the Indian Constitution'.⁶⁵ During the drafting process, members of the Constituent Assembly discussed and disagreed for several months on the exact contours of the right to property. The key issue was if any adjective such as 'just', 'fair', 'adequate', or 'equitable' should be added before compensation that must be given by the State if it acquires personal property for public purposes.⁶⁶ The Constitution framers were clearly wary of giving courts the power to adjudicate on the sufficiency of compensation. At the same time, some members of assembly did not want to confer on the government an absolute right to acquire private property. Finally, a compromise was reached, as reflected in recognition of the FR to property under Article 31 and Article 19(1)(f) of the Constitution.

Nevertheless, to build an egalitarian society, the Constitution framers had envisaged that agrarian reforms would have to be carried out and the *zamindari* system would have to be abolished. They had also thought that the judiciary would not invoke the right to property to frustrate such policies.⁶⁷ During the

Constituent Assembly debates, Pandit Nehru had observed that ‘no Supreme Court and no judiciary can stand in judgment over the sovereign will of Parliament representing the will of the entire community’.⁶⁸ During the drafting of the Constitution, ‘property’ was delinked from ‘life’ and ‘liberty’.⁶⁹ One can then say that although the Constituent Assembly decided to protect property as an FR,⁷⁰ it was not to be accorded the same level of protection as other FRs recognised in [Part III](#).

The Indian Supreme Court, however, did not buy this socialist vision of the right to property. In fact, the Court had initially accorded more robust protection to property than liberty.⁷¹ The right to property as an FR under Article 31 was amended by Parliament on six occasions;⁷² the trigger for each amendment was some judicial decision which the government considered to be restricting the goals of establishing an egalitarian society. Ultimately, in 1978, Parliament had to delete both Articles 19(1)(f) and 31 from the list of FRs and provide protection to private property under Article 300A.

After reviewing various cases in which the FR to property was invoked, Upadhyaya concludes that the Court has ‘done its best’ to protect agrarian reforms over the years.⁷³ This conclusion, however, does not sit well with the constitutional reality examined by Austin in the form of a battle for supremacy between the judiciary and Parliament since the middle of the 1960s.⁷⁴

2. Fundamental Rights versus Directive Principles

FRs and DPSPs appear in separate parts of the Constitution. Although DPSPs are not justiciable, they are ‘nevertheless *fundamental in the governance* of the country and it *shall* be the duty of the State to apply these principles in making laws’.⁷⁵ The non-justiciable nature of DPSPs has been used by scholars to question their usefulness⁷⁶ or to claim that they are inferior to FRs.⁷⁷ This aspect also led the judiciary to conclude initially that FRs are superior to DPSPs.⁷⁸

The clash as to the relative normative hierarchy of FRs and DPSPs led to the birth of saving clauses and also set the tone for several decades of battle for supremacy between the Supreme Court and Parliament.⁷⁹ It seems, however, that the Constitution framers did not intend to put FRs on a higher pedestal. The leaders of the independent movement drew no distinction between the positive (say DPSPs) and negative (say FRs) obligations of the State.⁸⁰ Moreover, during the Constitution framing, some members of the Constituent Assembly had, in fact, demanded a justiciable status for DPSPs⁸¹ and the unenforceable nature of DPSPs remained a constant source of criticism at various drafting stages.⁸²

A compromise was, however, reached in the end because justiciability might not have been appropriate for DPSPs at that time.⁸³ But non-justiciability of DPSPs in itself should not be used as evidence of their status being inferior to that of FRs.⁸⁴ It was simply a matter of constitutional design that the Constitution makers vested the *exclusive* responsibility of implementing DPSPs on the other two government branches and excluded the judiciary from this role. This position is consistent with the ‘progressive realisation’ approach accepted at the international level in relation to socioeconomic rights. In fact, measures to implement even FRs are mostly taken by the executive/legislature. The judiciary is merely given a supervisory role. However, the Constitution did not envisage vesting the judiciary with a supervisory role in relation to DPSPs. This role was rather given to people and other stakeholders of democracy, such as the media.⁸⁵

While the judiciary should act as a watchdog in supervising that the (non)actions of the executive/legislature do not result in violations of FRs, it has a very minimal role in supervising whether and how the government is implementing DPSPs. Courts should show full deference to the government in implementing DPSPs, considering that the government is constitutionally obliged to take DPSPs into account ‘in making laws’. The role of the judiciary should be limited to controlling a colourable exercise of power by the

government and striking a balance between FRs and DPSPs if required.

However, as we have seen, courts have exceeded their limited role canvassed here. Whether the superman-like role played by the judiciary has yielded positive benefits is debatable,⁸⁶ but this has resulted in at least two serious consequences. I have already alluded to the first one: courts' overreach triggered a backlash from Parliament and consequent insertion of exceptional provisions in the form of saving clauses. Secondly, judicial trespass into the supervisory domain meant for other democracy stakeholders has contributed to democratic deficits by undermining the evolution of alternative means of accountability critical for a vibrant democracy. Rather than acting as the sole custodian of DPSPs, the judiciary should have channelled grievances concerning bad implementation or non-implementation of DPSPs towards various other stakeholders of democracy.

VI. CONCLUSION

The saving clauses—Article 31A, Article 32B read with the Ninth Schedule, and Article 31C—are very unique and exceptional provisions of the Indian Constitution. They are like a protective constitutional island, which enjoys a status higher to other parts of the Constitution. In this chapter, I have tried to offer an alternative reading of the origin and scope of the saving clauses: rather than being seen as an abuse of power by Parliament, their origin could be explained by the struggle for supremacy between the government and the judiciary. This struggle was (mostly) triggered by courts not showing adequate deference to legislative measures aimed at securing socioeconomic justice and their overzealous protection of the FR to property. It also seems that the judiciary misunderstood their limited role in relation to the government's laws and policies that sought to implement DPSPs.

Although the saving clauses have been misused in the past, there are reasons to believe that in the future this trend may not continue. Nevertheless, courts should have a limited judicial review power to ensure that the Ninth Schedule is used only to serve the original purpose of saving agrarian reforms or the *zamindari* abolition from a potential constitutional challenge. It may also not be appropriate to test the validity of Ninth Schedule laws on the touchstone of the basic structure doctrine.

At a wider level, the Indian experience of saving clauses shows that while courts enjoy a primary role in unpacking the constitutional vision, they should

also give some space to the other two government organs. The principle of shared constitutional space is preferable to conferring absolute authority of determining and realising constitutional values on any one institution, even if it is the judiciary.

* I would like to thank Kavitha Ramanathan for providing excellent research assistance for writing this chapter.

¹ MP Jain, *Indian Constitutional Law*, vol 2, eds Justice Ruma Pal and Samaraditya Pal (updated 6th edn, LexisNexis 2013) 1857.

² All leading commentaries on Indian constitutional law attest to this.

³ Tribe talks about the US Constitution providing guidance, at least suggestive, if not decisive. Lawrence Tribe, *Constitutional Choices* (Harvard University Press 1986) 25.

⁴ Sen frames this tussle in terms of the exercise of ‘popular sovereignty’ by Parliament. Sarbani Sen, *The Constitution of India: Popular Sovereignty and Democratic Transformations* (Oxford University Press 2007) 168–74.

⁵ *Kameshwar Singh v State of Bihar*, AIR 1951 Pat 91 (Patna High Court).

⁶ For a review of the first four amendments, see M Ramaswamy, ‘Constitutional Developments in India 1600–1955’ (1956) 8 *Stanford Law Review* 326, 366–75.

⁷ Datar, however, argues that there ‘was no constitutional justification for the Ninth Schedule. If the Government had to abolish *zamindari* estates or nationalise industries, just and fair compensation ought to have been paid.’ Arvind Datar, ‘Our Constitution and Its Self-inflicted Wounds’ (2007) 1 *Indian Journal of Constitutional Law* 92, 95.

⁸ ‘*Zamindars*’ means landowners who held huge tracts of land, mostly in a hereditary manner, and exploited farmers who often actually worked on land.

⁹ As long as the main thrust of the laws is agrarian reform, they will receive the protection of art 31A. See MP Singh (ed), *Shukla’s Constitution of India* (12th edn, Eastern Book Company 2013) 326–28; Jain ([n 1](#)) 1861–64.

¹⁰ Constitution (First Amendment) Act 1951, Statement of Objects and Reasons.

¹¹ Granville Austin, *The Indian Constitution: Cornerstone of a Nation* (Oxford University Press 1966) 100–01.

¹² Prior to the deletion of the right to property from [Part III](#) of the Constitution, art 31 was also listed, along with arts 14 and 19.

¹³ Jain labels art 31B as ‘a novel, innovative, and drastic technique of constitutional amendment’. Jain ([n 1](#)) 1869.

¹⁴ If Parliament amended a law included in the Ninth Schedule, such an amendment will not receive the protection, unless the parent law was included in the Schedule after the amendment. Jain ([n 1](#)) vol 1, 332.

¹⁵ Jain ([n 1](#)) 1858; Austin ([n 11](#)) 87–99.

¹⁶ AIR 1954 SC 170.

¹⁷ Tom Allen, ‘Property as a Fundamental Right in India, Europe and South Africa’ (2007) 15 *Asia Pacific Law Review* 193, 198.

¹⁸ Constitution (Fourth Amendment) Act 1955.

¹⁹ *P Vajravelu Mudaliar v Special Deputy Collector* AIR 1965 SC 1017. See also *Union of India v Metal Corporation of India* AIR 1967 SC 637.

²⁰ *Rustom Cavasjee Cooper v Union of India* (1970) 1 SCC 248.

²¹ AIR 1967 SC 1643.

²² (1973) 4 SCC 225.

²³ *Minerva Mills v Union of India* (1980) 3 SCC 625. There is some uncertainty as to whether *Minerva Mills* revived the original text of art 31C or the provision has become inoperative after this judgment. Jain ([n 1](#)) 1882.

²⁴ For a critique of the *Minerva Mills* ruling that a balance should and could be struck between FRs and DPSPs, as well as the judges' reliance on Austin's *Cornerstone of a Nation* to reach such a conclusion, see HM Seervai, *Constitutional Law of India*, vol 2 (4th edn, Universal Book Traders 2002) 1951–2008.

²⁵ See [Figures 35.1](#) and [35.2](#). See also Datar ([n 7](#)) 95.

²⁶ With the exception of three entries (65, 66, and 257A), all laws were inserted in the Ninth Schedule in big batches.

²⁷ This is evident, among others, from the fact that a Ninth Schedule law like the Monopolies and Restrictive Trade Practices Act 1969 is still listed in the Schedule, despite its repeal by the Competition Act 2002.

²⁸ Three laws (entries 87, 92, and 130) were removed subsequent to their insertion, so there are currently 282 laws in the Ninth Schedule.

²⁹ The Bill leading to the Constitution (Seventeenth Amendment) Act 1964 was introduced in Parliament during Nehru's tenure as Prime Minister, but it was enacted during Shastri's tenure due to Nehru's sudden death. Despite this unique situation, forty-four laws inserted in the Ninth Schedule by the Seventeenth Amendment are still placed under Shastri's tenure because his socialistic policies were quite consistent with those adopted by Nehru.

³⁰ VP Singh was the only exception to this trend: he led an unstable coalition government for less than one year, but still inserted fifty-five laws in the Ninth Schedule.

³¹ Both arts 31A and 31B were inserted by the same constitutional amendment. So they were part of a package to clear judicial roadblocks or speed breakers. Also, the Statement of Objects and Reasons appended to the Constitution (First Amendment) Bill 1951 provided that the main object of the Bill was 'to insert provisions fully securing the constitutional validity of *zamindari* abolition laws in general and certain specified State Acts in particular'.

³² Unlike art 31A, laws under the protective umbrella of art 31B can take away or abridge *any* FR. The Court in *Coelho* noted that the 'consequence of insertion is that it nullifies entire [Part III](#) of the Constitution'. *IR Coelho v State of Tamil Nadu* (2007) 2 SCC 1.

³³ Entries 17–19, 88, 90–91, 93–105, 125–29, 131, 133, 148–49, and 257A of the Ninth Schedule.

³⁴ Both these laws were subsequently deleted from the Ninth Schedule.

³⁵ See Pathik Gandhi, 'Basic Structure and Ordinary Laws (Analysis of the Election Case and the Coelho Case)' (2010) 4 Indian Journal of Constitutional Law 47, 69.

³⁶ As a contrast, in a civil law country like the People's Republic of China, the National People's Congress and its Standing Committee have the sole power to interpret the Chinese Constitution.

³⁷ Jeremy Waldron, 'The Core of the Case Against Judicial Review' (2006) 115 Yale Law Journal 1346.

³⁸ Mark Tushnet, *Taking the Constitution Away from the Courts* (Princeton University Press 1999).

³⁹ See, for example, the Court's decision upholding the constitutional validity of Section 377 of the Indian Penal Code 1860, which criminalises 'unnatural' sex, including between homosexuals. *Suresh Kumar Koushal v Naz Foundation* (2014) 1 SCC 1.

⁴⁰ See eg, art 79(3) of the Basic Law of the Federal Republic of Germany; art 139 of the Constitution of the Italian Republic; art 177 of the Constitution of the Islamic Republic of Iran; art 60(4) of Subsection II of the Constitution of the Federative Republic of Brazil; art 152 of the Constitution of Romania; art 153 of the Constitution of Cambodia; arts 159 and 161E of the Federal Constitution of Malaysia; art 4 of the Constitution of the Republic of Turkey; art 112 of the Constitution of Norway; art 37 of the Constitution of Indonesia; and art 110 of the Constitution of Greece.

⁵⁶ (2010) 10 SCC 96 [30].

⁴¹ Prateek regards the debate about the applicability of the basic structure doctrine to ordinary laws as merely ‘academic’ because any law that violates the basic structure is likely to be found unconstitutional under the normal judicial review mechanism. Satya Prateek, ‘Today’s Promise, Tomorrow’s Constitution: “Basic Structure”, Constitutional Transformations and the Future of Political Progress in India’ (2008) 1 NUJS Law Review 417, 487.

⁴² (1981) 2 SCC 362.

⁴³ *Minerva Mills* (n 23).

⁴⁴ *Coelho* (n 32). For the implications of *IR Coelho*, compare Subhash Kashyap, ‘Ninth Schedule can’t help—evading judicial scrutiny not possible’ *The Tribune* (Chandigarh, 29 January 2007) <<http://www.tribuneindia.com/2007/20070129/edit.htm>>, accessed November 2015, with Indira Jaising, ‘Ninth Schedule: what the Supreme Court judgment means’ *Rediff* (11 January 2007) <<http://www.rediff.com/news/2007/jan/11indira.htm>>, accessed November 2015.

⁴⁵ *Coelho* (n 32) [149].

⁴⁶ *Coelho* (n 32) [126].

⁴⁷ While making a distinction between the ‘rights test’ and the ‘essence of right test’, the Court ruled that the former is more relevant when an amendment seeks to make the whole [Part III](#) inapplicable. But the Court later interpreted *Coelho*’s ratio to be that both tests may be relevant, depending upon the nature and kind of a constitutional amendment. *Indian Medical Association v Union of India* (2011) 7 SCC 179.

⁴⁸ *Coelho* (n 32) [114].

⁴⁹ *Coelho* (n 32) [148].

⁵⁰ *Coelho* (n 32) [103].

⁵¹ *Coelho* (n 32) [103].

⁵² Applying the Cohn-Kremnitzer model to measure judicial activism to the *Coelho* decision, Khosla concludes that ‘the decision has both shades of activism and restraint, and if anything, the overall picture leans more towards restraint’. Madhav Khosla, ‘Addressing Judicial Activism in the Indian Supreme Court: Towards an Evolved Debate’ (2009) 32 *Hastings International and Comparative Law Review* 55, 98.

⁵³ It observed that ‘... it has to first find whether the Ninth Schedule law is violative of [Part III](#). If on such examination, the answer is in the affirmative, the further examination to be undertaken is whether the violation found is destructive of the basic structure doctrine.’ *Coelho* (n 32) [148].

⁵⁴ (2012) 7 SCC 499. In this case, the Court upheld that constitutional validity of section 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act 1974.

⁵⁵ However, if the validity of a Ninth Schedule law could be challenged not on the ground of infringing any part of the basic structure but only certain FRs which are part of the basic structure, one can then argue that the Court is drawing a hierarchy even amongst the basic features of the Constitution. The Court is suggesting that some basic features of the Constitution are more important than others.

⁵⁷ The Statement of Objects and Reasons appended to such a constitutional amendment Bill typically states that certain progressive laws aimed at land reforms are being included in the Ninth Schedule to provide them immunity from a constitutional challenge for violating FRs. See, for example, the Constitution (Sixty-sixth Amendment) Act 1990; Constitution (Seventy-eighth Amendment) Act 1995.

⁵⁸ Singh (n 9) 333. See also MP Singh, ‘Ashok Thakur v Union of India: A Divided Verdict on an Undivided Social Justice Measure’ (2008) 1 NUJS Law Review 193, 216–17.

⁵⁹ See eg, *Kuldip Nayar v Union of India* (2006) 7 SCC 1.

⁶⁰ *Glanrock Estate Pvt Ltd* (n 56) [25].

⁶¹ This is well documented, for instance, in relation to how the Supreme Court has interpreted the ‘rarest of rare’ principle while administering capital punishment. See Surya Deva, ‘Death Penalty in the “Rarest of Rare” Cases: A Critique of Judicial Choice-Making’ in Roger Hood and Surya Deva (eds) *Confronting*

Capital Punishment in Asia: Human Rights, Politics, Public Opinion (Oxford University Press 2013) 238.

⁶² Datar (n 7) 96.

⁶³ For a detailed defence of the basic structure doctrine, see Sudhir Krishnaswamy, *Democracy and Constitutionalism in India: A Study of the Basic Structure Doctrine* (Oxford University Press 2009). Datar argues that *Kesavananda*, the case in which the doctrine was propounded, saved Indian democracy, otherwise 'India would most certainly have degenerated into a totalitarian State or had one-party rule'. Arvind Datar, 'The case that saved Indian democracy' *The Hindu* (Chennai, 24 April 2013) <<http://www.thehindu.com/opinion/op-ed/the-case-that-saved-indian-democracy/article4647800.ece>>, accessed November 2015. But one can also argue that although this doctrine may have saved Indian democracy in the short term, exercise of unlimited powers by Indian courts has in fact damaged the process of the evolution of a robust democracy in the long run.

⁶⁴ For a detailed critical analysis of the case law on this point, see Seervai (n 24) 1428–48.

⁶⁵ Jain (n 1) 1893.

⁶⁶ Austin (n 11) 87–99.

⁶⁷ But courts provided wealthy *zamindars* wide leeway to challenge the government's redistributive laws and policies. See Manoj Mate, 'Two Paths to Judicial Power: The Basic Structure Doctrine and Public Interest Litigation in Comparative Perspective' (2010) 12 *San Diego International Law Journal* 175, 179–81.

⁶⁸ *Constituent Assembly Debates*, vol 9 (Lok Sabha Secretariat 1986) 1195, 10 September 1949.

Cited in Austin (n 11) 99.

⁶⁹ Sardar Patel and others had insisted on this delinking. Subhash C Kashyap, *Indian Constitution: Conflicts and Controversies* (Vitasta Publishing 2010) 149; Austin (n 11) 86.

⁷⁰ In the Congress Party meetings, Nehru spoke against the inclusion of the right to property as an FR. Kashyap (n 69) 134. The early death of Patel perhaps allowed Nehru to push his original vision of the right to property more easily. Nick Robinson, 'Expanding Judiciaries: India and the Rise of the Good Governance Court' (2009) 8 *Washington University Global Studies Law Review* 1, 29.

⁷¹ MP Jain, 'The Supreme Court and Fundamental Rights' in SK Verma and Kusum Kumar (eds) *Fifty Years of the Supreme Court of India: Its Grasp and Reach* (Oxford University Press 2000) 1, 87–89.

⁷² Constitution (First Amendment) Act 1951; Constitution (Fourth Amendment) Act 1956; Constitution (Seventeenth Amendment) Act 1964; Constitution (Twenty-Fifth Amendment) Act 1971; Constitution (Forty-second Amendment) Act 1976; and Constitution (Forty-fourth Amendment) Act 1978.

⁷³ ML Upadhyaya, 'Agrarian Reforms' in SK Verma and Kusum Kumar (eds) *Fifty Years of the Supreme Court of India: Its Grasp and Reach* (Oxford University Press 2000) 569, 589.

⁷⁴ Granville Austin, *Working a Democratic Constitution: The Indian Experience* (Oxford University Press 1999) 69–122, 171–292.

⁷⁵ Constitution of India 1950, art 37 (emphasis added).

⁷⁶ Wheare wondered 'whether there is any gain, on balance, from introducing these paragraphs of generalities into a Constitution'. KC Wheare, *Modern Constitutions* (Oxford University Press 1951) 69, cited in Austin (n 11) 114.

⁷⁷ Seervai, for example, argues that DPSPs are the only part of the Constitution whose breach by a law will not render the said law unconstitutional. Seervai (n 24) 1963. But this is a circular argument: this consequence follows from the text of the Constitution (art 37) itself. The non-justiciability of DPSPs does not automatically mean that they are inferior to FRs.

⁷⁸ *State of Madras v Champakam Dorairajan* AIR 1951 SC 226.

⁷⁹ For an analysis of relationship between individual rights and social rights, see O Chinnappa Reddy, *The Court and the Constitution of India: Summits and Shallows* (Oxford University Press 2008).

⁸⁰ Austin (n 11) 52.

⁸¹ Austin (n 11) 78–79.

⁸² B Shiva Rao (ed), *The Framing of India's Constitution: A Study* (Indian Institute of Public Administration 1968) 324–26, 328–29.

⁸³ Austin ([n 11](#)) 78–79; Rao ([n 82](#)) 321–22.

⁸⁴ See MP Singh, 'The Statics and the Dynamics of the Fundamental Rights and the Directive Principles —A Human Rights Perspective' (2003) 5 SCC J 1.

⁸⁵ While highlighting the difference in the *nature* of enforceability enjoyed by FRs and DPSPs, Ambedkar observed: '[The DPSPs become] justifiable for another reason ... [Persons in power] may not have to answer for their breach in a court of law. But [persons in power] will certainly have to answer for them before the electorate at election time.' *Constituent Assembly Debates*, vol 7 (Lok Sabha Secretariat 1986) 42, 4 November 1948.

⁸⁶ For a critique of judicial activism and public interest litigation, see Surya Deva, 'Public Interest Litigation in India: A Quest to Achieve the Impossible?' in Yap Po Jen and Holning S Lau (eds) *Public Interest Litigation in Asia* (Routledge 2010) 57.

CHAPTER 36

DIRECTIVE PRINCIPLES OF STATE POLICY

GAUTAM BHATIA

I. INTRODUCTION

THE Directive Principles of State Policy ('DPSPs') occupy an ambiguous place in our constitutional scheme. They are framed as a set of obligations upon the State. Nonetheless, the constitutional text expressly renders them unenforceable. At the time of drafting, the only other Constitution that contained anything analogous was the Irish. The members of the Constituent Assembly themselves were deeply divided over the DPSPs. Many could not see the utility of an unenforceable set of exhortations. Some recommended scrapping the chapter altogether, while others argued for placing it within the domain of [Part III](#) and the fundamental rights. Still others argued over the level of detail that the DPSPs set out. And some of them pointed out the contradictions inherent in placing abstract principles of economic justice alongside concrete policies like prohibition and controlling cow slaughter.

Nonetheless, [Part IV](#) survived the birth pangs of the Constitution relatively unscathed. Yet its life after that has been anything but straightforward. Judicial approaches to the interpretation of [Part IV](#) as a whole, to individual principles, and to their relationship with fundamental rights, have been inconsistent. And lately, directive principles such as the provision of universal primary education have been shifted from [Part IV](#) to [Part III](#) via constitutional amendment—raising the question whether there is any genuine conceptual distinction between fundamental rights and DPSPs at all. In this medley of diverging voices and with such a chequered history, is it at all possible to ground the DPSPs within a coherent intellectual vision, one that is justified both constitutionally and philosophically?

In this chapter, I argue that it is. Drawing upon the text of the Constitution, its structure, its history, judicial precedent and political philosophy, I shall make two claims. First, the directive principles are best understood as providing the *framework of values that structure and constrain the interpretation and*

construction of fundamental rights; and secondly, in giving teeth to the DPSPs, the Court has regularly adopted a limiting principle that constrains *its own role* in interpretive exercise, one that is grounded in ideas of institutional competence and legitimacy.

My method of analysis is chronological. I substantiate the above claims by examining the Court's own evolving understanding of the place of [Part IV](#) within our constitutional scheme: starting from a blanket refusal to accord the Principles any weight in an interpretive inquiry, to a more detailed and nuanced approach, developed over sixty years—not always consistently—that seeks to balance the non-enforceability commandment with an approach that does not simply relegate DPSPs—as so many members of the Constituent Assembly feared they *would* be relegated—to mere 'pious wishes'.

It is often stated that the courts have accomplished an end-run around the non-enforceability of the DPSPs by developing a jurisprudence that interprets the Fundamental Rights chapter in light of the DPSPs, and virtually incorporates some of the DPSPs into [Part III](#), despite the constitutional separation between the two. This claim is true, but also rather empty: what does it mean to say that fundamental rights are interpreted 'in light of' the DPSPs? How does that play out in concrete cases? One of the principal endeavours of this chapter is to unpack this truism, and explain the different ways in which the Court has fused Parts III and IV of the Constitution in its jurisprudence.

A caveat: the DPSPs' abstract and wide-ranging scope has rendered them particularly suitable for providing the rhetorical window-dressing to a rapidly proliferating set of judicial opinions—especially over the past twenty years. This chapter does not—indeed, it cannot—catalogue all those instances. Rather, its aim is to provide a conceptual understanding of their role in constitutional reasoning, and its examination of the cases is limited to that end.

II. ORIGINS: JUDICIAL MINIMALISM

Let us commence with the constitutional text. The preamble Article 37 states:

The provisions contained in this Part *shall not be enforceable* by any court, but the principles therein laid down are nevertheless *fundamental in the governance of the country* and it shall be *the duty of the State* to apply these principles in making laws.¹

The three underlined terms can carry multiple meanings. 'Not enforceable' means, straightforwardly, that a breach of a directive principle cannot ground a

legal claim (unlike the breach of a fundamental right). But does unenforceability prohibit the Court from taking into account the existence and content of the Directive Principles while *interpreting* other laws? The word ‘fundamental’ has been used for a very specific purpose in [Part III](#), to characterise the Bill of Rights. Does the use of the same word in [Part IV](#) imply at least some conceptual overlap between fundamental rights and DPSPs? And what precisely is the nature of the ‘duty’ placed upon the State? Is it a legal duty or a moral duty? If it is the latter, then what is it doing in a document whose intention is to define the basic legal structure of the Indian polity and its set of governing institutions? The text of the Constitution, standing alone, cannot answer these questions for us.

HM Seervai, however, sees no ambiguity in Article 37. He argues that the Directive Principles are merely *political exhortations* to the legislature. They possess no legal significance, and the only remedy for their violation lies in the ballot box.² For Seervai, the presence or absence of the DPSPs should make absolutely no difference to anything a court does.

This, precisely, was the judiciary’s initial approach, between 1950 and 1960. In *State of Madras v Champakam Dorairajan*,³ for instance, Madras attempted to justify caste-based affirmative action policies, which conflicted with the fundamental right to non-discrimination, on the basis of the DPSPs. The Supreme Court flatly rejected the argument, pointing to the non-enforceable nature of the DPSPs in refusing to accord them any weight in judging the constitutionality of the action.

This strict approach continued in *Muir Mills v Suti Mills Mazdoor Union*,⁴ where the DPSPs were invoked in an argument over workmen’s rights to bonus payments. *Muir Mills* was not even a question of enforcement, involving only a question of *interpretation*. Nonetheless, the Court refused to use the DPSPs even as interpretive guides, preferring to adhere instead to traditional common law employment concepts of wages and bonuses. Various State High Courts followed the Supreme Court’s lead, taking the non-enforcement clause as evidence that the DPSPs had no role whatsoever to play in the judicial task. In *Jaswant Kaur v State of Bombay*,⁵ the Bombay High Court refused to let the DPSPs inform its interpretation of the Bill of Rights, holding categorically that ‘any article conferring fundamental rights cannot be whittled down or *qualified* by any thing that is contained in part IV of the Constitution’.⁶

In this early phase of the Court’s history, therefore, the DPSPs were a classic example of what James Madison referred to as ‘parchment barriers’.⁷ Perhaps the exemplar of this approach is the constitutional bench judgment in *Mohd*

Hanif Qureshi v State of Bihar.⁸ A cow slaughter ban was challenged under Article 19(1)(g). It was argued that because the ban was designed to give effect to Article 48, and because the DPSPs were fundamental to the governance of the country, a rights-based challenge to such a legislation must fail. The Court made short shrift of this contention, holding:

[A] harmonious interpretation has to be placed upon the Constitution and so interpreted it means that the State should certainly implement the directive principles but it must do so in such a way that its laws do not take away or abridge the fundamental rights.⁹

In other words, it was desirable for the government to frame legislation advancing the DPSPs, but the provisions of [Part III](#), standing alone and interpreted autonomously, would serve as side constraints on any such endeavour. The DPSPs might or might not have some role to play at the time of enacting legislation, but none afterwards. This was evident in the manner in which the Court decided *Qureshi*. Its exhaustive economic analysis informing the application of Articles 19(1)(g) and 19(6) saw no reference to the DPSPs.¹⁰

The end of the 1950s, however, marked a subtle—yet distinct—change. *Re The Kerala Education Bill* dealt with the rights of minorities to run educational institutions.¹¹ Referring to the Directive Principle that mandated the State to ensure the provision of effective and adequate education,¹² the Court observed, in language that would soon become a staple feature of judicial decisions:

The directive principles of State policy have to conform to and run as subsidiary to the Chapter on Fundamental Rights ... nevertheless, in determining *the scope and ambit* of the fundamental rights relied on by or on behalf of any person or body the court may not *entirely ignore* these directive principles of State policy laid down in [Part IV](#) of the Constitution but should adopt the principle of harmonious construction *and should attempt to give effect to both as much as possible*.¹³

While both *Mohd Hanif Qureshi* and *Re The Kerala Education Bill* use the phrase ‘harmonious construction/interpretation’, they use it in different senses. *Qureshi*’s harmony does not accord any interpretive role to the DPSPs. In *Re Kerala Education Bill*, on the other hand, while reaffirming the primacy of the fundamental rights, the Court nonetheless opens the gates for DPSPs to play a tangible—if subsidiary role—in interpretation, holding that the ‘scope and ambit’ of the fundamental rights should be determined in such a harmonious way that full effect is given both to [Part III](#) and [Part IV](#). This is the first hint that we have of that oft-repeated phrase, that is, that fundamental rights must be interpreted in light of the DPSPs.

Before we pause to examine the evolution of this approach, we must examine the constitutional arguments that support this position. The first is textual.

Article 37 states that it *shall* be the duty of the State to apply the DPSPs in making laws. Now, whether the obligation is legal, moral, or political, it is, at the very least, a *constitutional* obligation.¹⁴ And if we are to accept the benign fiction that the legislature is composed of reasonable persons pursuing reasonable ends reasonably,¹⁵ then it makes sense to assume that, insofar as Parliament acts in good faith while enacting laws, it is taking the DPSPs seriously, and applying them in the making of such laws. Consequently, when a court is called upon to *interpret* those laws, the DPSPs may be invoked in determining their content.¹⁶ Thus, textually, there is at least *some* scope for the DPSPs in an interpretive inquiry (the clause leaves open what scope, exactly) that does not rise to the level of ‘enforcement’. According to Ambedkar himself, the proscription on enforceability was to be as imposing no obligation upon the State to *act* upon the DPSPs—not that the Principles themselves were irrelevant in understanding *how the State had (legislatively) acted*, once it did.¹⁷

Seervai relies upon Ambedkar’s initial speech in the Constituent Assembly debates to substantiate the ballot box argument.¹⁸ Ambedkar, however, made the ballot box point in a very specific context: to draw a contrast between requiring the government to answer for the *breach* of a Directive Principle in a court of law, and to answer for it to the electorate. That is, he was concerned about non-enforceability, which, as we have seen, does not exhaust the textual possibilities of Article 37. In the same speech, indeed, Ambedkar repudiated the objection that the DPSPs were no more than pious wishes, arguing that no *legal* force did not imply no *binding* force.¹⁹ Ambedkar’s use of the word ‘binding’ (as opposed to ‘political’ or ‘moral’)—a word that is equally at home in both a legal and a non-legal context—seems to indicate that the DPSPs, while falling well short of enforceability, were not meant to be legally *irrelevant* either.²⁰ Responding subsequently to Naziruddin Ahmad’s call to remove [Part IV](#) altogether, he expressly argued that the DPSPs were both *fundamental* and *directive* in the sense that they ‘should be made the basis of all executive and legislative action’.²¹

Other members of the Drafting Committee agreed. Alladi Krishnaswamy Iyer argued that while the DPSPs were neither *justiciable* nor *enforceable*, it would be ‘idle to suggest that any responsible government or any legislature elected on the basis of universal suffrage *can* or will ignore these principles’.²² The use of the word ‘can’ (in addition to ‘will’) is telling: it suggests that it is simply not open to the legislature to ignore the Principles, *whether it chooses to or not*. But the only way in which this makes sense would be if the Court was to impose the

legal fiction that we have discussed before—that the legislature *has* applied the DPSPs in the making of laws (whether or not individual legislators consciously did so).²³

Evidence that what distinguished [Part III](#) and [Part IV](#), in the mind of the framers, was a narrow conception of legal *enforceability*/remedies is evident from the debate over draft Article 36. Originally worded as ‘every citizen is *entitled* to free primary education’, it was amended to ‘The State *shall endeavour* to provide ... free and compulsory education’—on the *specific ground* that the language of entitlement (which, of course, logically entails a remedy) was the language of fundamental rights.²⁴ In addition, the fact that the word ‘enforceable’ in Article 37 was actually brought in to *replace* the word ‘cognisable’ (which is of much wider import) makes the argument compelling.²⁵

To these arguments, we can add a brief, structural point. The principle of non-superfluity is a standard interpretive technique, based on the assumption that the legislature does not waste its words. Thus, an interpretation that renders a part of a statute legally irrelevant is to be avoided, if possible. Surely the same argument applies with even greater force to the Constitution: *ceteris paribus*, an interpretation that renders an entire chapter *constitutionally* irrelevant is to be avoided, if possible. The above arguments have been designed to demonstrate that at the very least, an interpretation that *does not* do so is feasible.

In sum, therefore, the text, history, and structure of the Constitution suggest the following holistic reading of Article 37: the first part—the non-enforceability clause—is limited to just that: citizens may not move the Court seeking remedies for either breach of a Directive Principle, or for requiring Parliament to *enact* a Directive Principle into law. The second and third parts—that specify the fundamental nature of the DPSPs and the duty of the State to apply them—set out an interpretive role for the Principles to play in determining the *legal meaning* of statutes. Article 37, thus, is Janus-faced: it carves out a sphere in which the DPSPs have no role to play, and at the same time, carves out another sphere in which they do. I suggest, therefore, *contra* Seervai, that in *Re The Kerala Education Bill*, therefore, the Supreme Court was correct in turning away from its own earlier jurisprudence.²⁶

Let us now turn to the Supreme Court’s jurisprudence in the aftermath of *Re The Kerala Education Bill*, to understand what interpretive role the DPSPs have played in the judicial inquiry.

III. THE DIRECTIVE PRINCIPLES AS MARKERS OF REASONABLENESS

The Indian Constitution provides inbuilt, textual limitations to its fundamental rights. For instance, Article 19(1)(g), which guarantees the freedom of trade, also permits the government to legislate ‘reasonable restrictions...in the interests of the general public’.²⁷ In the aftermath of *Re The Kerala Education Bill*, the Court made the DPSPs an integral part of any inquiry into the validity of fundamental rights restrictions. This was the first—and most basic way—in which fundamental rights came to be interpreted in light of the DPSPs, and the DPSPs began to be read into [Part III](#): the question of what restrictions were in the public interest was to be adjudged by looking to the DPSPs.

This happened primarily in the realm of labour legislation, where a number of employee-oriented laws were challenged under Article 19(1)(g). In *Prakash Cotton Mills v State of Bombay*,²⁸ the question was whether the State could compel companies to join collective bargaining agreements to which they had not directly consented. Examining the application of Article 19(1)(g), the Bombay High Court observed, ‘In the larger interests of the country an employer must submit to those burdens and carry on his business in conformity with the *social legislation* which is put upon the statute book.’²⁹

While *Prakash Cotton Mills* did not *directly* refer to the DPSPs, *Jugal Kishore v Labour Commissioner* did so,³⁰ citing no less than three of the principles to hold that notice requirements and other restrictions upon employers’ discretion were restrictions in the interests of the general public. Similarly, in *Chandra Bhavan Boarding and Lodging v State of Mysore*,³¹ the Court upheld State minimum wage legislation, cursorily dismissing the 19(1)(g) claims of the employers by stating: ‘We are not convinced that the rates prescribed would adversely affect the industry of even a small unit therein. If they do, then the industry or the unit as the case may be has no right to exist. Freedom of trade does not mean freedom to exploit.’³²

Chandra Bhavan is also noteworthy in that it came at the end of the 1960s, and marked another shift in the Court’s jurisprudence by abandoning the ‘subordinate-but-relevant’ doctrine of *Re The Kerala Education Bill*. In *Chandra Bhavan*, the Court observed that the Bill of Rights and the DPSPs were ‘complementary and supplementary’ to each other. In some way, this approach had already been adopted in *IC Golaknath v State of Punjab*,³³ and it was echoed in two of the important constitutional cases of the 1970s, *Kesavananda Bharati v*

*State of Kerala*³⁴ and *Minerva Mills v Union of India*.³⁵ The Court rationalised this approach by defining the DPSPs as ‘social goals’, and the fundamental rights as ‘side constraints’ to be scrupulously adhered to by the government in its pursuit of those goals. In thirty years, therefore, the Court moved from a position where the DPSPs were constitutionally irrelevant to a point where they were constitutionally *on par* with the Bill of Rights, with the only difference being that citizens could not move the Court *directly* to enforce them. Yet the judgments of the 1970s, placing the DPSPs on the same *conceptual* level as the Bill of Rights was to have far-reaching consequences, as we shall presently note.

The shift in the 1970s, which we shall go on to discuss, was complementary to the reasonableness-of-restrictions approach; it did not replace it. Throughout its history, the Court has regularly invoked the DPSPs to find that Article 19 restrictions are valid, in fairly unproblematic ways. The Court has done this through a simple argument: the DPSPs, it has held, are self-evidently expressions of what public interest is. Any governmental policy aimed at advancing a Directive Principle, then, cannot but be in the public interest,³⁶ and can, at times, raise a presumption of reasonableness.³⁷ Unfortunately, the Court has also held, on occasion, that such a policy is reasonable simply by virtue of being enacted in pursuit of a Directive Principle.

This is clearly unwarranted. Consider, for example, the 2012 *Right to Education* case. The Court held that the obligations imposed by the Right of Children to Free and Compulsory Education Act 2009 upon private schools—that is, a compulsory 25 per cent intake from economically underprivileged households within a certain catchment area—to be reasonable restrictions under Article 19(6), by virtue of being in pursuance of the DPSP.³⁸ The Court would probably not have reached the same result had the compulsory reservation been, say, 80 per cent, although that *too* would have been in pursuance of the DPSPs.

Clearly, then, it is quite possible to implement the goals set out in [Part IV](#) in an *unreasonable* manner. This was something the Court clearly understood in *Mirzapur Moti*, where it held that a restriction aimed at fulfilling the DPSPs will be reasonable insofar as it does not run in ‘clear conflict’ with the fundamental right.³⁹ It is this line of reasoning that is correct and—it is submitted—ought to be followed in the future.

IV. THE DIRECTIVE PRINCIPLES AS INTERPRETIVE GUIDES

Once the Court had cleared the path for invoking the DPSPs in legal adjudication in *Re The Kerala Education Bill*, it was not long before it took the next logical step: using them as interpretive guides. In *Balwant Raj v Union of India*,⁴⁰ a 1966 judgment of the Allahabad High Court, an employee of the Indian Railways contracted tuberculosis and was unable to come to work for a time. Consequently, he was discharged for ‘failing to resume duty’ under the stipulated rule. Reading the Directive Principle requiring the State to secure the right to work, the Court limited the phrase ‘failing to resume duty’ to *voluntary* failures, holding that ‘the rule must be interpreted in accordance with letter and spirit of the Directive Principles of State Policy’.⁴¹ Thus, the Court assumed the legal fiction that the State had, in fact, applied the Principles in framing the contested legislation.⁴²

Yet what, precisely, is the *strength* of that legal fiction? A survey of comparative constitutional practice reveals four distinct standards that constitutional courts have adopted when construing legislation to harmonise with standards contained in a super-statute or constitution. Let us call these four standards ‘weak’, ‘medium’, ‘strong’, and ‘modificatory’.

A weak standard only requires courts to select that interpretation, out of a series of *equally reasonable interpretations arrived at independently*, which coheres better with the background right at issue. A medium standard, found in New Zealand, requires a meaning that is ‘fairly open ... and tenable’⁴³ to be preferred if it is consistent with the Bill of Rights. The strong standard, adopted by the UK Supreme Court in interpreting the Human Rights Act, goes further and allows for any interpretation, no matter how strained, to be preferred if it is consistent with the Human Rights Act and is an *intelligible* reading of the statute in question.⁴⁴ And the modification standard goes furthest of all—it stipulates that the *meaning of legislation itself* is to be determined by referring to the background right.⁴⁵

In *Balwant Raj*, the Court adopted—arguably—a strong standard of review, infusing an additional condition into a provision that was nowhere in evidence on its face. Subsequently, however, it went even further: in *Uttar Pradesh State Electricity Board v Hari Shankar*,⁴⁶ the Supreme Court was interpreting the phrase ‘Nothing in this Act shall apply ...’ The technical details of the case need not detain us here; it is this observation of the Court that is striking: ‘That is the only construction which gives meaning and sense to Sec. 13-B and that is a construction which can legitimately be said to conform to the Directive Principles of State Policy proclaimed in Articles 42 and 43 of the Constitution.’⁴⁷

In other words, the Court treated the DPSPs as *constitutive of legislative meaning*: the maximum degree to which it could infuse Directive Principles into the law without directly enforcing them. This strong vision of the DPSPs has been latent in the Court's jurisprudence since then.⁴⁸ In 2013, for example, the Court invoked the DPSPs in determining the meaning of the phrase 'public purpose' under Article 282 of the Constitution. It held that the Tamil Nadu State Government's distribution of free televisions was a valid 'public purpose' under Article 282 *because* it was in pursuance of the DPSPs.⁴⁹ Unfortunately, however, the Court—thus far—has failed to undertake a coherent, doctrinal analysis of the precise role that the Principles are meant to play in statutory interpretation.

V. THE DIRECTIVE PRINCIPLES AS ESTABLISHING FRAMEWORK VALUES

We have seen how in the 1960s and 1970s, the Court gradually chipped away at its earlier jurisprudence: beginning with making the DPSPs constitutionally relevant, and then erasing their subordinate status to the fundamental rights. The consequences of these two moves are crucial. Before we examine the cases, however, a brief digression into political philosophy is apposite.

It hardly needs repeating that Bills of Rights are framed in abstract language, laying down broad principles and concepts rather than concrete conceptions. Take the classic example of 'freedom'. Everyone agrees that if I am locked up in a room, my freedom is curtailed. Everyone also agrees that my inability to fly unaided is a *limitation* upon my actions, but not an infringement upon my *freedom*. My body structure and the forces of gravity, which combine to render it impossible for me to fly, are simply background conditions that structure the world in which we all live. But now consider this: my lack of money bars my access to goods and services that I otherwise want or need. Is *this* a violation of my freedom? Hayek would answer in the negative, holding that only the *intentional actions of individuals*—and not the impersonal workings of the market—can constitute restrictions upon liberty.⁵⁰ GA Cohen, on the other hand, would argue precisely the opposite.⁵¹ What, then, are we to make of a constitutional clause that promises freedom? Does it embody Cohen's vision—and thus, potentially, place an obligation upon the State to provide adequate social security—or does it embody Hayek's vision—placing no such obligation?

Or another vision altogether? To answer this question, naturally, we must investigate the basic values that underlie the Constitution in question, and going beyond that, the political, economic, and social values that structure the polity that has adopted that Constitution.

The result of the Indian Supreme Court's twenty-year incremental approach to the DPSPs brought it to a point, I argue, where the Directive Principles finally came to assume the role of structuring values. The best example is *State of Kerala v NM Thomas*.⁵² In order to understand what was at stake in *NM Thomas*, recall the judgment in *Champakam Dorairajan*. The government's affirmative action programme for admissions to medical and engineering colleges was struck down on Article 15 grounds, and the State's reference to the DPSPs (Article 46) was rejected. In response, Parliament *amended* the Constitution to introduce Article 15(4), specifically allowing for affirmative action in educational institutions.

The Court's judgment—and Parliament's response—demonstrates a specific vision of equality running through Articles 15 and 16. Let us call this the 'colour-blind conception' of equality.⁵³ This holds that there is a specific harm whenever the State classifies *individuals* on the basis of their caste, race, sex, etc—because historically, it was these bases that were used to sort people into categories, and determine their worth. Therefore, any distribution of benefits or burdens that classifies us into groups on such grounds is presumptively suspect. Individuals are to be treated *qua* individuals, and not as *members* of groups.

That this was the animating vision of the *Dorairajan* court is evident from the fact that it refused to locate the permissibility of remedial affirmative action *within* Article 15 itself, and that it required a specific amendment from Parliament to legalise it. Cases after *Dorairajan* affirmed this view, treating Articles 15(4) and 16(4) as *exceptions* to the Articles 14–16 equality code.⁵⁴

While the colour-blind conception of equality is individual-centric, there is a competing vision. Call it the 'group-subordination' vision.⁵⁵ This argues that groups have been the *locus* of historic discrimination. Thus, remedial action must take into account the subordinate status of groups (such as women, or 'lower caste'), and governmental policies are perfectly legitimate if they make groups the site of redressing historic discrimination and achieving genuine present-day equality. Article 46, which was cited and dismissed by the Court in *Champakam Dorairajan*, specifically envisages this conception, when it refers to the interests of the weaker *sections* of the people.⁵⁶

Under the colour-blind conception of equality, *NM Thomas* ought to have been an easy case. The question was about the constitutionality of caste-based

affirmative action in employment. Article 16 guaranteed the equality of opportunity in employment. Article 16(4) carved out a specific exception for ‘socially and educationally backward classes’.⁵⁷ It was not disputed that caste-based affirmative action was not covered by the 16(4) exception. Surely, then, this was a straightforward equal-opportunities violation. Not so, said the Court. Articles 15(4) and 16(4) were not *exceptions* to 15(1) and 16(1), but *emphatic restatements* of it. In other words, remedial affirmative action for certain historically subordinated groups was no longer grounded in 15(4) and 16(4), which specifically provided for it, but *implicit within the logic of the constitutional commitment to equality itself*.

What justifies this departure from precedent, and seemingly from the text as well, that speaks of ‘persons’ under Articles 15(1) and 16(1)? The majority doesn’t say, but Mathew and Krishna Iyer JJ, in their concurring opinions, do. According to Mathew J:

[I]f we want to give equality of opportunity for employment to the members of the Scheduled Castes and Scheduled Tribes, we will have to take note of their social, educational and economic environment. Not only is the directive principle embodied in *Article 46* binding on the lawmaker as ordinarily understood but it should equally inform and illuminate the approach of the Court ... the guarantee of equality, before the law or the equal opportunity in matters of employment is a guarantee of something more than what is required by formal equality. *It implies differential treatment of persons who are unequal...today, the political theory which acknowledges the obligation of government under [Part IV](#) of the Constitution to provide jobs, medical care, old age pension, etc., extends to human rights and imposes an affirmative obligation to promote equality and liberty*. The force of the idea of a state with obligation to help the weaker sections of its members seems to have increasing influence in Constitutional law.⁵⁸

This is crucial, because the *shift* from the precedent-based, colour-blind vision of equality to a group subordination conception is *justified* by invoking the DPSPs in general, and Article 46 in particular. Articles 14, 15, and 16 set out the abstract concept of equality. Mathew J uses the Directive Principles to decide which *conception*—colour-blind or group subordination—is more faithful to the Constitution. *It is in this way that the Directive Principles act as structuring values*. Thus, as Krishna Iyer J observed: ‘The upshot, after *Bharati*, is that *Article 46 has to be given emphatic expression* while interpreting Article 16(1) and (2).’⁵⁹

The point is perhaps summed up best by Bhagwati J’s partially dissenting opinion in *Minerva Mills*:

Where a law is enacted for giving effect to a Directive Principle in furtherance of the constitutional goal of social and economic justice it may conflict with a formalistic and doctrinaire view of equality before the law, but it would almost always conform to the principle of equality before the law in its total magnitude and dimension ...⁶⁰

Once again, then, it is the DPSPs that inform the conception of equality that Articles 14, 15, and 16 only lay out abstractly. More recently, *Ashoka Kumar Thakur* put the point another way, holding that ‘the *facets* of the *principle* of equality could be altered ... to carry out the Directive Principles ...’⁶¹

The present argument reflects a point first made by Tripathi, long before this jurisprudence came into being. In 1972, Tripathi argued that it is the Supreme Court’s ‘duty so to discharge its own function of enforcing fundamental rights as *not to obstruct the legislature in its respective function of applying the directive principles* in the making of laws’.⁶² Drawing an analogy with the American Supreme Court’s upholding of President Roosevelt’s extensive New Deal social welfare legislation (despite no express textual peg in the American Constitution on which to hang them), Tripathi understood the Directive Principles to be performing a similar function of mitigating the social evils that spring from a *laissez-faire* interpretation of formal equality, the right to property, and other such civil rights. Indeed, Tripathi saw the abstract wording of [Part III](#) rights as an invitation for ‘judicial creativity’.⁶³ The aim of this section has been to demonstrate how such creativity might best be applied in a manner that is most consistent with the text, structure, and animating philosophy of the Constitution.

This argument conforms with the three-pronged holistic interpretation of Article 37 that we discussed above. It is consistent with the prohibition on enforcement, while maintaining a place for the Principles in the judicial inquiry, and saving them from redundancy. It also tracks a strain of constitutional thought that was present throughout the late stages of the freedom struggle, up to the framing of the Constitution. In her survey of the primary material, Jayal notes that economic and social rights were understood through the 1930s and 1940s as essential for securing the ‘meaningful’ enjoyment of civil and political rights. In his 1947 *Memorandum*, Ambedkar specifically argued that political democracy must ensure that an individual is not forced to ‘relinquish ... rights as a condition of receiving a privilege’,⁶⁴ and focused on the meaninglessness of civil and political rights to the unemployed, starving, and economically powerless. *Ergo*, even if social and economic rights were not to be made enforceable, there was strong support for the proposition that meaningful civil and political rights could not exist without being conceptualised in a way that took into account socioeconomic considerations.

This tempered understanding of socioeconomic rights—unenforceable yet relevant—is evident in the Constituent Assembly debates. Consistent with the role of the principles as structural values, arguments to make them more detailed and specific were repeatedly rejected. For example, an amendment to add the

prohibition of monopolies to the Directive Principle prohibiting the concentration of economic wealth did not succeed. KT Shah's proposal to add 'socialist' to the preamble was met with Ambedkar pointing out that the 'socialistic direction' of the Constitution was provided by the Directive Principles such as equal pay for equal work, the rejection of the concentration of economic wealth, and so on.⁶⁵ Yet perhaps the best evidence of the framers' intent can be gleaned from Ambedkar's elaborate speech in defence of the DPSPs. Ambedkar identified the goal of the Directive Principles as the achievement of 'economic democracy', complementary to 'parliamentary democracy', which was the task of the rest of the Constitution. He steadfastly refused to identify economic democracy with a particular economic or political school of thought (notwithstanding his earlier remark about the socialistic direction of [Part IV](#)), only referring ambiguously to the principle of 'one man, one value'.⁶⁶

Ambedkar's speech does two things. First, it affirms that there is an animating vision underlying [Part IV](#) as a whole, one that is sufficiently abstract so as not to be tied to political and economic-isms, but also sufficiently constraining (through specific provisions such as non-concentration of wealth, equal pay for equal work, and so on). And secondly, if *economic democracy* and *parliamentary democracy* are meant to be complementary and of equal importance—as the speech reflects—then the interrelation between Parts III and IV that we have proposed appears to be a seamless integration of the two. Parliamentary democracy is guaranteed by the set of individual rights located in [Part III](#); but the substantive *content* of those rights—whether equality means colour-blindness or remedying group subordination, for instance; whether the free speech guarantee requires the government to adopt a laissez-faire approach⁶⁷ or permits it to remedy market inequalities guaranteeing persons an equitable access to the *modes* of communication (like newspapers)—*these* questions, that [Part III](#) leaves open, are to be resolved by determining what economic democracy under [Part IV](#) means, and informing the content of fundamental rights based upon that understanding.

This, therefore, is perhaps the best way of understanding—and intellectually grounding—the Court's approach that Seervai finds so unpalatable. In a series of cases, from *Kesavananda Bharati*⁶⁸ through *Minerva Mills*, and beyond,⁶⁹ the Court has called for a 'harmonious construction' of Parts III and IV and regularly cited Granville Austin to observe that Parts III and IV 'are complementary and supplementary' to each other, followed by vague pronouncements that leave it entirely unclear how this harmonising is done, and

what basis it has.⁷⁰ If we view harmonising as the DPSPs providing the structural foundation within which fundamental rights are understood, it is not only one way of understanding what the courts are doing, but also—as we have seen above—grounded in both text and history.⁷¹

Although we have traced this interpretive approach to *NM Thomas*, we find glimpses of it throughout the Court’s jurisprudence. In his concurring opinion in *Re The Kerala Education Bill*, for instance, Aiyer J refused to find a right to State recognition in minority educational institutions under Article 30(1) as implicit in the right to *establish* minority institutions, *on the ground* that this would make Article 45 redundant. Aiyer J was very clear that the question was not about a *conflict* between Article 30(1) and Article 45; it was not about which of the two was subordinate to the other. Rather, the question was about the *content* of the Article 30(1) right, whose determination was informed by Article 45.⁷²

We can also find the argument in cases after *NM Thomas*. In *Randhir Singh v State of Uttar Pradesh*, the question was whether different pay scales for drivers working in different departments violated Articles 14 and 16. Invoking Article 39(d)—equal pay for equal work—the Court held:

Construing Articles 14 and 16 in the light of the Preamble and Art. 39(d) we are of the view that the principle ‘Equal pay for Equal work’ is deducible from those Articles and may be properly applied to cases of unequal scales of pay based on no classification or irrational classification though those drawing the different scales of pay do identical work under the same employer.⁷³

This is precisely the kind of reasoning we have discussed above. The Court invokes the DPSPs to understand what equality under our Constitution truly means, in concrete circumstances; that is, in this case, it is the [Part IV](#) commitment to equal pay for equal work that informs the understanding of the Court that a *distinction* in pay for similar work is precisely the kind of arbitrary/irrational classification that amounts to unequal treatment under Article 14.⁷⁴ A similar argument was echoed in *Atam Prakash v State of Haryana*,⁷⁵ where the Court referred to the preamble and the DPSPs to examine whether a particular classification was legitimate under Article 14.

Interestingly, the argument made by the Court in *NM Thomas*, *Randhir Singh* and *Atam Prakash* had been anticipated as far back as 1973, in the context of Article 19(1)(a). In *Bennett Coleman* the Court held that the government was not permitted, under 19(1)(a), to impose restrictions upon big newspapers in an attempt to equalise market conditions and facilitate the entry of new players into the marketplace of ideas, who wouldn’t otherwise be able to compete.⁷⁶ In so

doing, the Court adopted a particular individualistic, liberal theory of free speech that rendered constitutionally irrelevant the economic conditions that limited access to the existing means of effective communication of ideas in society, such as newspapers, television, etc, all of which require a substantial resource base.⁷⁷ Mathew J's dissent invoked the DPSPs to argue against this conception, and advocate an alternative vision of free speech that refused to separate the freedom of expression from the economic and social conditions that defined and shaped it in a liberal-capitalist society. He held:

[A]ny theory of freedom of expression must take into account ... the right of the public to education arising from the affirmative duty cast on the Government by the directive principles to educate the people, apart from the right of the community to read and be informed arising under the theory of the freedom of speech itself.⁷⁸

Mathew J's rejection of free speech as an individual right of non-interference, in favour of it being a social good characterised by principles of equal access, was grounded in the DPSPs, much like *NM Thomas's* changed vision of equality. And twenty years after *Bennett Coleman*, in *LIC v Manubhai D Shah*,⁷⁹ the Supreme Court, in holding that Article 19(1)(a) required having a right to reply, even for an in-house journal, in order to ensure complete information, essentially accepted the free-speech-as-a-social-good approach. Although the *LIC* Court did not expressly cite [Part IV](#), the implications are obvious, when it held that fundamental rights were broadly phrased, as abstract concepts, precisely so that courts could ground them and give them meaning in accordance the socioeconomic goals found elsewhere in the Constitution (which, obviously, would be the preamble and [Part IV](#)):

[The framers] *had themselves made provisions in the Constitution to bring about a socioeconomic transformation*. That being so, it is reasonable to infer that the Constitution makers employed a broad phraseology while drafting the fundamental rights ...⁸⁰

Similarly, in *Bandhua Mukti Morcha v Union of India*,⁸¹ the Court referred to Articles 39(d) and (e), 41, and 42 to infuse substantive content into the dignitarian principle underlying Article 21's guarantee of the right to life—and many of the substantive rights that the Court was to subsequently read into Article 21 were located within this dignitarian foundation. In *Olga Tellis v Bombay Municipal Corporation*,⁸² the same technique was used (relying upon Articles 39(a) and 41) to read in a right to livelihood under the right to life. In *Nashirwar v State of Madhya Pradesh*,⁸³ the Court invoked the Directive Principles dealing with prohibition to infuse moral content into Article 19(1)(g)'s freedom of trade: the right to freedom of trade itself was held *not* to include

activities of a *res extra commercium* nature such as trade in alcohol.⁸⁴ And as recently as 2014, it invoked Articles 39(e) and (f) to hold that the right to a safe and healthy environment was part of the right to life.⁸⁵

In sum, we have seen how the DPSPs have structured the application of equality under Articles 14–16, free expression under 19(1)(a), freedom of trade under 19(1)(g), and life under Article 21, helping the courts to select which conceptions, out of a number of available (and conflicting) ones, all consistent with the abstract concepts of equality, speech, etc, are *concretely* required by the Constitution.

But doesn't this approach, it might be objected, render fundamental rights utterly subordinate to the DPSPs? We are, after all, arguing for the DPSPs playing a role in ascertaining the very *content* of fundamental rights. It is important to understand that this is not so. The Directive Principles, we have argued, *inform* the content of fundamental rights; they do not *determine* them. The fundamental rights continue to embody *concepts*, and concepts themselves not only have determinate meaning, but also have core, paradigm cases that any conception must respect and account for. To invoke an old chestnut: HLA Hart's famous 'No vehicles in the Park' rule has its penumbra of doubt in the case of bicycles and toy trucks, where the decision might go either way without necessarily being right or wrong, but it also has its core of certainty that definitively proscribes buses and tractors.⁸⁶ Similarly, the DPSPs might tell us which *conception* of equality the Constitution subscribes to, as they did in *NM Thomas*, but they can only do so within the bounds allowed by the *concept* of equality.

The tortured history of Articles 31A and 31C seems to bear this out. Article 31A, aimed at land reform, was inserted into the Constitution following a series of Article 14 challenges to land legislation. Article 31A bars an Article 14 challenge to laws—inter alia—authorising the acquisition of any estate, taking over the management of any property, and so on. Although the amendment itself—historically—was necessitated by a particularly doctrinaire interpretation of equality by the early Court, it is also obvious that its provisions are broad enough for land legislation that might be difficult to justify on most conceptions of equality, even those shaped by the DPSPs—hence the need for the protection of a constitutional amendment. Similarly, Article 31C insulated *any* law aimed at giving effect to anything in [Part IV](#) from a 14 or 19 challenge—clearly indicating that it is possible for [Part IV](#)-grounded laws to violate fundamental rights (hence, the need for an amendment to insulate them).⁸⁷

This understanding at least partially motivates the Court's 2005 opinion in

State of Gujarat v Mirzapur Moti Kasab Jamat,⁸⁸ another cow slaughter case. There, the Court observed, ‘A restriction placed on any Fundamental Right, aimed at securing Directive Principles will be held as reasonable and hence intra vires [as long as] it does not run in clear conflict with the fundamental right ...’⁸⁹

In light of our discussion above, I suggest that ‘clear conflict’ is best understood as implying the settled, indisputable central (or minimum) core of any concept (such as equality, free speech, freedom of conscience, etc) that conceptions cannot violate if they are to be conceptions of that concept in the first place. The DPSPs are structuring values, but they themselves operate within a web of constraints determined by the very concepts (located in [Part III](#)) whose underlying structure they must provide.

VI. THE LIMITING PRINCIPLE: NON-ENFORCEMENT

Is there any difference that now remains between fundamental rights and Directive Principles, one may well ask—apart from the fact that laws cannot be struck down for violating the DPSPs?⁹⁰ The Court answered that question in its 1982 case of *Ranjan Dwivedi v Union of India*,⁹¹ well into the heyday of the Directive Principles era. Article 39A mandated the State to provide equal justice and free legal aid.⁹² In *Ranjan Dwivedi*, the petitioner’s claim to a State-paid counsel engaged at a fee commensurate with the fees the State was paying to its own counsel was rejected, the Court holding that:

As is clear from the terms of Art. 39A, the social objective of equal justice and free legal aid has to be implemented by suitable legislation or by formulating schemes for free legal aid. The remedy of the petitioner, if any, lies by way of making an application before the learned Additional Sessions Judge.⁹³

In other words, the Court understood that shaping the State’s fiscal policy was most definitely beyond its remit. A similar set of concerns guided the Court’s decision in *Ahmedabad Municipal Corporation v Nawab Khan Gulab Khan*.⁹⁴ In that case, the Court invoked Articles 38, 39, and 46 to read into the right to life the right to shelter, and a correlative *constitutional duty* upon State instrumentalities to ‘provide adequate facilities and opportunities by distributing its wealth and resources for settlement of life and erection of shelter over [indigent persons] heads to make the right to life meaningful, effective and fruitful’.⁹⁵ In the same breath, however, it *also* held that ‘courts cannot give

direction to implement the scheme with a particular budget as it being the executive function of the local bodies and the State to evolve their annual budget'.⁹⁶ Thus, the Directive Principles played a structuring role in determining the contours of the right to life under Article 21, but insofar as *enforcement* of that right appeared to require decisions that, according to classical separation of powers models, belong to the legislative⁹⁷ or executive branches, the Court said, *thus far and no further*.⁹⁸

This institutional concern is reflected most vividly in the history of the right to education through the 1990s and the 2000s. In a series of cases such as *Mohini Jain*⁹⁹ and *Unnikrishnan v State of Andhra Pradesh*,¹⁰⁰ the Court invoked the DPSPs to read into Article 21's guarantee of a right to life, a right to education as well—but conspicuously refrained from going any further into an issue that would have profound economic and social implications, not to mention a massive reorientation of budgetary priorities. Eventually, it was the legislature that amended the Constitution to introduce Article 21A, codifying the right to education;¹⁰¹ and the Court's task was to uphold the validity of legislation passed under that provision that imposed certain economic burdens upon private schools.¹⁰²

VII. CONCLUSION

Between 1950 and 2015, as far as the DPSPs go, the wheel has turned a full 180 degrees. When the Constitution was written, there was a clear separation between Parts III and [Part IV](#), between enforceable civil/political rights (classically understood), and non-enforceable socioeconomic guarantees. But after sixty-five years of judicial interpretation, finding different ways to read the [Part IV](#) guarantees into [Part III](#) and blur that distinction, it has now become almost routine for the Supreme Court to invoke [Part IV](#) in its decisions—as routine as Articles 14 and 21. With the increasing role of the DPSPs, the need for judicial discipline cannot be overstated. If the DPSPs are interpreted to mean everything, then they will end up meaning nothing. This chapter has attempted to use constitutional text, history, precedent, and philosophy to tether the DPSPs to a firm conceptual foundation, offering both a faithful description of existing practice and prescriptive recommendations for the road ahead.

The DPSPs, I have argued, serve three distinct roles in judicial interpretation; in other words, there are three different ways in which fundamental rights (and

other laws, for that matter) are interpreted ‘in light of’ the DPSPs. *First*, legislation enacted in service of the DPSPs meets the ‘public interest’ threshold in a fundamental rights challenge (importantly, its reasonableness must then be examined, and *not* on the touchstone of the Directive Principles). *Secondly*, if legislation is intelligibly susceptible to more than one interpretation, then the meaning that corresponds more closely to the DPSPs is to be preferred over others (although, as we discussed, the Court is yet to clarify the standard applicable to this inquiry). And *thirdly*, the DPSPs play a structuring role in selecting the specific conceptions that are the concrete manifestations of the abstract concepts embodied in the Fundamental Rights chapter. This is the best way to understand the Court’s dictum that fundamental rights ‘ought to be interpreted in light of the DPSPs’. There is thus a clearly delineated role for the Directive Principles in constitutional analysis.

The limits to this role are twofold: *first*, the Court may not strike down legislation for non-compliance with the DPSPs; and *secondly*, the Court may not incorporate the DPSPs to a point that requires it stepping outside its designated role under classical separation-of-powers theory—making policy choices and budgetary allocations (of course, the Court has not shirked from this role more generally).

Such an approach, I suggest—although complex—is both intellectually defensible and constitutionally faithful. Importantly, it ensures against the judicial drift that has blighted Articles 14 and 21, and is threatening to blight [Part IV](#), with its recent indiscriminate usage. Only time will tell, however, whether the Court will follow this path.

¹ Constitution of India 1950, art 37 (emphasis added).

² HM Seervai, *Constitutional Law of India*, vol 2 (4th edn, Universal Law Publishing 2002) 1934–40.

³ AIR 1951 SC 226.

⁴ AIR 1955 SC 170.

⁵ AIR 1952 Bom 461.

⁶ *Jaswant Kaur v State of Bombay* AIR 1952 Bom 461 [4] (Chagla CJ) (emphasis added).

⁷ James Madison, *The Federalist No 48* (1788) <<http://www.constitution.org/fed/federa48.htm>>, accessed November 2015.

⁸ AIR 1958 SC 731.

⁹ *Mohd Hanif Qureshi* ([n 8](#)) [12] (Das CJ).

¹⁰ *State of Bombay v FN Balsara* AIR 1951 SC 318, which used the DPSPs to interpret the reasonableness of an art 19(6) restriction, is an exception to the rule. The analysis in that case, however, is minimally developed.

¹¹ AIR 1958 SC 956.

¹² Constitution of India 1950, art 45.

¹³ *Re The Kerala Education Bill* AIR 1958 SC 956 (Das CJ) (emphasis added).

¹⁴ The language of ‘constitutional obligation’ is used by Tripathi, although he doesn’t draw out the exact implications. PK Tripathi, ‘Directive Principles of State Policy’ in *Spotlights on Constitutional Interpretation* (NM Tripathi 1972) 295.

¹⁵ Henry Hart and Albert Sacks, *The Legal Process*, eds William Eskridge and Philip Frickey (Foundation Press 1994) 1374, 1378.

¹⁶ This textual point was underscored by the Court as early as *State of West Bengal v Subodh Gopal Bose* AIR 1954 SC 92.

¹⁷ *Constituent Assembly Debates*, vol 7 (Lok Sabha Secretariat 1986) 476, 19 November 1948.

¹⁸ Seervai ([n 2](#)) 1926.

¹⁹ *Constituent Assembly Debates*, vol 7 (Lok Sabha Secretariat 1986) 41, 4 November 1948 (Dr Ambedkar).

²⁰ The *Kesavananda* court, for example, cited Professor Goodhart for the proposition that ‘if a principle is recognized as binding on the legislature, then it can be correctly described as a legal rule even if there is no court that can enforce it’. *Kesavananda Bharati v State of Kerala* (1973) 4 SCC 225.

²¹ *Constituent Assembly Debates*, vol 7 (Lok Sabha Secretariat 1986) 476, 19 November 1948. See also *Constituent Assembly Debates*, vol 7 (Lok Sabha Secretariat 1986) 482, 19 November 1948 (Shibban Lal Saxena).

²² *Constituent Assembly Debates*, vol 7 (Lok Sabha Secretariat 1986) 336, 8 November 1948.

²³ See eg, the presumption of continuous usage in statutory interpretation. Antonin Scalia and Brian A Garner, *Reading Law: The Interpretation of Legal Texts* (West Group 2012) (emphasis added).

²⁴ See eg, *Constituent Assembly Debates*, vol 7 (Lok Sabha Secretariat 1986) 538, 23 November 1948 (Pandit Lakshmi Kanta Maitra).

²⁵ J Minattur, ‘The Unenforceable Directives in the Indian Constitution’ (1975) 1 SCC J 17.

²⁶ A parallel strain of argument, which surfaces occasionally, has it that ‘State’ includes the judiciary, and that therefore art 37 obligates the Court to abide by the DPSPs as it adjudicates. *Revanasiddappa v Mallikarjun* (2011) 11 SCC 1.

²⁷ Constitution of India 1950, art 19(6).

²⁸ (1957) 59 Bom LR 836; following *Crown Aluminium Works v Workmen* AIR 1958 SC 30.

²⁹ *Prakash Cotton Mills* ([n 28](#)) [6] (Chagla CJ) (emphasis added).

³⁰ AIR 1958 Pat 442.

³¹ (1969) 3 SCC 84.

³² *Chandra Bhavan* ([n 31](#)) [32] (Hegde J).

³³ AIR 1967 SC 1643.

³⁴ *Kesavananda Bharati* ([n 20](#)).

³⁵ (1980) 3 SCC 625.

³⁶ *Workmen of Meenakshi Mills Ltd v Meenakshi Mills Ltd* (1992) 3 SCC 336; *Papnasam Labour Union v Madura Coats Ltd* (1995) 1 SCC 501; *Indian Handicrafts Emporium v Union of India* (2003) 7 SCC 589.

³⁷ *MRF Ltd v Inspector Kerala Govt* (1998) 8 SCC 227.

³⁸ *Society for Unaided Private Schools of Rajasthan v Union of India* (2012) 6 SCC 1.

³⁹ *State of Gujarat v Mirzapur Moti Kureshi Kassab Jamat* 2005 (8) SCC 534.

⁴⁰ AIR 1968 All 14.

⁴¹ *Balwant Raj* ([n 40](#)) [7] (Dhavan J).

⁴² This approach is discussed by Baxi. Upendra Baxi, ‘Directive Principles and the Sociology of Indian Law’ (1969) 11(3) *Journal of the Indian Law Institute* 245, 250.

⁴³ New Zealand Bill of Rights Act 1990, s 6: ‘Wherever an enactment can be given a *meaning that is consistent* with the rights and freedoms contained in this Bill of Rights, *that meaning* shall be preferred to any other meaning.’ *Hansen v The Queen* [2007] NZSC 7, [115] (Tipping J). See also *Hopkinson v The Police* [2004] 3 NZLR 704; *In the Matter of the Adoption Act 1955* [2010] NZHC 977.

⁴⁴ *Ex Parte Simms* [1999] UKHL 33; *R v A* [2001] UKHL 25; *R v Lambert* [2001] UKHL 37; *Sheldrake v DPP* [2004] UKHL 43.

⁴⁵ See eg, German cases using the freedom of conscience clause to determine when it is ‘reasonable’ for a publisher to refuse to publish books glorifying war.

⁴⁶ (1978) 4 SCC 16.

⁴⁷ *Hari Shankar* (n 46) [17] (Chinnappa Reddy J).

⁴⁸ See *Regional Provident Fund Commissioner v Hooghly Mills Co Ltd* (2012) 2 SCC 489 (interpreting ‘as may be’ in the Employers’ Provident Funds Act 1952 in light of the DPSPs).

⁴⁹ *S Subramaniam Balaji v State of Tamil Nadu* (2013) 9 SCC 659. The same argument was made in *Bhim Singh v Union of India* (2010) 5 SCC 538.

⁵⁸ *Re The Kerala Education Bill* (n 13) [64]–[67] (Mathew J) (emphasis added).

⁶⁰ *Minerva Mills* (n 35) [111] (Bhagwati J).

⁷³ (1982) 1 SCC 618 [8] (Chinnappa Reddy J); see also *V Markendaya v State of Andhra Pradesh* (1989) 3 SCC 191.

⁷⁸ *Bennett Coleman* (n 76) [175] (Mathew J).

⁸⁰ *LIC* (n 79) [7] (Ahmadi J) (emphasis added).

⁵⁰ Friedrich Hayek, *The Constitution of Liberty* (University of Chicago Press 1960).

⁵¹ GA Cohen, ‘Freedom and Money’ in M Ostuka, ed, *On the Currency of Egalitarian Justice, and Other Essays in Political Philosophy* (Princeton University Press 2011) 166–92.

⁵² (1976) 2 SCC 310.

⁵³ See eg, *Grutter v Bollinger* 539 US 306 (2003).

⁵⁴ *MR Balaji v State of Mysore* AIR 1963 SC 649.

⁵⁵ Reva Siegel, ‘Equality Divided’ (2013) 127 Harvard Law Review 1.

⁵⁶ Constitution of India 1950, art 46.

⁵⁷ Constitution of India 1950, art 16(4).

⁵⁹ *NM Thomas* (n 52) [159] (Krishna Iyer J) (emphasis added).

⁶¹ *Ashoka Kumar Thakur v Union of India* (2008) 6 SCC 1 [91] (Balakrishnan CJ).

⁶² Tripathi (n 14) 296 (emphasis added).

⁶³ Tripathi (n 14) 315.

⁶⁴ Niraja Gopal Jayal, *Citizenship and its Discontents* (Harvard University Press 2013) 148.

⁶⁵ *Constituent Assembly Debates*, vol 7 (Lok Sabha Secretariat 1986) 402, 15 November 1948.

⁶⁶ *Constituent Assembly Debates*, vol 7 (Lok Sabha Secretariat 1986) 494, 19 November 1948.

⁶⁷ *Sakal Papers v Union of India* AIR 1962 SC 305.

⁶⁸ *Kesavananda Bharati* (n 20). Ray CJ, writing in dissent, perhaps came closest to enunciating a principle when he argued that the directive principles ‘shape’ the meaning of fundamental rights.

⁶⁹ *Air India Statutory Corporation v United Labour Union* (1997) 9 SCC 377.

⁷⁰ *Air India Statutory Corporation* is a case in point.

⁷¹ A variant of this argument is made by Jagat Narain, who calls for reading the equal protection of property rights *in light of* arts 38 and 39, in order to justify redistributive schemes. J Narain, ‘Equal Protection Guarantee and the Right of Property under the Indian Constitution’ (1996) 15(1) International

and Comparative Law Quarterly 199, 208; J Narain, 'Judicial Lawmaking and the Place of the Directive Principles in the Indian Constitution' (1985) 27 Journal of the Indian Law Institute 198.

⁷² *Re The Kerala Education Bill* ([n 13](#)) (Aiyer J).

⁷⁴ Affirmed in *Surinder Singh v Engineerin-Chief, CPWD* (1986) 1 SCC 639; and more recently in *Union of India v Dineshan KK* (2008) 1 SCC 586.

⁷⁵ (1986) 2 SCC 249. See also *Mohini Jain v State of Karnataka* (1992) 3 SCC 666.

⁷⁶ *Bennett Coleman v Union of India* (1972) 2 SCC 788.

⁷⁷ See eg, Mark Graber, *Transforming Free Speech* (University of California Press 1992).

⁷⁹ (1992) 3 SCC 637.

⁸¹ (1984) 3 SCC 161.

⁸² (1985) 3 SCC 545.

⁸³ (1975) 1 SCC 29.

⁸⁴ Affirmed again in 2013: *State of Kerala v Kandath Distilleries* (2013) 6 SCC 573.

⁸⁵ *Occupation Health and Safety Association v Union of India* (2014) 3 SCC 547, citing *Consumer Education and Research Centre v Union of India* (1995) 3 SCC 42.

⁸⁶ HLA Hart, *The Concept of Law* (3rd edn, Oxford University Press 2012) 127.

⁸⁷ Due to limitations of space, it is impossible to discuss the constitutional history of these provisions, through *Kesavananda Bharati* to *Minerva Mills* and *Sanjeev Coke*, and beyond. We may take a moment to note, however, that *Sanjeev Coke* held that it would be possible for a law in pursuit of 39(b) or (c) to violate art 14—and hence the need for 31C. *Sanjeev Coke v Bharat Coking Coal* (1983) 1 SCC 147.

⁸⁸ *Mirzapur Moti Kasab Jamat* ([n 39](#)).

⁸⁹ *Mirzapur Moti Kasab Jamat* ([n 39](#)) (Lahoti CJ).

⁹³ *Ranjan Dwivedi* ([n 91](#)) [7] (Sen J); see also *B Krishna Bhat v Union of India* (1990) 3 SCC 65.

⁹⁰ A position most recently affirmed in *Akhil Bharat Goseva Sangh (3) v State of Andhra Pradesh* (2006) 4 SCC 162.

⁹¹ (1983) 3 SCC 307.

⁹² Constitution of India 1950, art 39A.

⁹⁴ (1997) 11 SCC 121.

⁹⁵ *Ahmedabad Municipal Corporation* ([n 94](#)) [13] (Ramaswamy J).

⁹⁶ *Ahmedabad Municipal Corporation* ([n 94](#)) [27] (Ramaswamy J).

⁹⁷ See *Lily Thomas v Union of India* (2000) 6 SCC 224, with respect to legislating a Uniform Civil Code, as required by art 44.

⁹⁸ A point repeatedly emphasised in *Ashoka Kumar Thakur* ([n 61](#)).

⁹⁹ *Mohini Jain* ([n 75](#)).

¹⁰⁰ (1993) 1 SCC 645.

¹⁰¹ Constitution of India 1950, art 21A.

¹⁰² *Society for Unaided Private Schools of Rajasthan* ([n 38](#)).

CHAPTER 37

PUBLIC INTEREST LITIGATION

SHYAM DIVAN

I. INTRODUCTION

BUILT in dark basalt, the Bombay High Court rises at the edge of the Oval *maidan*.¹ Here, on 22 October 1975, Jayantilal Gandhi J commenced dictating his oral judgment in the *Backbay* case.² The task continued over several weeks and eventually ended 953 pages later with the judge substantially allowing the petition. The lead petitioner, Piloo Mody, an architect and Member of Parliament, was President of the Swatantra Party. The co-petitioner, Mrinal Gore, was a member of the Maharashtra Legislature. The petitioners, residents of Bombay, were concerned about haphazard development in a recently reclaimed portion of the city known as Backbay Reclamation. They complained that the government, acting at the bidding of Chief Minister VP Naik and two other ministers, had allotted prime real estate to preferred builders in a secretive manner at an undervalued price.³ The respondents sought dismissal. They argued that the petitioners lacked legal standing, the allotments were contractual and beyond the Court's power of judicial review, and the process adopted was of no concern to anyone other than the government itself, which had acted in good faith.

With few precedents to guide him, Gandhi J upheld the standing of the petitioners. As citizens, they had an interest in the development of their city. Where the disposal of government property was 'arbitrary and capricious' and important constitutional questions were involved, 'no injustice can be tolerated and technical plea of *locus standi* will not come in the way of the court exercising its jurisdiction under Article 226'.⁴ Ministers occupy a position analogous to trustees and they were bound to dispose of resources for the benefit of the State, not for the benefit of private persons. Judicial review was available to ensure that ministers did not arbitrarily and capriciously dispose of government property. There was a public duty on the State and its officials to ascertain the market price before disposing of the land.

Gandhi J found that the State and its ministers had acted with reckless

negligence in allotting plots without a public auction or due publicity and without ascertaining the correct market price.⁵ Having struck a blow for government accountability, the judge crafted an ingenious order. While asserting jurisdiction to direct the private builders to return possession to the State, the judge preferred a pragmatic resolution. He allowed the builders to retain their plots, provided they agreed to undo the gross undervaluation by paying the exchequer a further one-third of the allotment value.⁶ In this manner, the High Court staked out an expanded oversight turf, declared valuable principles for improved governance, and issued remedial directions that were accepted by all the parties.⁷ *Backbay* with its heady mix of politicians, builders, and a scam was closely reported in newspapers.⁸ It is amongst the earliest cases where judicial review was exercised in the public interest to enhance government accountability.⁹ By lowering the standing threshold, articulating a quasi-trustee standard for the exercise of all government power, and fashioning a resolution that was prospective and ameliorative, *Backbay* anticipated the robust administrative law and public interest litigation (PIL) jurisprudence developed by the Supreme Court in later years.¹⁰

Front and centre, PIL now occupies an unrivalled space in Indian constitutional law that bridges the citizen, the court, and the State. It arose in response to citizens seeking to curb widespread human rights violations or illegalities in government functioning that harmed public administration or the environment. Despair over an apathetic executive with no real possibility of near-term improvements spurred both litigant and judge to fix a broken system. How did PIL jurisprudence expand this swiftly? The Supreme Court, anxious to restore its prestige in the wake of the Emergency, stretched traditional doctrine so that judges could reach out and assist the destitute whose existence was forgotten by a callous State. The result of this extended oversight was to redefine public law. Matters traditionally considered within the exclusive sphere of the executive or the legislature are now debated in court. The Supreme Court has shifted from being a mere constitutional or appellate court to an institution of governance. PIL has become a vehicle of choice for those seeking redress of public grievances. Rather than pursuing elected representatives or public officials in the hope of governance reforms, a strategic judicial intervention mandating government action is simpler, cheaper, and possibly quicker. Amongst several difficult options to improve governance, activists view PILs as the least bad. PILs are a new way to work a democratic constitution. While a large part of PIL activity takes place in the High Courts, particularly with respect to local issues, the warp and weft of PIL jurisprudence was provided by the

Supreme Court. In this chapter, while acknowledging the High Courts' contribution, we focus on the Supreme Court.

II. CHARACTERISTICS

PILs are a type of judicial business carried out by the High Courts and the Supreme Court in the exercise of their writ jurisdictions under Articles 32 and 226 of the Constitution.¹¹ In contrast to private dispute adjudications affecting individual rights, PILs deal with public grievances such as flagrant human rights violations by the State or seek to vindicate the public policies embodied in statutes or constitutional provisions.¹² Early in PIL's evolution, the Supreme Court explained the scope of this nascent field:

Public Interest Litigation, as we conceive it, is essentially a cooperative or collaborative effort on the part of the petitioner, the State or public authority and the court to secure observance of the constitutional or legal rights, benefits and privileges conferred upon the vulnerable sections of the community and to reach social justice to them.¹³

In a PIL, the focus dictates the principal features of the litigation. Since the litigation is not strictly adversarial, the scope of the controversy is flexible. Parties and officials may be joined as the litigation unfolds; and new and unexpected issues may emerge to dominate the case. The orientation of the case is prospective. The petitioner seeks to prevent an egregious state of affairs or an illegitimate policy from continuing into the future. Because the relief sought is corrective rather than compensatory, it is not shaped as an injunction or monetary award in the traditional sense. It does not always derive logically from the right asserted. Instead, it is fashioned for the special purpose of the case, sometimes by a quasi-negotiating process between the court and the responsible agencies. It is difficult to delimit the duration and effect of PIL. The parties often return to the court for fresh directions and orders and, in many situations, the court's anxiety to view tangible results persuades the judge to retain *seisin* over a case and monitor implementation. Finally, because the relief is sometimes directed against government policies, it may have an impact that extends beyond the parties in the case. In view of these features, judges play a large role in organising and shaping the litigation and in supervising the implementation of relief. This activist role of the PIL judge contrasts with the passive umpireship traditionally associated with judicial functions.¹⁴ As the characteristics make it easy to see, the litigation landscape was transformed with the advent of PIL in

India. The orthodox bilateral dispute yielded space in the dockets of the constitutional courts to a polycentric, problem-solving exercise, often with a strong legislative flavour in terms of sweep, policy content, and reformative focus.¹⁵

III. EVOLUTION

PIL, drawn in many ways from radical changes in American public law adjudication, arrived in India several years after these changes in the United States.¹⁶ Many scholars trace the beginnings of PIL to the landmark desegregation decisions of the 1950s when the US Supreme Court required schools in southern American States to end racial segregation.¹⁷ By the 1980s, just as PIL jurisprudence was gaining momentum in India, the allure of public law litigation began to fade in the United States.¹⁸ Quite apart from the personalities of the judges of the Supreme Court who actively fostered PIL, four distinct influences contributed to its growth,¹⁹ first, the 1970s trend that broadened the reach of administrative law to keep pace with the expanding role of government in a welfare state. The great leap forward in judicial oversight occurred when the Supreme Court through a process of judicial interpretation introduced the notion of ‘due process of law’ in its 1978 decision in *Maneka Gandhi*.²⁰ The framers of the Indian Constitution chose not to employ the expression ‘due process of law’ used in the US Constitution, and this omission was initially viewed as limiting judicial review of executive action.²¹ Prior to 1978, Article 21 of the Constitution was interpreted narrowly to mean that as long as there was some statute enacted by the legislature impinging upon a person’s life or personal liberty, the action could not be challenged as violating fundamental rights. *Maneka Gandhi* reversed this approach by reading Articles 14, 19, and 21 together, and the judgment effectively empowered the judiciary in India ‘to supervise and invalidate any union or State action, whether legislative or executive or of any public authority perceived by the court to be “arbitrary” or “unreasonable”’.²² The right to equality guaranteed under Article 14 of the Constitution was made even more muscular in a triad of decisions rendered in quick succession: *Ramana Dayaram Shetty v International Airport Authority of India*,²³ *Kasturi Lal Lakshmir Reddy v State of Jammu and Kashmir*,²⁴ and *Ajay Hasia v Khalid Mujib Sehravardi*.²⁵ The upshot of these judgments was that all government action was required to be based on some rational and relevant

principle that was non-discriminatory, failing which the action would be treated as 'arbitrary' and violating Article 14. It is this administrative law doctrine that serves as the bedrock of PIL in India.

The second influence, closely intertwined with the expansion of PIL, was a new imagination that informed Supreme Court judgments on the content of Article 21. The expression 'life' was interpreted broadly and positively to include every aspect of life that enabled a person to live with dignity.²⁶ The Supreme Court also recognised several unarticulated liberties that were implied by Article 21.²⁷ For this it turned to the Directive Principles of State Policy contained in [Part IV](#) of the Constitution, which indicate goals to guide government.²⁸ Although unenforceable as per Article 37, the Directive Principles (DPSPs) were increasingly cited by judges as complementary to fundamental rights, and a justification for lending content and depth to the fundamental right to life.²⁹

The third factor was the disposition of the Supreme Court to increase access to justice. Legal aid as an instrument of enabling the poor and disadvantaged to enforce their constitutional and statutory rights was the subject of three government reports.³⁰ These reports were the extrajudicial work of judges who steered early PILs in the Supreme Court, and who were sensitive to the peculiar problems of India's multitudinous poor.³¹ The reports recognised (to varying degrees) the necessity of courts altering their procedures so that those who were socio-economically handicapped were not denied their rights. Legal aid camps, voluntary mediation through Lok Adalats, and PILs were all part of a raft of initiatives by the Supreme Court to enable the poor to secure redress for their grievances.³² As with other jurisdictions that adopted group litigations in the public law sphere,³³ access to justice served as an important impetus to PIL in India.³⁴

The judicial renaissance of the late 1970s and 1980s followed upon a dark period when the Supreme Court justices abdicated their primary function as custodians of the Constitution. The anxiety of the Supreme Court to reclaim institutional legitimacy in the aftermath of the internal Emergency may be considered a fourth factor that propelled forward PIL jurisprudence. On 25 June 1975, an Emergency was declared on the ground of 'internal disturbance' threatening the security of India.³⁵ A widespread denial of civil and political rights followed, including the arrest and detention of persons opposed to Indira Gandhi's government.³⁶ Overturning the decisions of several High Courts that had upheld the citizen's liberty during the Emergency, the Supreme Court

capitulated to the executive's bidding and held that during the Emergency a person could be divested of his liberty even where he had not committed any breach of the law.³⁷ PIL enabled the Supreme Court to champion the protection of human rights and thereby rebuild its tarnished reputation.³⁸

Looking back at three decades of PIL jurisprudence, the Supreme Court in 2010 classified the evolution of this field into three overlapping phases.³⁹ In its view, the earliest phase was when the Supreme Court issued directions to protect the right to life for the benefit of marginalised groups and sections of society who could not access courts because of their poverty, illiteracy, and ignorance. The second phase encompassed protection of environment, forests, natural resources, and cultural heritage such as historical monuments. This class of PILs may be termed as involving 'a collective right to a collective good'.⁴⁰ The third phase comprised efforts by the Court to maintain probity, transparency, and integrity in governance.⁴¹ The trend line of PIL evolution indicates a drift away from the poverty and human rights focus of the early years to governance-related matters involving the democratic process.⁴²

The pivot in the development of PIL jurisprudence in India has been Article 32 of the Constitution. Article 32 guarantees the remedy to petition the highest court for enforcement of any fundamental right assured in the Constitution. Consequently, in addition to its primary role as the final appellate court, Article 32 provides a direct link between the Supreme Court and citizens. This powerful, rolled-together original and final remedy was wielded by the Supreme Court in the post-Emergency phase to target gross human rights violations. Not having to await an initial adjudication at the High Court tier, the Supreme Court was able to script rapid developments in PIL jurisprudence in cases it directly received.

IV. STANDING

To efficiently deploy judicial resources and decide genuine disputes of a legal character, courts regulate access by recognising only those persons with locus standi or legal standing.⁴³ But for this discipline, courts would get inundated by complaints from parties who have no legal stake in the resolution of the dispute. A competing vision, crucial for enhancing access to justice in respect of public grievances or with regard to the poor and disadvantaged, is the need for a liberal approach towards standing requirements. This latter vision was commended by the Supreme Court, anticipating the PIL era:

Test litigations, representative actions, *pro bono publico* and like broadened forms of legal proceedings are in keeping with the current accent on justice to the common man and a necessary disincentive to those who wish to bypass the real issues on the merits by suspect reliance on peripheral, procedural shortcomings ... Public interest is promoted by a spacious construction of locus standi in our socioeconomic circumstances ...⁴⁴

Consistent with this approach and the recommendations in the legal aid reports authored by two of its judges,⁴⁵ the Supreme Court relaxed the traditional rules governing locus standi. Since a court will not hear a party unless he or she has sufficient stake in the controversy, judicial perception of who has sufficient interest (ie, 'the person aggrieved') is critical. In what is possibly the most significant factor that spurred the growth of PIL, the Supreme Court lowered the standing barriers by enlarging the concept of 'person aggrieved'.⁴⁶

Traditionally, only a person whose own right was in jeopardy was entitled to seek a remedy. When extended to public actions, this meant that a person asserting a public right or interest had to show special circumstances, for example, that he or she had suffered some special injury over and above what members of the public had generally suffered.⁴⁷ Thus, diffuse public injuries, such as air pollution affecting a large community or corruption in public administration, were difficult to redress through courts. Even under the orthodox standing doctrine, a narrow exception was available to citizens bringing before the court public grievances against local authorities. A rate payer, for example, could compel municipal authorities to perform their public duties, although the rate payer had suffered no individual harm.⁴⁸ The traditional view of standing also effectively prevented the grievances of India's poor from being heard by a court. Frequently, the poor and underprivileged are unwilling to assert their rights because of poverty, ignorance, or fear of social or economic reprisals from dominant sections of the community. These challenges could be reduced if, as in the case of a minor or a detained person, the law allowed a concerned citizen to sue on behalf of the underprivileged. In this section, we focus on three features of standing that are noticeable in PIL cases, developing upon an initial typology posited by Clark Cunningham in his classic study of the topic.⁴⁹

1. Representative Standing

In the late 1970s and early 1980s, in cases involving the underprivileged, the Supreme Court began to override the procedural obstacles and technicalities that had until then obstructed redress. Rather than reject a petition for lack of standing, the Court chose to expand standing so that it could decide the substantive issues affecting the rights of the underprivileged. This modification of the traditional rule of standing which permits the poor and oppressed to be represented by volunteers may be described as ‘representative standing’.⁵⁰ Early representative standing cases in the Supreme Court helped secure the release of bonded labourers,⁵¹ obtain pension for retired government employees,⁵² and improve the living conditions of inmates at a protective home for women.⁵³ In *Hussainara Khatoon v Home Secretary*,⁵⁴ the Court implicitly recognised the standing of a public-spirited lawyer to move a petition on behalf of eighteen prisoners awaiting trials for very long periods in jails in the State of Bihar. The petition led to the discovery of over 80,000 prisoners,⁵⁵ some of whom had been languishing in prisons for periods longer than they would have served, if convicted.⁵⁶ Likewise, in *PUDR*,⁵⁷ the Court allowed a group of social activists to petition on behalf of exploited government construction workers, who were being paid less than the statutory minimum wage. The Court observed:

Here the workmen whose rights are said to have been violated and to whom a life of basic human dignity has been denied are poor, ignorant, illiterate humans who, by reason of their poverty and social and economic disability, are unable to approach the courts for judicial redress and hence the petitioners have, under the liberalised rule of standing, locus standi to maintain the present writ petition espousing the cause of the workmen.⁵⁸

Thus, where a section of people have been denied access to the administration of justice, the PIL jurisdiction is exercised generously.⁵⁹

2. Citizen Standing

The second modification of the classical standing doctrine may be termed 'citizen standing'.⁶⁰ Here a concerned citizen (or voluntary organisation) may sue, not as a representative of others but in his or her own right as a member of the citizenry to whom a public duty is owed. This liberalisation stemmed from the need to check the abuse of executive authority in a modern welfare state. Enormous regulatory and fiscal authority is vested in the administrative agencies of government. On occasion, these agencies misuse their power and funds. If a public authority acting illegally causes a specific legal injury to a person or a specific group of persons, a private action for redress would lie under the traditional doctrine of standing. At times, however, the injury arising may be diffuse, as where government policy threatens to undermine judicial independence, or where official inaction threatens to harm the environment. In such cases, the restrictive traditional doctrine precludes relief and renders the executive action immune from judicial scrutiny.

Under increasing pressure to curb instances of official lawlessness, the Supreme Court expanded standing to enable a citizen to challenge such government actions in public interest, even though the citizen had not suffered any individual harm. An early suggestion of this trend is present in *Fertilizer Corporation Kamgar Union v Union of India*,⁶¹ where a trade union challenged the sale of old machinery and a plant belonging to a State-owned corporation on the ground that the sale was arbitrary and violated the workers' right to occupation. The Court rejected the petition, finding no merit in either claim. However, on the issue of the trade union's standing, the Court observed:

If public property is dissipated, it would require a strong argument to convince the court that representative segments of the public or at least a segment of the public which is directly interested and affected would have no right to complain of the infraction of public duties and obligations ... We are not too sure if we would have refused relief to the workers if we had found that the sale was unjust, unfair or mala fide.⁶²

A concurring opinion developed the theme further:

Public interest litigation is part of the process of participative justice and 'standing' in civil litigation of that pattern must have liberal reception at the judicial doorsteps ... If a citizen is no more than a wayfarer or officious intervener without any interest or concern beyond what belongs to any one of the 660 million people of this country, the door of the court will not be ajar for him. But, if he belongs to an organization which has special interest in the subject-matter, if he has some concern deeper than that of a busybody, he cannot be told off at the gates, although whether the issue raised

by him is justiciable may still remain to be considered.⁶³

It was a small step from here for the Supreme Court to hold in the *Judges' Transfer* case,⁶⁴ that even where no specific legal injury had been suffered, any concerned citizen may sue to check the damage to the public interest and uphold the rule of law.⁶⁵ Citizen standing has enabled individuals to check the abuse of public office by high government functionaries;⁶⁶ to challenge government policies;⁶⁷ and to test the legality of a fiscal policy that favoured tax dodgers.⁶⁸

3. Litigational Competence

In 1981, a seven-judge bench of the Supreme Court delivered a definitive judgment on standing in the *Judges' Transfer* case.⁶⁹ Although every judge delivered a separate opinion, there was general agreement with Bhagwati J's view on the issue of locus standi. Bhagwati J upheld the standing of practising lawyers to challenge a government policy to transfer High Court judges, thereby undermining judicial independence. The transformation in the law of standing in the PIL jurisdiction has seen the notion of a 'person aggrieved' replaced by a more accommodative concept of 'litigational competence'.⁷⁰ Today, recognising their constitutional obligation to protect fundamental rights and advance good governance, judges are primarily concerned about the issue raised in the PIL and will generally lower procedural barriers where the cause warrants judicial intervention.⁷¹ Affirmatively, the threshold for litigational competence requires the petitioner to act in 'utmost good faith'.⁷² There is a high expectation of civic responsibility from a PIL petitioner. Where a petitioner's *bona fides* are in doubt but the cause of action is genuine and in the general public interest, the Court may appoint an *amicus curae* to deal with the matter keeping the original petitioner out.⁷³ Negatively, the PIL jurisdiction cannot be invoked by a person pursuing a hidden agenda,⁷⁴ acting as a 'surrogate for ... phantom lobbies',⁷⁵ seeking to pursue commercial gain,⁷⁶ using the court process merely for publicity,⁷⁷ or similar oblique motivations.⁷⁸ To preserve the sanctity of the PIL jurisdiction, a court will impose heavy costs where the petitioner lacks *bona fides*.⁷⁹

V. PROCEDURAL INNOVATIONS

A range of procedural innovations distinguish the PIL field from conventional litigation. Legal procedures that ensure fairness and uniformity at the trial of conventional, adversarial lawsuits may not be necessary in PIL cases. Strict rules of pleading do not apply in PIL.⁸⁰ Judges like to view PIL as a collaborative effort between the court, the citizen, and the public official, where procedural safeguards have a diminished utility and may be relaxed to enable relief: 'it has to be remembered that every technicality in the procedural law is not available as

a defence when a matter of grave public importance is for consideration before the court'.⁸¹

For instance, the Supreme Court and the High Court treat letters written to the court as writ petitions. These letters usually contain a bare outline of the grievance, the unsuccessful steps taken by the writer and a request to the court to set matters right. An early case in point is the *Dehradun Quarrying case*,⁸² where the Supreme Court directed a letter to be treated as a writ petition under Article 32 of the Constitution. The letter alleged that illegal limestone quarrying was devastating the fragile environment in the Himalayan foothills around Mussoorie. Satisfied that the matter merited inquiry, the Court first issued notices to the State and the collector of Dehradun to appear before the Court. Then, as a clearer picture of the facts, regulatory structures, and policies emerged, other affected parties—the Union Government, concerned government agencies and the mine owners—were also impleaded. By August 1988, when the Supreme Court delivered its final order, five years after it had received the letter, the litigation had grown into a full-blown, complex environmental case. To streamline the procedure for letter petitions, the Supreme Court issued administrative guidelines indicating when letter petitions would be entertained and the procedure to be followed by its registry.⁸³ Moreover, acceptance of letter PILs indicates a departure from strict adherence to the rules of pleading. As a PIL progresses, the court generally does not insist upon formal amendments to the petition so long as the parties have notice of the issues being considered.⁸⁴ Akin to letter petitions, the *suo motu* PIL is occasionally resorted to where a High Court or Supreme Court bench learns about an emergent matter of public concern that troubles the judicial conscience. These cases are usually triggered by media reports.

As the flow of PILs grew, judges were pressed to evolve new procedures to facilitate resolution. Judicial innovation was required to: (1) secure detailed facts, since the petitioners' information was usually sketchy; (2) receive expert testimony in cases involving complex social or scientific issues; and (3) ensure the continuous supervision of prospective judicial orders. To construct the facts, the Court usually requires the concerned public officials to furnish comprehensive affidavits. Sometimes, as where a swift, impartial assessment of the facts is needed and the official machinery is unreliable, slow or biased, an affidavit may be unhelpful. Though site inspections to gauge the position in the field were initially tried by some judges,⁸⁵ this impracticable method yielded to court-appointed commissions to gather facts.⁸⁶ The commissioner's report is treated as *prima facie* evidence of the facts and data gathered.⁸⁷ Once the report

is received by the Court, copies of it are supplied to the parties, who may choose to dispute the contents of the report in an affidavit. The Court then considers the report in light of the affidavits, and proceeds to decide the issues.⁸⁸

In pollution cases in the 1990s, the Supreme Court relied on the National Environment Engineering Research Institute (NEERI), Nagpur to visit the affected locality and submit its field report. Confronted with severe pollution caused by the chemical industry, the Supreme Court directed NEERI to study the situation around Bichhri village in Rajasthan and submit a report suggesting remedial measures.⁸⁹ When tackling the pollution of the river Ganga by tannery clusters in Calcutta, the Supreme Court directed NEERI to report on the situation at the site and suggest solutions.⁹⁰ NEERI's role as an expert has extended to assessing the damage caused by polluters⁹¹ or those who have caused other ecological harm.⁹² The most notable expert body is the Central Empowered Committee (CEC) that assists the Supreme Court in forest cases and which has gained near-institutional status over a decade of functioning.⁹³ In December 1996, responding to a rapid decline in India's forests, the Supreme Court asserted jurisdiction over all matters pertaining to the diversion of forests to non-forest use.⁹⁴ In discharging this role as custodian of national forests, the court relies heavily on the CEC for the purposes of assessing whether or not to permit forest clearance in individual cases and also to recommend measures to restore degraded areas.

Frequently, independent scientific expertise is essential to inform judicial decisionmaking. Judges in such cases usually appoint a committee of experts to probe scientific questions and advise the Court on a course of action. Since eminent scientists drawn from leading institutions compose these committees, the Court treats their opinion with great deference. For instance, faced with the allegation that imported Irish butter targeted for distribution was contaminated by the nuclear fallout from the Chernobyl disaster, the Supreme Court appointed an expert committee to determine whether the imported milk and dairy products were safe for human consumption. When the committee reported that the milk products were safe, the Court released the butter for distribution.⁹⁵ In the *Shriram Gas Leak* case, the Supreme Court solicited the help of several expert committees. The Nilay Choudhary committee was requested to advise the Court on whether Shriram's hazardous chemical plant, which was located in Delhi, should be allowed to recommence operations in view of the danger to the neighbourhood. The committee was also asked to suggest measures to reduce the environmental threat that the plan posed.⁹⁶ In the *Dehradun Quarrying* case,⁹⁷

the Supreme Court enlisted an expert committee to evaluate the environmental impact of limestone quarrying operations in the Mussoorie–Dehradun region. A ‘monitoring committee’ was formed to oversee the running of three limestone mines that had been allowed to continue operations, and to monitor reforestation measures in the region.⁹⁸ A ‘rehabilitation committee’ was also set up to rehabilitate the mine owners whose mines had been closed by the Court.⁹⁹

In PIL jurisdiction, judges find that a deserving cause may at times suffer due to a lack of effective legal representation. To overcome this handicap, the Supreme Court has developed a practice of appointing *amicus curiae* to assist the Court *pro bono publico*.¹⁰⁰ Finally, in a conventional litigation, there are usually two stages: the interim hearing where the Court balances the equities and makes a temporary arrangement; and the final adjudication where relief is granted or denied. In contrast, the relief in most PIL cases is obtained through a series of interim directions. Since the judicial focus is on improving a deplorable state of affairs, judges are required to monitor compliance of their directions by periodically assessing progress in the case. This technique of monitoring compliance over several months or indeed, often years, is termed as a ‘continuing mandamus’,¹⁰¹ another procedural innovation peculiar to PILs.

VI. JUSTICIABILITY

The growth of PIL shattered traditional notions of justiciability. Matters involving State policy or technical intricacies were generally regarded beyond the judicial pale. This is because judges have no specialist knowledge, no support of a popular mandate, and no access to all competing viewpoints. With PIL creeping into areas of governance, notions of what could be decided by judges changed. The expanded reach of the right to life and the willingness of judges to declare policy based on technical and expert reports submitted to the court blurred the boundaries circumscribing adjudication. The main check on the ambit of justiciability is the judiciary itself because it is judges who decide on whether or not a particular issue is capable of judicial resolution. The sweep of PILs and the steady growth of its users testify to the erosion of this bulwark.

The earliest cases that we now recognise as PILs were brought by community-minded citizens seeking to hold government accountable for arbitrary conduct as in *Backbay*¹⁰² or for human rights violations. As word spread about the low threshold requirements in instituting a PIL, the class of users expanded. The

courts have entertained lawyers, journalists, law teachers, academics, environmentalists, social activists, students, eminent citizens, affected residents, farmers, and individuals with a special knowledge or concern on the subject of the petition. Seizing the opportunity opened up by the lowered standing barrier, numerous non-governmental organisations stepped forward to secure directions, frequently quasi-legislative in character, on a myriad subjects.¹⁰³ Often, established organisations extended their activism and reach by filing PILs, while on occasion groups coalesced to canvas a particular cause in court. PILs have been prosecuted by consumer rights groups, environmental groups, organisations focused on urban planning, human rights groups, housing societies, trade unions, animal rights organisations, judicial accountability forums, bar associations, child rights groups and forums established to redress the specific grievances of a community. Indeed, there are now organisations that are devoted to improving governance through PILs.¹⁰⁴ What are the causes espoused in PILs and entertained by the constitutional courts? Without building an exhaustive taxonomy, this short survey of a few Supreme Court decisions indicates the breadth of judicial discourse.¹⁰⁵

A number of major PIL cases have involved human rights. For example, the Supreme Court has through its directions attempted to humanise prison administration. Prisoners languishing in Bihar's jails for years awaiting trial, and who had served time beyond the maximum sentence that could be imposed were released when the Court learnt about this horror.¹⁰⁶ The Court articulated the right to a speedy trial,¹⁰⁷ issued directions for the humane treatment of detainees,¹⁰⁸ including limits on solitary confinement of prisoners¹⁰⁹ and excessive handcuffing of prisoners.¹¹⁰ Custodial violence and deaths have invoked a strong response from the Court to rein in police barbarity,¹¹¹ extending public law litigation to the award of compensation in cases of custodial death or torture.¹¹²

Children's rights have been another area of intervention. Finding that children were being illegally detained and harassed in prisons, the Supreme Court directed the establishment of juvenile courts with specially trained officers¹¹³ who were sensitive to the special needs of children. Juveniles, when detained, could not be kept in the regular jails, but were sent to children's homes or special juvenile jails. The Court has also issued comprehensive directions governing inter-country adoptions.¹¹⁴ The Supreme Court has intervened to prevent child labour employed in a match factory,¹¹⁵ the carpet industry,¹¹⁶ and circuses.¹¹⁷ Relying on the fundamental right to education, the Supreme Court issued

directions to ensure that school buildings comply with the national building code and are safe and secure for students.¹¹⁸

In several cases, the Supreme Court has paid special attention to the rights of women. Responding to a complaint about custodial violence against women prisoners, the Supreme Court framed guidelines for the proper treatment of women who are arrested.¹¹⁹ Perhaps the most significant Supreme Court decision in a PIL relating to women in the workplace is when it laid down comprehensive guidelines with respect to the prevention of sexual harassment and establishing a machinery to redress complaints.¹²⁰ To redress nutritional deficiencies in children and pregnant women, the Supreme Court revised nutritional and feeding norms.¹²¹

Apart from civil-political rights, PIL has been a major instrument through which socioeconomic rights adjudication has developed in India. Here, environmental protection has received special attention from the Supreme Court, possibly more than any other sphere of PIL activity.¹²² At a substantive level, the Court has enunciated numerous principles that form the bedrock of environmental jurisprudence in India. These principles include the fundamental right of every person to a healthful environment,¹²³ the principle of sustainable development,¹²⁴ the precautionary principle,¹²⁵ the polluter pays principle,¹²⁶ the public trust doctrine,¹²⁷ and the principle of intergenerational equity.¹²⁸ The tort liability regime was transformed in relation to accidents caused by hazardous industry with the articulation of the absolute liability principle.¹²⁹ The Supreme Court has required strict compliance with environmental laws,¹³⁰ set down policy when faced with an unresponsive administration,¹³¹ and nudged the government to frame legislation.¹³² The most far-reaching exercise by the Supreme Court is with respect to the national forests resources, where the Court has acted as a custodian since 1996, permitting diversion of forests only where it is satisfied that the need is imperative.¹³³ The Supreme Court, through environmental PILs, has elevated the importance of ecological issues in developmental decision making, put a stop to some of the most egregious cases of pollution and illegal mining,¹³⁴ and worked to introduce a culture of compliance by insisting upon strict enforcement of environmental laws.

As noted previously, a major feature of PIL has been the transformation of the Supreme Court into an institution that mediates and adjudicates matters of governance. The Supreme Court has through its directions attempted to improve governance by increasing accountability and transparency. The voter's right to know the antecedents of candidates contesting elections was secured by the

Court.¹³⁵ Abuse of discretion in allotting petrol pumps¹³⁶ and government accommodation¹³⁷ has been struck down. The Court has worked to unshackle the Central Bureau of Investigation from executive interference by monitoring criminal investigations against politically powerful persons.¹³⁸ Strengthening the appointment process regarding the Central Vigilance Commissioner, the Supreme Court has laid down parameters for ensuring that persons of high integrity are selected.¹³⁹ To restore public confidence in the criminal justice system, the Supreme Court has appointed special investigation teams¹⁴⁰ and directed retrial where there was an apparent failure of justice.¹⁴¹ In an effort to deter backroom deals in the allocation of natural resources, the Court invalidated allocations and returned the resource to the State.¹⁴²

These judicial forays challenge traditional notions of justiciability to the point where practitioners can scarcely predict whether a particular PIL will be entertained or not. There is no perceptible threshold to cross, except satisfying a judge that some aspect of governance can benefit from a judicial heave. The continuous search for judicially manageable standards lends creative uncertainty to a journey that commenced with *Backbay* in 1975.

VII. CONCLUSION

For close to four decades, Indian courts have set apart judicial resources to foster PIL to a point where this jurisdiction defines public perception of the higher judiciary. In a milieu of rapid social transformation, a young aspiring population, and a vibrant civil society, courts directly speak to citizens through judgments on issues of moment. Their decisions generally add to the prestige of the judiciary, often at the expense of other wings of government. As Indians work towards realising their constitutional goals and enforcing constitutional guarantees, they have secured to themselves a new manner of exerting pressure on the State to improve governance. Supplementing the electoral process, street agitations, and lobbying, constitutional courts are now a further means for connecting sections of the citizenry and government. The voice of the informed citizen, generally lost in the political din or unheard by the bureaucracy, is amplified by judicial notice. Although the PIL docket remains small, these cases are generally prioritised, having regard to the significant public interest element involved.¹⁴³ Electronic and print media increase the Court's visibility by widely reporting judicial observations in PILs, a heady experience for members of a cloistered

calling. Indeed, PILs, in conjunction with the media, have provided a platform to the Supreme Court and the High Courts to enhance their own prestige by catalysing societal change in the face of moribund governance. While the courts recognise that major social engineering—or indeed even improvements—are scarcely possible through judicial intervention alone,¹⁴⁴ the justification for PIL remains the pursuit of constitutional goals by constitutional means. Guiding this new channel of citizen pressure, courts are now institutions of governance.

Inevitably, given the significance and nature of PIL, the revolution has led to numerous criticisms. Some suggest that the judiciary has lost its way, forsaking its initial constituency of the deprived and downtrodden to now address middle-class and elite concerns. Judicial intervention has hobbled agencies, which prefer to await court directions rather than perform their administrative functions. By wresting control over forests, monitoring pollution levels, and overseeing relief after a natural disaster, the court acts as a super-agency. Direct access to the constitutional courts through PIL tilts policymaking in favour of the minority who access these courts. Indeed, where policies are cast, multiple dimensions could well escape the attention of judges. The Court's efforts to cleanse government by overturning natural resource allocations result in massive economic disruptions. Business rivals and racketeers abuse the PIL processes to stall projects,¹⁴⁵ and on occasion, PILs have culminated in disastrous judgments recriminalising homosexuals,¹⁴⁶ depriving millions of Mumbai's citizens access to green and recreational spaces,¹⁴⁷ and foisting on a nation a river interlinking project that could severely undermine the subcontinent's ecological integrity.¹⁴⁸ More modestly, the Court's directions are at times unenforceable.¹⁴⁹ The judicial incursion into the legislative and administrative sphere is potentially disruptive of the delicate institutional balance and constitutional framework of separation of powers.¹⁵⁰ Apart from the serious encroachment of turf, PIL judgments, with their ad hoc solutions, undermine certainty, predictability, and restraint—three cardinal values that nourish judicial legitimacy.

Important as these concerns are, the contributions of PIL in the fields of human rights and the environment—to pick two areas of activity—lend some justification to the judiciary's activism. Bonded labourers and illegally incarcerated prisoners, in their thousands, have been liberated. The fundamental principles of environmental law were all laid out in PILs, with the legislature catching up through subsequent legislation.¹⁵¹ It is the Supreme Court that raised public awareness about the importance of environmental protection, long before any sustained executive initiative. Parliament too has recognised the value of PILs by empowering the National Human Rights Commission, as well as the

National Legal Services Authority, to petition the Supreme Court or the High Court in the discharge of their functions.¹⁵²

The fears of limitless judicial review and an imperial judiciary are tempered by the changing contours of PIL jurisprudence. New sector-specific statutes effectively shrink jurisdiction and the varied approaches to PIL.¹⁵³ Nevertheless, in a nation that persistently scores low on the human development index, it will be some time before the governance deficit shrinks to justify judicial retreat. Until then, PIL remains the judiciary's most visible tool for marketing constitutionalism.

¹ The building, constructed in neo-Gothic style, was completed in 1878. The Oval *maidan*, a popular recreational ground, derives its name from its oval shape.

² *Piloo Mody v State*, Miscellaneous Petition No 519/1974 (unreported). Page references are to the typed judgment copy available in the Bombay High Court record.

³ Naik was the Chief Minister of Maharashtra when the writ petition was filed. HG Vartak, Minister of Revenue and Forests, and Rafiq Zakaria, Minister of Public Health and Urban Development.

⁴ *Backbay* (n 2) 866–67.

⁵ *Backbay* (n 2) 588–89. The High Court held that the transactions were *mala fide* and the circumstances raised a strong suspicion that some of the respondents may have colluded. Since suspicion could not take the place of proof, no finding of collusion was rendered. *Backbay* (n 2) 792.

⁶ *Backbay* (n 2) 949–51.

⁷ There was no appeal.

⁸ Gyan Prakash, *Mumbai Fables* (HarperCollins 2010) 278–84.

⁹ Ashok H Desai and S Muralidhar, 'Public Interest Litigation: Potential and Problems' in BN Kirpal and others (eds) *Supreme but Not Infallible: Essays in Honour of the Supreme Court of India* (Oxford University Press 2000) 158, 163.

¹⁰ The earliest big-ticket environmental PIL was also a High Court case. The petition challenged a hydroelectric project in Kerala's Palghat District (*Society for Protection of Silent Valley v Union of India*, Original Petition Nos 2949 and 3025/1979, Kerala High Court; judgment dated 2 January 1980 (unreported)). Historically, PILs arose first in some High Courts 'although the caste-view of judiciary in India has so far forbidden explicit recognition of this fact'. Upendra Baxi, 'Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India' (1985) 4 *Third World Legal Studies* 107, 130.

¹³ *People's Union for Democratic Rights* (n 12) [2]. See also *Janata Dal v HS Chowdhary* (1992) 4 SCC 305 [53]; *Holicow Pictures (P) Ltd v Prem Chandra Mishra* (2007) 14 SCC 281 [10]; *State of Uttaranchal v Balwant Singh Chauhan* (2010) 3 SCC 402 [36]; SK Agrawala, *Public Interest Litigation in India: A Critique* (NM Tripathi 1985) 2, 9–10; Sonia Hurra, *Public Interest Litigation: In Quest of Justice* (Mishra and Company 1993) 4.

¹¹ Art 32 of the Constitution empowers the Supreme Court to issue writs across India for the enforcement of fundamental rights. Art 226 empowers High Courts to issue similar writs and orders to enforce fundamental rights 'and for any other purpose'.

¹² *People's Union for Democratic Rights v Union of India* (1982) 3 SCC 235 [2].

¹⁴ Abram Chayes, 'The Role of the Judge in Public Law Litigation' (1976) 89(7) *Harvard Law Review* 1281; Abram Chayes, 'Foreword: Public Law Litigation and the Burger Court' (1982) 96 *Harvard Law*

Review 4. *Sheela Barse v Union of India* (1988) 4 SCC 226 [11]–[13] recognises several of these distinct characteristics.

¹⁵ SP Sathe, *Judicial Activism in India* (Oxford University Press 2002) 203.

¹⁶ Agrawala ([n 13](#)) 1–5.

¹⁷ Rajeev Dhavan, ‘Whose Law? Whose Interest?’ in Jeremy Cooper and Rajeev Dhavan (eds) *Public Interest Law* (Blackwell 1986) 17–18; Videh Upadhyay, *Public Interest Litigation: Concepts, Cases, Concerns* (LexisNexis 2007) 9. Some scholars trace the roots of PIL to an earlier epoch when legal aid offices were first established in the US. Mamta Rao, *Public Interest Litigation in India* (Eastern Book Company 2002) 13–17.

¹⁸ The decline of PIL in the US is examined in Clark D Cunningham, ‘Public Interest Litigation in Indian Supreme Court: A Study in Light of the American Experience’ (1987) 29 *Journal of the Indian Law Institute* 494, 495.

¹⁹ Agrawala ([n 13](#)) 6: ‘As contrasted to the American scene, the PIL in India has been initiated by some judges of the Supreme Court themselves.’ Baxi ([n 10](#)) 111: ‘A striking feature of [social action litigation] is that it is primarily judge-led and even judge-induced.’ Early champions of PIL in the Supreme Court were PN Bhagwati and VR Krishna Iyer JJ. As the membership of the Court changed, the baton passed to other judges. See Gobind Das, *Supreme Court in Quest of Identity* (Eastern Book Company 2000) 156, 368; *BALCO Employees’ Union v Union of India* (2002) 2 SCC 333 [77].

²⁰ (1978) 1 SCC 248.

²¹ *AK Gopalan v State of Madras* AIR 1950 SC 27; *Indira Nehru Gandhi v Raj Narain* 1975 Supp SCC 1.

²² TR Andhyarujina, ‘The Evolution of Due Process of Law by the Supreme Court’ in BN Kirpal ([n 9](#)) 193.

²³ (1979) 3 SCC 489.

²⁴ (1980) 4 SCC 1.

²⁵ (1981) 1 SCC 722.

²⁶ *Francis Coralie Mullin v Administrator, Union Territory of Delhi* (1981) 1 SCC 608 [8]; *Bandhua Mukti Morcha v Union of India* (1984) 3 SCC 161 [10].

²⁷ See eg, *Maneka Gandhi* ([n 20](#)) (Right to travel abroad); *Hussainara Khatoon (3) v Home Secretary, State of Bihar* (1980) 1 SCC 93 (Right to a speedy trial); *Khatri (2) v State of Bihar* (1981) 1 SCC 627 (Right to legal aid); *Chameli Singh v State of Uttar Pradesh* (1996) 2 SCC 549 (Right to shelter); *Olga Tellis v Bombay Municipal Corporation* (1985) 3 SCC 545 (Right to livelihood); *Mohini Jain v State of Karnataka* (1992) 3 SCC 666 (Right to education); *Dinesh Trivedi v Union of India* (1997) 4 SCC 306 (Right to know).

²⁸ MP Jain, ‘The Supreme Court and Fundamental Rights’ in SK Verma and K Kusum (eds), *Fifty Years of the Supreme Court of India* (Oxford University Press 2000) 98.

²⁹ Jain ([n 28](#)) 66–67.

³⁰ Government of Gujarat, *Report of the Legal Aid Committee* (1971) (Chairperson: PN Bhagwati, then the Chief Justice of the Gujarat High Court); Government of India, Ministry of Law, Justice and Company Affairs, *Report of the Expert Committee on Legal Aid: Processual Justice to the People* (1973) (Chairperson: Justice VR Krishna Iyer). Government of India, Ministry of Law, Justice and Company Affairs, *Report on National Juridicare: Equal Justice-Social Justice* (1977). (The Committee on Juridicare was composed of Justice Bhagwati (Chairperson) and Justice Krishna Iyer (Member).)

³¹ Desai and Muralidhar ([n 9](#)) 161–62.

³² Baxi ([n 10](#)) 113.

³³ Carol Harlaw, ‘Public Law and Popular Justice’ (2002) 65(1) *Modern Law Review* 1, 8.

³⁴ *SP Gupta v Union of India* (1981) Supp SCC 87 [13]–[26]; PN Bhagwati, ‘Judicial Activism and Public Interest Litigation’ (1985) 23 *Columbia Journal of Transnational Law* 561.

³⁵ The proclamation was revoked in March 1977 shortly after the Indira Gandhi government was swept out of power in a national election.

³⁶ Sathe ([n 15](#)) 74.

³⁷ *ADM Jabalpur v Shivakant Shukla* (1976) 2 SCC 521; Sathe ([n 15](#)) 100–05.

³⁸ Granville Austin; *Working a Democratic Constitution: A History of the Indian Experience* (Oxford University Press 1999); Sathe ([n 15](#)) 106–07; Baxi ([n 10](#)) 108; Desai and Muralidhar ([n 9](#)) 161.

³⁹ *Balwant Singh Chaufal* ([n 13](#)) [43]. Suggesting a ‘three-phase’ evolution before this judgment, Professor Surya Deva conflates the second and third phases of the Supreme Court’s classification and then describes the current phase as ‘a period in which anyone could file a PIL for almost anything’. Surya Deva, ‘Public Interest Litigation in India: A Critical Review’ (2009) 28 *Civil Justice Quarterly* 19, 28.

⁴⁰ PP Craig and SL Deshpande, ‘Rights, Autonomy and Process: Public Interest Litigation in India’ (1989) 9 *Oxford Journal of Legal Studies* 356, 368–73.

⁴¹ A decade earlier, Professor Baxi saw a very different triptych: euphoria, chaos, and disenchantment. He tracks the PIL story from its idealistic beginnings to a phase of confusion followed by a loss of ‘adjudicatory nerve’. Upendra Baxi, ‘The Avatars of Indian Judicial Activism: Explorations in the Geographies of [In]Justice’ in Verma and Kusum ([n 28](#)) 156–65.

⁴² Lavanya Rajamani, ‘Public Interest Environmental Litigation in India: Exploring Issues of Access, Participation, Equity, Effectiveness and Sustainability’ (2007) 19(3) *Journal of Environmental Law*, 293, 302; Arun K Thiruvengadam ‘In Pursuit of “The Common Illumination of Our House”: Trans-Judicial Influence and the Origins of PIL Jurisprudence in South Asia’ (2008) 2 *Indian Journal of Constitutional Law* 67, 83; Prashant Bhushan, ‘Misplaced Priorities and Class Bias of the Judiciary’ (2009) 44(14) *Economic and Political Weekly* 32, 37.

⁴⁴ *Mumbai Kamgar Sabha v Abdulbhai Faizullabhai* (1976) 3 SCC 832 [7].

⁴³ VS Deshpande, ‘Standing and Justiciability’ (1971) 13 *Journal of the Indian Law Institute* 153, 154–55; Sathe ([n 15](#)) 201–02.

⁴⁵ Government of Gujarat ([n 30](#)); Government of India ([n 30](#)).

⁴⁶ *Balwant Singh Chaufal* ([n 13](#)) [42]–[75].

⁴⁷ *Jasbhai Motibhai Desai v Roshan Kumar* (1976) 1 SCC 671 [39]; Deshpande ([n 43](#)) 165; Sathe ([n 15](#)) 201–02.

⁴⁸ *K Ramadas Shenoy v Town Municipal Council, Udipi* (1974) 2 SCC 506.

⁴⁹ Cunningham ([n 18](#)).

⁵⁸ *People’s Union for Democratic Rights* ([n 12](#)) [9].

⁵⁰ Cunningham ([n 18](#)) 498.

⁵¹ *Bandhua Mukti Morcha* ([n 26](#)).

⁵² *DS Nakara v Union of India* (1983) 1 SCC 305.

⁵³ *Upendra Baxi v State of Uttar Pradesh* (1983) 2 SCC 308.

⁵⁴ (1980) 1 SCC 93 and 98.

⁵⁵ Cunningham ([n 18](#)) 499.

⁵⁶ Although essentially a *habeas corpus* case, it is widely recognised as the earliest example of PIL in the Supreme Court. The petitioner was the advocate Kapila Hingorani.

⁵⁷ *People’s Union for Democratic Rights* ([n 12](#)).

⁵⁹ *State of Madhya Pradesh v Narmada Bachao Andolan* (2011) 7 SCC 639.

⁶² *Fertilizer Corporation Kamgar Union* ([n 61](#)) [23].

⁶³ *Fertilizer Corporation Kamgar Union* ([n 61](#)) [43]–[48].

⁶⁰ Cunningham ([n 18](#)) 500.

⁶¹ (1981) 1 SCC 568.

⁶⁴ *SP Gupta* ([n 34](#)) [26].

⁶⁵ Though *SP Gupta* was overruled in *Supreme Court Advocates-on-Record Association v Union of India* (1993) 4 SCC 441 on the main issue relating to the primacy of the judiciary in the appointment of High Court and Supreme Court judges, the *SP Gupta* judgment continues to be relied upon as stating the correct position with respect to locus standi. See eg, *BALCO Employees' Union* ([n 19](#)) [81]; *Balwant Singh Chaufal* ([n 13](#)) [53]–[54].

⁶⁶ *PB Samant v State of Maharashtra* (1982) 1 Bom CR 367 (the Bombay High Court judgment led to the resignation of Chief Minister Antulay of Maharashtra); *Rudraiah Raju v State of Karnataka* ILR 1986 Kar 587 (the Karnataka High Court judgment led to the resignation of Chief Minister Hegde of Karnataka); *Shivsagar Tiwari v Union of India* (1996) 6 SCC 558 and (1996) 6 SCC 599 (out-of-turn allotment of government accommodation by the urban development minister).

⁶⁷ *Pravinbhai J Patel v State of Gujarat* (1995) 2 Guj LR 1210 (Gujarat High Court).

⁶⁸ *RK Garg v Union of India* (1981) 4 SCC 675.

⁶⁹ *SP Gupta* ([n 34](#)).

⁷⁰ *Restatement of Indian Law: Public Interest Litigation* (Universal Law Publishing 2011) 49, 55–59.

⁷¹ *Narmada Bachao Andolan* ([n 59](#)).

⁷² *Arun Kumar Agrawal v Union of India* (2014) 2 SCC 609 [95].

⁷³ *Narmada Bachao Andolan* ([n 59](#)).

⁷⁴ *Chhetriya Pardushan Mukti Sangharsh Samiti v State of Uttar Pradesh* (1990) 4 SCC 449 [8]; *Subhash Kumar v State of Bihar* (1991) 1 SCC 598.

⁷⁵ *Neetu v State of Punjab* (2007) 10 SCC 614; *Arun Kumar Agrawal* ([n 72](#)) [95].

⁷⁶ *Neetu* ([n 75](#)) [6].

⁷⁷ *Holicow Pictures (P) Ltd* ([n 13](#)) [10].

⁷⁸ *Holicow Pictures (P) Ltd* ([n 13](#)) [10].

⁷⁹ *Dattaraj Nathuji Thaware v State of Maharashtra* (2005) 1 SCC 590; *Sanjeev Bhatnagar v Union of India* (2005) 5 SCC 330; *Neetu* ([n 75](#)).

⁸⁰ *Narmada Bachao Andolan* ([n 59](#)).

⁸¹ *Rural Litigation and Entitlement Kendra v State of Uttar Pradesh* (1989) Supp (1) SCC 504 [16].

⁸² *Rural Litigation and Entitlement Kendra* ([n 81](#)).

⁸³ Sangeeta Ahuja, *People, Law and Justice: A Casebook of Public-Interest Litigation*, vol 2 (Orient Longman) 860. Instances of ‘epistolary jurisdiction’: *Sunil Batra (II) v Delhi Administration* (1980) 3 SCC 488 (Prisoners’ rights); *Ram Kumar Misra v State of Bihar* (1984) 2 SCC 451 (Minimum wages); *Parmajit Kaur v State of Punjab* (1996) 7 SCC 20 (Mass cremation by the Punjab police).

⁸⁴ See eg, *MC Mehta v Union of India* (1987) 1 SCC 395 [2].

⁸⁵ Krishna Iyer J visited Ratlam town and observed the urban squalor before deciding *Ratlam Municipality v Vardhichand* (1980) 4 SCC 162. Bhagwati J, who decided *Rural Litigation and Entitlement Kendra* ([n 81](#)), visited the Doon valley and found that addressing the environmental issues caused by limestone quarrying would necessarily impact workers, traders, and mine owners. Geetanjoy Sahu, ‘Implications of Indian Supreme Court’s Innovations for Environmental Jurisprudence’ (2008) 4(1) Law, Environment and Development Journal 375, 383–84.

⁸⁶ The Supreme Court has appointed district judges, a professor of law, journalists, an officer of the Court, lawyers, bureaucrats, mental health professionals, expert bodies, and a social scientist as commissioners for the purpose of carrying out an inquiry and reporting to the Court. Agrawala ([n 13](#)) 25–

26; Desai and Muralidhar ([n 9](#)) 165, 186.

⁸⁷ Sathe ([n 15](#)) 207–08.

⁸⁸ Upadhyay ([n 17](#)) 55–56. For a survey of commissioners appointed by the Supreme Court in the early 1980s, see Rao ([n 17](#)) 212–16.

⁸⁹ *Indian Council for Enviro-Legal Action v Union of India* (1996) 3 SCC 212 [16].

⁹⁰ *MC Mehta v Union of India* (1997) 2 SCC 411.

⁹¹ *Re Bhavani River—Sakthi Sugars Ltd* (1998) 2 SCC 601.

⁹² *MC Mehta v Kamal Nath* (1997) 1 SCC 388.

⁹³ The CEC was first constituted by a Supreme Court order on 9 May 2002, followed by a statutory notification under the Environment (Protection) Act 1986. When the statutory five-year term of the CEC expired, the Court continued the CEC under its orders. *Samaj Parivartana Samudaya v State of Karnataka* (2013) 8 SCC 154.

⁹⁴ *TN Godavarman Thirumulpad v Union of India* (1997) 2 SCC 267.

⁹⁵ *Shivarao Shantaram Wagle (II) v Union of India* (1988) 2 SCC 115.

⁹⁶ *MC Mehta v Union of India* (1986) 2 SCC 176 [7].

⁹⁷ *Rural Litigation and Entitlement Kendra* ([n 81](#)).

⁹⁸ *Rural Litigation and Entitlement Kendra* ([n 81](#)) [60].

⁹⁹ *Rural Litigation and Entitlement Kendra* ([n 81](#)) [59].

¹⁰⁰ Desai and Muralidhar ([n 9](#)) 166–67.

¹⁰¹ *Vineet Narain v Union of India* (1998) 1 SCC 226.

¹⁰² *Backbay* ([n 2](#)).

¹⁰³ Baxi ([n 41](#)) 173–76.

¹⁰⁴ See eg, *Centre for Public Interest Litigation v Union of India* (2000) 8 SCC 606.

¹⁰⁵ A survey of PILs till December 1996 is compiled in Ahuja ([n 83](#)). Since 1985, the Annual Survey of Indian Law published by the Indian Law Institute carries a chapter devoted to PIL.

¹⁰⁶ *Hussainara Khatoon (I) v Home Secretary, State of Bihar* (1980) 1 SCC 81.

¹⁰⁷ *Hussainara Khatoon (I)* ([n 106](#)); *Kadra Pahadiya v State of Bihar* (1981) 3 SCC 671.

¹⁰⁸ *DK Basu v State of West Bengal* (1997) 1 SCC 416.

¹⁰⁹ *Sunil Batra (II)* ([n 83](#)).

¹¹⁰ *Prem Shankar Shukla v Delhi Administration* (1980) 3 SCC 526.

¹¹¹ *DK Basu* ([n 108](#)).

¹¹² *Rudul Sah v State of Bihar* (1983) 4 SCC 141; *Sebastian M Hongray v Union of India* (1984) 3 SCC 82; *Bhim Singh v State of Jammu and Kashmir* (1984) Supp SCC 504 (1985) 4 SCC 677; *Saheli v Commissioner of Police* (1990) 1 SCC 422; *Nilabati Behera v State of Orissa* (1993) 2 SCC 746.

¹¹³ *Sheela Barse v Secretary, Children's Aid Society* (1987) 3 SCC 50.

¹¹⁴ *Lakshmi Kant Pandey v Union of India* (1984) 2 SCC 244.

¹¹⁵ *MC Mehta v State of Tamil Nadu* (1996) 6 SCC 756.

¹¹⁶ *Bandhua Mukti Morcha v Union of India* (1997) 10 SCC 549.

¹¹⁷ *Bachpan Bachao Andolan v Union of India* (2011) 5 SCC 1.

¹¹⁸ *Avinash Mehrotra v Union of India* (2009) 6 SCC 398.

¹¹⁹ *Sheela Barse v State of Maharashtra* (1983) 2 SCC 96.

¹²⁰ *Vishaka v State of Rajasthan* (1997) 6 SCC 241.

- ¹²¹ *People's Union for Civil Liberties v Union of India* (2009) 14 SCC 392.
- ¹²² Since the mid-1990s, forest resource cases are heard by a special bench popularly known as the 'Forest Bench'. A 'Green Bench' heard pollution cases in the 1990s.
- ¹²³ *Subhash Kumar* ([n 74](#)) [7].
- ¹²⁴ *Vellore Citizens' Welfare Forum v Union of India* (1996) 5 SCC 647.
- ¹²⁵ *Andhra Pradesh Pollution Control Board v Prof MV Nayudu* (1999) 2 SCC 718.
- ¹²⁶ *Indian Council for Enviro-Legal Action* ([n 89](#)).
- ¹²⁷ *Kamal Nath* ([n 92](#)).
- ¹²⁸ *Andhra Pradesh Pollution Control Board* ([n 125](#)).
- ¹²⁹ *MC Mehta v Union of India* ([n 84](#)).
- ¹³⁰ *MC Mehta v Union of India* (1987) 4 SCC 463.
- ¹³¹ Rajamani ([n 42](#)) 298–301; Shyam Divan and Armin Rosencranz, *Environmental Law and Policy in India* (2nd edn, Oxford University Press 2001) 277–79.
- ¹³² *Almitra H Patel v Union of India* (1998) 2 SCC 416; Rajamani ([n 42](#)) 297.
- ¹³³ *TN Godavarman Thirumulpad* ([n 94](#)).
- ¹³⁴ *Samaj Parivartana Samudaya* ([n 93](#)); *Goa Foundation v Union of India* (2014) 6 SCC 590.
- ¹³⁵ *People's Union for Civil Liberties v Union of India* (2003) 4 SCC 399.
- ¹³⁶ *Common Cause v Union of India* (1996) 6 SCC 530.
- ¹³⁷ *Shivsagar Tiwari* ([n 66](#)).
- ¹³⁸ *Vineet Narain* ([n 101](#)); *Manohar Lal Sharma v Principal Secretary* (2014) 2 SCC 532.
- ¹³⁹ *Centre for PIL v Union of India* (2011) 4 SCC 1.
- ¹⁴⁰ *National Human Rights Commission v State of Gujarat* (2009) 6 SCC 342; *Bharati Tamang v Union of India* (2013) 15 SCC 578.
- ¹⁴¹ *Zahira Habibulla H Sheikh v State of Gujarat* (2004) 4 SCC 158.
- ¹⁴² *Centre for Public Interest Litigation v Union of India* (2012) 3 SCC 1; *Manohar Lal Sharma v The Principal Secretary* (2014) 9 SCC 516, (2014) 9 SCC 614.
- ¹⁴³ PILs constitute less than 1 per cent of the overall caseload. Varun Gauri, 'Public Interest Litigation in India: Overreaching or Underachieving?' (2009) World Bank Policy Research Working Paper No 5109 <<http://elibrary.worldbank.org/doi/pdf/10.1596/1813-9450-5109>>, accessed November 2015.
- ¹⁴⁴ *Bandhua Mukti Morcha* ([n 26](#)) 838.
- ¹⁴⁵ *Kalyaneshwari v Union of India* (2011) 3 SCC 287.
- ¹⁴⁶ *Suresh Kumar Koushal v Naz Foundation* (2014) 1 SCC 1.
- ¹⁴⁷ *Bombay Dyeing & Mfg Co Ltd v Bombay Environmental Action Group* (2006) 1 SCC 586.
- ¹⁴⁸ *Re Networking of Rivers* (2012) 4 SCC 51.
- ¹⁴⁹ *TN Godavarman Thirumulpad v Union of India* (2012) 3 SCC 277.
- ¹⁵⁰ *Divisional Manager, Aravali Golf Club v Chander Hass* (2008) 1 SCC 683.
- ¹⁵¹ Principles of 'no fault/absolute' liability, the polluter pays principle, and sustainable development were all legislated after Supreme Court judgments declared these principles.
- ¹⁵² Protection of Human Rights Act 1993, s 18(b). Legal Services Authorities Act 1987, s 4(d).
- ¹⁵³ See eg, National Green Tribunal Act 2010, creating a specialist forum for resolving environmental disputes.

CHAPTER 38

THE CONSTITUTIONALISATION OF INDIAN PRIVATE LAW

SHYAMKRISHNA BALGANESH*

I. INTRODUCTION

It may appear a little out of place to find a discussion of private law embedded into a handbook on Indian constitutional law. Constitutional law is after all at the core of public law, against the backdrop of which private law is commonly understood. Private law is routinely conceptualised as the body of law that applies to horizontal interactions between individuals in their capacities as private actors.¹ This is in contrast to public law, which focuses primarily on the vertical relationship between the State and the individual, or between different State actors.² Constitutional law, administrative law, and criminal law are taken to be paradigmatic of the latter, while the common law areas of tort law, contract law, property law, and other advanced regimes that build on these common law subjects (eg, intellectual property law, or the law of commercial arbitration) form the mainstay of the former.³

The interaction between public law and private law has generated a good deal of scholarly attention over the years.⁴ While public law and private law are often treated as analytically distinct in theory, in actual practice the divide between the two often breaks down. When this occurs, ideas, concepts, and devices from one move into or influence the other. The most common situation where this occurs is in relation to the doctrine of ‘horizontal effects’, wherein a constitutional directive or norm is interpreted by courts to apply horizontally; that is, as between individuals.⁵ The South African Constitution, for instance, expressly renders its Bill of Rights applicable to the horizontal context.⁶ Another common way in which public law and private law interact is when courts either explicitly or implicitly employ ideas and concepts from constitutional law in interpreting and applying private law concepts.⁷ Additionally, in some jurisdictions public law ideals and elements come to influence private law by imposing constraints on what the judiciary, understood as a ‘State actor’, can and cannot do in

applying a substantive common law rule.⁸ The US Supreme Court adopted this approach in its landmark decision on racially restrictive covenants in *Shelley v Kraemer*, where it found that a court's enforcement of a substantive private law rule to produce a discriminatory result was itself a violation of the equal protection guarantee.⁹ What is interesting about these analytical spillovers—all of which have the effect of transcending the public law–private law divide—is the reality that they are almost always seen by scholars as palpably beneficial, and as producing functional synergies that the rigidity of the traditional distinction fails to enable.

While the interaction between public law and private law might indeed produce important benefits in individual cases, less commonly acknowledged among courts and scholars is the reality that such an interaction might also generate several undesirable systemic results: both structural and substantive. It is this hitherto underappreciated phenomenon that I explore in this chapter, focusing on the interaction between Indian constitutional law and Indian tort law. Using the context of the Indian Supreme Court's dramatic expansion of its fundamental rights jurisprudence over the past three decades, I argue that while the Court's conscious and systematic effort to transcend the public law–private law divide and incorporate concepts and mechanisms from the latter into the former might have produced a few immediate and highly salient benefits for the public law side of the system, its long-term effects on India's private law edifice have been devastating. The Court's fusion of constitutional law and tort law has successfully cabined the independent efficacy, normativity, and analytical basis of equivalent private law claims in Indian lower courts. Coupled with the unique history of India's various basic private law regimes, and the legal system's failure to strengthen these regimes after Independence, the Court's efforts have only served to undermine the overall legitimacy of India's private law mechanisms. While this phenomenon is most apparent in relation to tort law in India, it persists to a lesser degree in other areas of private law as well, such as contract law and property law. Yet, in all the discussions of India's progressive fundamental rights jurisprudence, one finds no mention whatsoever of its effects on Indian private law.¹⁰

Section II of this chapter provides a brief analytical discussion of the public law–private law distinction, and situates it within the unique contingencies of the Indian legal system and the historical processes through which the bulk of its private law and public law regimes came into existence. Section III analyses the Indian Supreme Court's jurisprudence—beginning in the mid-1980s—that recognised the analytics of the public law–private law divide, but nonetheless

chose to collapse it. This section shows that the Court's fusion of the two bodies was neither incidental nor unintended, but was instead a direct effort to expand India's public law (ie, fundamental rights) jurisprudence to new domains, in the interests of justice. Finally, Section IV takes a step back and critically examines the hitherto unappreciated effects of the merger identified in Section III: analytical, doctrinal, and expressive.

II. PUBLIC LAW AND PRIVATE LAW IN THE INDIAN LEGAL SYSTEM

While the modern distinction between private law and public law is usually traced back to Roman law,¹¹ few if any would claim that it can be understood and operationalised with conceptual clarity. As noted previously, the distinction is ordinarily described as lying in the difference between the vertical and horizontal operation of legal rules. Constitutional law, criminal law, and administrative law represent bodies of law that govern the interactions between the various branches of government or between the government and individual subjects, and are taken to form the staple of public law.¹² By contrast, areas that focus on the interaction between subjects in their private capacities—most prominently the common law subjects of tort, contract, property, and unjust enrichment—are paradigmatic of private law.¹³ Other more specialised areas tend to draw a little from both categories insofar as they rely on basic common law principles (eg, ownership, agreements), but superimpose on that basic framework additional regulatory and public policy goals.

Very importantly, the public law–private law distinction is less about the character of the actors involved and more about the structural nature of the legal directives that govern and influence the relationship in question. Government actors thus routinely enter into agreements and contracts with private individuals (or other government actors) and in so doing enter the domain of private law insofar as their relationship—as contracting parties—is predominantly horizontal. Similarly, when an essential government function is delegated to a private corporation, its relationship to the individuals that it provides its services to starts to partake of public law, since its directives now operate vertically, despite the formal nature of the corporation as a private entity. The distinction is therefore hardly wedded to the character of the entities involved, even though there remains a strong correlation to that effect.

All the same, it certainly isn't the case that the State plays no role whatsoever in private law. In private law settings, recourse to the State's coercive machinery is left to the discretion of private actors; or, specifically, the private actor who is vested with a legally cognisable claim. The law defines the relationship between parties through its traditional normative apparatus, but then takes a step back to allow parties to play out the consequences—positive or negative—of the relationship in question. The State plays a background role, of a safety net, in private law dealings unlike in the public law context, where the State is a direct participant.¹⁴ The State's 'background' role in private law settings imbues private law with a rather distinctive claim to legal normativity, in turn constructed through the language of rights and duties that the State-created (private law) doctrine sets up before stepping out of the relationship.¹⁵ Scholars continue to disagree over whether private law can indeed exist without the State altogether; an issue that while interesting, need not detain us here.¹⁶

In most of the English-speaking world, the basic areas of private law—that is, property, torts, and contracts—are primarily common law subjects. They were historically created and developed by courts from within the contexts of individual disputes, and despite their piecemeal codification, courts continue to retain a fairly significant role in their continuing growth and evolution. This is especially true in both the US and in England, where private law remains strongly associated with the common law. The story of Indian private law and of its modern-day eclipse by Indian constitutional law is fairly different, and must begin with its somewhat spurious origins.

In the second half of the nineteenth century, the colonial government in India embarked on a rather extensive project of codifying the common law for all of British India.¹⁷ Following the failure of the 'codification movement' in England and the US, India emerged as a prime candidate for testing the fruitfulness of the codification exercise.¹⁸ Between 1860 and 1910, the British government in India enacted fifteen laws into effect, and among them were several areas of private law, most notably the laws of contract and unjust enrichment, property law, and the law of private remedies.¹⁹ While Indian tort law was initially on the list of areas intended for legislative intervention, it eventually escaped being codified, despite a draft Bill being commissioned by the Indian government from Sir Frederick Pollock.²⁰ In each of the areas that did come to be codified, the (British) codifiers began with the basic rules of English common law and modified them as they deemed most appropriate for Indian society. In so doing, they routinely employed the use of clear, bright-line rules, and precisely drafted definitions and illustrations, all with the conscious design of minimising judicial

discretion and unpredictable legal change.²¹ The direct result of this codification exercise was that it effectively distanced Indian private law from the common law and its intrinsic generativity.

Following the codification, Indian courts came to treat private law disputes as entailing little more than the interpretation and application of legislative directives. At Indian Independence, the Indian Constitution drafters thought it wise to keep all pre-Independence legislation in place until the Indian Parliament saw it necessary to replace it with newer versions, and expressly afforded such legislation continuing validity under the new constitutional system.²² In the six decades after Indian Independence this replacement has occurred only rarely, even though the codes themselves have been amended on the margins. As a result, much of Indian private law is today contained in late-nineteenth-century colonial legislation, consciously enacted (at the time) with the idea of minimising judicial lawmaking and creativity. Indian private law is therefore ‘common law’ in content though not in process, approach, and style. Indian courts are relegated to an unequivocally subservient position *vis-à-vis* the legislature in formulating the directives and content of private law.

As noted earlier, Indian tort law managed to avoid the early codification exercise, though for political reasons. All the same, in the early twentieth century, the British enacted a series of specialised enactments, each of which provided for civil redress (ie, compensation) mechanisms within the context of particular activities that were believed to commonly produce accidental harm to life and property. Following Independence, Parliament systematically updated, and in some instances even replaced, these specialised codes with newer ones. For instance, compensation for motor vehicle accidents is today covered by the Motor Vehicles Act of 1989, which replaced the Motor Vehicles Act of 1939; compensation for workplace injuries continues to be governed by the Workmen’s Compensation Act of 1923; and injuries relating to the Indian Railways are governed by the liability provisions of the Railways Act of 1989, which replaced the prior Act of 1890. In a few instances, Parliament intervened decades after Independence to introduce an altogether new enactment dealing with an area. The Consumer Protection Act of 1986 is one such example, which today deals with products (and services) liability. Indian tort law for the most part today comprises a set of specialised liability regimes, each dealing with a unique area of activity. Each of these enactments contains a detailed set of provisions allowing defendants to claim compensation from a wrongdoer, by approaching either a lower court or a specialised tribunal or authority. Courts treat these enactments as having exhausted the field in question and generally

restrict themselves to interpreting and applying the law. They interpret and apply these specialised enactments in essentially the same way that they do other areas of general private law. Judicial lawmaking in all of Indian private law is as a result, for the most part, simply non-existent.

In stark contrast to this, modern Indian public law, especially constitutional law, is almost entirely the product of far-reaching changes introduced by the country's higher judiciary. As is well known, these changes have involved both substantive and procedural components. Ever since the 1980s, the Indian Supreme Court has expanded the Constitution's protections for various fundamental rights to encompass progressive socioeconomic rights.²³ Simultaneously, it has also loosened the restrictions on when and how an aggrieved party can approach the court for relief. Most of these changes are captured in what is commonly described as India's 'public interest litigation' revolution.²⁴

The disparate institutional bases of change in the two areas—that is, public law and private law—may seem somewhat anomalous at first. What prevented the Indian higher judiciary from playing a more active role in reforming Indian private law, just as it had done for Indian constitutional law? A good part of the answer lies in the unique synthesis of substantive and structural change that the courts' public law changes entailed, and which were infeasible in the private law context. The most far-reaching changes introduced by the Indian Supreme Court (ie, the public interest litigation reforms) came about in the exercise of the Court's original writ jurisdiction, contained in Article 32 of the Indian Constitution. Article 32, somewhat uniquely, is both a jurisdiction-enabling provision and a substantive fundamental right, the 'right to move the Supreme Court' for the enforcement of fundamental rights.²⁵ This dual jurisdiction-right provision allowed the Court to both make far-reaching substantive changes to the rights themselves and simultaneously to see to their implementation on its own, without having to remand matters back to lower courts for this task. The Court's expansion of parties' standing was thus as much about expanding its own jurisdiction as it was about furthering litigants' access to justice.²⁶ Personal (institutional) oversight over implementation fuelled both the willingness of the Court to introduce substantive changes and legitimised it, by ensuring that such changes didn't remain without effect. While this trend was started by the Supreme Court, High Courts soon followed suit, vested with their analogous but less far-reaching writ jurisdiction for fundamental rights under Article 226 of the Constitution.²⁷

Most private law actions under Indian law are to be commenced in the lower

judiciary, at the district court level. The higher judiciary (the Supreme Court and the several High Courts) retains no more than appellate jurisdiction in this area. Consequently, even if the higher courts were to introduce far-reaching changes to the substantive content of the law—much as they did in the constitutional context—the primary responsibility to implement these changes in individual cases would fall to lower courts. Not only would there be no way of guaranteeing that this would be successful, but India's lower judiciary has long been characterised by extended delays and a host of additional structural issues, all of which would have masked the salience and utility of any substantive reform.²⁸ This explains the Indian higher judiciary's disparate approach to common-law-style substantive lawmaking in the public law and private law arenas ever since Indian Independence. Perhaps more importantly though, it also explains why the Indian higher judiciary has felt the recurrent urge to address private law questions *through* its public law apparatus whenever possible, an issue to which we next turn.

III. PRIVATE (TORT) LAW AS CONSTITUTIONAL LAW IN INDIA

Public interest litigation began in India in the early 1980s, primarily in cases where State actors such as prison officials had mistreated prisoners, usually through physical abuse. In exercising its plenary jurisdiction under Article 32 to protect and enforce the Constitution's fundamental rights, the Supreme Court's first move was to relax the requirement of locus standi to allow third parties to petition the Court in any way or form for relief.²⁹ In later cases, the Court interpreted its powers to allow it to consider a matter on its own motion (*suo motu*), effectively eliminating both the standing requirement and the need for an actual case or controversy to arise as preconditions for the exercise of its jurisdiction.³⁰

These early public interest litigation cases were in essence constitutional tort actions, where the petitioner was assailing a State actor for its action or omission, and alleging that such act or omission had violated a protected fundamental right (contained in [Part III](#) of the Constitution). In its genesis, the Supreme Court's merger of constitutional law and tort law under the rubric of public interest litigation was less than deliberate, but was instead the direct result of its liberal allowance for compensatory awards during such actions. Fairly early on in the development of public interest litigation, the Court began allowing successful petitioners to recover monetary damages. In *Rudul Sah v*

State of Bihar (hereinafter *Rudul Sah*),³¹ Chandrachud CJ endorsed this practice, but recognised an obvious dilemma. Allowing a litigant to seek damages in a writ petition (ie, a public interest litigation action) rather than through an ordinary civil suit could result in the ordinary judicial process coming to be circumvented. At the same time, failing to make such awards might undermine the very efficacy—not to mention legitimacy—of public interest litigation. The Court in *Rudul Sah* eventually chose to award the petitioner monetary damages and noted that in doing so it was both ‘mulct[ing]’ violators and offering a ‘palliative’ for victims. The Court was in essence then explicitly imbuing such recovery with both compensatory and punitive/exemplary elements.³²

With *Rudul Sah*, the Court cemented its practice of issuing damage awards in successful public interest litigation petitions. The dual-purpose argument also gave the Court significant discretion in fixing the quantum of these awards. In due course, the Court began to expand the subject matter of claims brought under the rubric of public interest litigation, while continuing to award petitioners monetary compensation.³³ Whereas the early cases had involved deliberate or intentional governmental action (eg, unlawful detention, torture of prisoners, etc), in later cases the Court became far more willing to extend liability to situations where the State actor had omitted to take any action. In so collapsing the act–omission distinction, public interest litigation thus came to be extended to situations where governmental inaction had been a factor in harm suffered by a victim.

With this expansion in subject matter, the Court’s approach in public interest litigation cases started bearing a stark resemblance to traditional private-law-based tort claims. This was most obvious in medical negligence cases involving government-run hospitals.³⁴ A government hospital’s failure to provide treatment or in negligently providing treatment could now be the subject of a writ petition against the government, rather than the subject of a simple negligence action against the doctors or hospital staff, and a court could award the petitioner compensation under either approach. The petitioner had ‘rights’ against both sets of parties: a fundamental right against the government, and a private law right against the private party. From a petitioner’s (ie, victim’s) perspective, bringing the action as a writ petition, however, held innumerable advantages. Most important among these were the expedited nature of the process, and the reality that a court’s decision in its writ jurisdiction did not require an elaborate factual record, but could instead be disposed of on affidavit evidence without further testimony. This practice was hardly unique to the Supreme Court, and was soon followed in equal measure by the various High

Courts in the exercise of their own writ jurisdiction under Article 226.³⁵ This expansion of scope, coverage, and remedial framework in constitutional jurisdiction brought the Indian higher judiciary's public law jurisprudence into direct conflict with private law—that is, tort law—a reality that litigants themselves (especially defendants) began to recognise.

It wasn't until the year 2000 that the Court directly confronted the question of whether its practice of awarding petitioners compensation under its writ jurisdiction—and for a variety of subject areas—amounted to a usurpation of private law, that is, tort law. In *Chairman, Railway Board v Chandrima Das* (hereinafter *Chandrima Das*),³⁶ the Court was presented with a case where a petition was brought by a civil rights lawyer on behalf of a foreign national who had been brutally gang-raped by railway employees at a government-owned railway station. The events in question happened when the employees were off duty, but on premises owned and run by the government. The petition specifically sought monetary compensation for the victim from the government, alleging that its failure to protect the victim and prevent the crime violated the victim's fundamental rights. As a procedural matter, the petition was brought before the Calcutta High Court under Article 226, and the High Court's award was then appealed to the Supreme Court. In the Supreme Court, the defendant (the government entity) openly objected to the award of any compensation in the case, and argued that doing so amounted to a usurpation of private law by the higher courts in the exercise of their writ jurisdiction. Areas of private law such as tort law, the defendant argued, required an elaborate factual record before compensation could be granted; and the writ process was ill-equipped to do this, since witnesses were never examined, and evidence was only ever presented on affidavit. While these arguments found little favour with the Court,³⁷ it nonetheless forced the Court to confront the private law-public law distinction and the argument that its writ jurisdiction had run roughshod over it.

Not surprisingly, upon examining the issue the Court merely reaffirmed its past practice and that of the several High Courts, but now purported to find a logical basis for the overlap. Using conclusory language, the Court observed that '[w]here public functionaries are involved and the matter relates to the violation of Fundamental Rights or the enforcement of public duties the remedy would still be available under the Public Law notwithstanding that a suit could be filed for damages under Private Law'.³⁸ Since the crime of rape amounted to a violation of the victim's right to life under Article 21 of the Constitution, the Court concluded that a public law remedy was wholly appropriate, since it was 'not a mere matter of violation of an ordinary right'.³⁹ What is important to note

here is that the Court was directly responding to the usurpation argument by expressly preserving the parallel nature of public law and private claims for the same set of facts, since they trigger two different types of rights (ie, fundamental and ordinary). The Court's reasoning now expressly recognised a parallel jurisdiction, which to its mind alleviated the concern with usurpation. This parallelism also liberated the Court in another important way—at the substantive level. By recognising that its public law jurisprudence was relying on private law but was nonetheless distinct from it, the Court was now in a position to modify (or abandon) any substantive private law constraints that it saw as impediments to the protection of constitutional rights in the exercise of its writ jurisdiction. The private law requirement of causation, central to all tort claims, was one such impediment. In fact, the Court in *Chandrima Das* even went so far as to eliminate the 'course of employment' requirement for vicarious liability in public-law-based tort claims, since the actors in the case were unambiguously acting beyond the scope of their employment when they sexually assaulted the victim.⁴⁰ Their—wholly private—actions were now causally imputed to their employers in order to award the petitioner damages.

The decision in *Chandrima Das* marked an important turning point in the merger of public law and private law in India. Not only did the Court formally validate all of what had been going on before, but it now also equipped the higher judiciary with a superficial analytical basis with which to render the merger functionally complete. First, it told High Courts around the country that they were free to continue awarding petitioners compensation in the exercise of their writ jurisdiction and on the basis of lower evidentiary standards, since the petitioners were always at liberty to commence an independent private law action. The public law action was, in other words, no longer to be seen as being in lieu of a private law claim, but as serving an independent (and more important) purpose. Secondly, it now authorised courts to freely modify the substance of private law actions when brought as public law claims, since the public law dimension of the claim now imbued it with a different purpose, which in turn could override certain private law constraints. This could be at the level of the claim (eg, causation) or at the level of remedy (eg, computation of damages).

Following *Chandrima Das*, High Courts around the country began exercising their writ jurisdiction more freely to award petitioners monetary compensation in a variety of substantive settings. The absence of a developed factual record was no longer seen as an impediment, and many courts took this to suggest the absence of a genuine dispute about the events in question. Thus, for instance, in one prominent case involving loss of life from a large fire in a movie theatre, the

Delhi High Court readily exercised its writ jurisdiction against the theatre owner and the municipal authorities to award the petitioners compensatory and punitive damages.⁴¹ In so doing, it expressly noted how liberated it was from the traditional constraints of private law adjudication:

[I]n the exercise of our jurisdiction under Article 226 of the Constitution, we are not required to go into the factual details of the matter nor without sufficient material before us we are in a position to hold as to what extent each of the parties involved were negligent. However, on the basis of the admitted facts on record about which there cannot be any controversy between the parties, we are of the view that an enterprise which is engaged in a hazardous or inherently dangerous industry which poses a potential threat to the safety of persons working in the premises or vicinity, owes an absolute and non-delegable duty to the patrons who visit the same to ensure that no harm results to anyone on account of the hazardous or inherent nature of the activity which it has undertaken.⁴²

Negligence, in other words, no longer had to be alleged or proven for liability! A cinema theatre was an inherently dangerous undertaking, which would trigger absolute liability for any harm; a rather dramatic expansion of the law. Other High Courts across the country soon did the same in a variety of substantive areas and contexts such as medical negligence,⁴³ electrocution,⁴⁴ wrongful conception,⁴⁵ negligent infection,⁴⁶ accidents at railway crossings,⁴⁷ and several others.

As this trend continued unabated, a few courts began to worry about the sufficiency of evidence for their decisions.⁴⁸ The issue became especially important in the rare instances where the defendant expressly disputed the existence of the injury or a causal connection to its actions. When the question eventually reached the Supreme Court, it concluded that a court's exercise of its writ jurisdiction would be inappropriate when there were real disputed questions of fact that required additional evidence.⁴⁹ The Court was quick to add that the restriction applied only to the higher judiciary's writ jurisdiction under Articles 32 and 226, and that it did not restrain its own power to address the matter under Article 142,⁵⁰ which allowed the Court to pass any order 'necessary for doing complete justice in any cause or matter'.⁵¹

To the extent that such factual disputes could operate as a limit on courts' writ jurisdiction in tort cases, the question nonetheless remained of how the court is to ascertain whether such a dispute does in fact exist. And here, the Court's guidance to high courts was sufficiently open-ended so as to render the limit meaningless. If there was 'negligence on the fact of it', a court was entitled to exercise its writ jurisdiction, but not otherwise.⁵² In practice, it has only been in the exceptional situation that a High Court has refused to find such negligence on the record. The net effect of this standard was that it extended tort law's rule

of *res ipsa loquitur* to just about any claim brought using a court's writ jurisdiction. Additionally, the 'negligence-on-the-face-of-it' standard created an active incentive for High Courts to avoid acknowledging the very existence of any factual disagreement between the parties, since such an acknowledgement would have required them to avoid hearing the case.⁵³

In summary, then, the subsumption of tort law and private law ideas into Indian constitutional law jurisprudence was both gradual and deliberate. Much of the impetus for the merger can be traced back to early constitutional law decisions and their insistence on awarding victims discretionary monetary awards for rights violations by State actors. When the subject matter of such public interest claims expanded, the absence of any real limits on courts' discretionary power to award compensation effectively resulted in the creation of a parallel form of private law adjudication under the rubric of a public law system of redress. What is perhaps more surprising than the actual phenomenon itself, however, is the fact that this merger—and its consequences—have been altogether ignored by scholars of Indian law.⁵⁴

IV. UNEXPLORED CONSEQUENCES

The hybrid *public law/tort* claim described in Section III—wherein a private law claim is brought as a public law action against a State actor, rather than as a private action against a private actor—is today a staple of the Indian constitutional law landscape. There is little doubt that it has produced important short-term benefits for litigants, by expediting their ability to be heard, and by minimising the system's reliance on formalities. It has also without question generated important benefits for the Indian higher judiciary as well, seen in the public's perception of its efficacy and responsiveness. Yet, its effects on the role of private law in the overall landscape of the Indian legal system have gone altogether unnoticed, primarily because these effects have been less obvious and immediate. While detailing these effects is worthy of its own separate treatment, this section outlines the nature and scope of these consequences, leaving for another time and place a more elaborate analysis.

Before describing these consequences, however, an important caveat is in order. The suggestion that the constitutionalisation of Indian tort law has contributed to the problems described below should not be taken to imply that Indian tort law (or private law more generally) was somehow unproblematic prior to this process. Indeed, the contrary is indeed true. In addition to being

substantively underdeveloped and ossified in statutory language, the Indian private law system has been continually haunted by the problem of exorbitant court fees, rendering its very availability to private individuals fairly elusive. Writing in 1958, the Law Commission of India famously noted that:

India is . . . the only country under a modern system of government which deters a person who has been deprived of his property or whose legal rights have been infringed from seeking redress by imposing a tax on the remedy he seeks . . . The [court] fee which we charge is so excessive that the civil litigant seeking to enforce his legal right pays not only the entire cost of the administration of civil justice but also the cost incurred by the State in prosecuting and punishing criminals for crimes with which the civil litigant has no concern.⁵⁵

Given these exorbitant fees, traditional tort law claims within the civil justice system have for long remained beyond the reach of ordinary litigants, and the public law/tort law jurisprudence can be seen as a mechanism designed to remedy—at least partially—that system-wide malaise, among others. Yet in so doing, it has itself contributed to the problem by directing attention away from a reform of the private law system; and indeed produced a series of secondary problems for tort law litigation in India as a whole, which I outline below.

1. Substantive Neglect

The most direct consequence of tort claims being addressed through public law adjudication has been the stagnation of substantive tort law qua private law in India. The doctrinal and institutional impoverishment of Indian tort law has been the subject of extensive discussion ever since the Bhopal disaster, where the Indian legal system first confronted the inadequacies of its private law mechanisms.⁵⁶ In the years since, hardly any serious effort has been made to strengthen the substantive and institutional content of tort law in India.⁵⁷ Very few tort law cases make it to the higher judiciary on appeal, leaving the lower courts at liberty to develop and apply the general rules of tort law to individual disputes with little supervision. Additionally, the reality that lower court decisions are never reported in the Indian system leaves litigants with a good deal of uncertainty about the area.⁵⁸

Against this backdrop, the development of the hybrid public law/tort claim has essentially proven to be a distraction. By raising the salience of substantive tort questions (eg, negligence, causation) only within the context of writ adjudications, the legal system has at once relegated the content of traditional private law adjudication to a veritable back seat and simultaneously minimised the perceived urgency of real reform in the area. The law of medical negligence is a prime example. While a private law claim for medical negligence has existed in India for decades now, the law has long been shrouded in a good deal of uncertainty about the appropriate legal standard that courts need to employ when adjudicating such claims,⁵⁹ and in computing damages.⁶⁰ This uncertainty has in turn resulted in plaintiffs rarely ever succeeding in such cases. By contrast, courts have almost never hesitated to find for petitioners when deciding such (ie, medical negligence) claims as writ petitions against government doctors and hospitals, and in awarding damages in such claims. And whereas mechanisms for computing damages in private law claims continue to remain controversial, contested, and unclear, hardly any court (or litigant) has questioned the way in which courts compute compensatory awards in their writ jurisdiction, for the very same subject matter. With the exponential growth of public law tort actions, it is unrealistic to expect any comprehensive reform of private-law-based tort adjudication in the conceivable future, since the former is systemically structured as a substitute for the latter.

2. Doctrinal Manipulation

Even more troubling than the neglect of tort law as a private law subject in India has been the manner in which the higher judiciary's jurisprudence (of tort law in the public law domain) has modified and obfuscated many of the area's core mechanisms and devices. While the public law/tort law claims entertained by the Supreme Court and the High Courts build on core tort law ideas, the unique structural constraints that this method of adjudication operates under has required these courts to effectuate important and far-reaching modifications to established tort law doctrine. We noted a prime example earlier, where one court expressly noted that it was 'not required' to undertake a fact-finding exercise to determine the existence of negligence on the part of the defendant, and that it was instead developing a theory of 'absolute liability' for such situations, since they were exceptional.⁶¹ What the Court, of course, fails to mention is that a determination of absolute liability requires very little factual investigation on its part, besides proof of actual harm (ie, something that an affidavit-based system is perfectly suited to). The Court's substantive reasoning and its new rule were thus driven almost entirely by the unique adjudicative structure involved, rather than by a considered need for a change in the rule. Along the same lines is the courts' expansion of the idea of vicarious liability to impose liability on government agencies for actions committed by their employees even when well outside the formal scope of their employment, or the courts' ready imposition of a duty of care for nonfeasance, almost unheard of in most other common law jurisdictions.

Changes along these lines aren't just problematic from a substantive point of view. They are additionally troublesome insofar as they are likely to not be limited to the unique needs of the adjudicative structure within which they are developed. Consequently, to lower courts looking for guidance on substantive law, these modifications in doctrine might have a generalisable dimension, and come to be seen as no different from modifications made in the higher judiciary's exercise of its appellate authority over private law cases.⁶² Such strategic manipulation of doctrine to suit the exigencies of the courts' writ jurisdiction could thus indelibly come to represent *the* tort law of India.

3. Moral Hazard

As an analytical matter, public-law-based tort claims present an additional problem. Recall that these claims involve imposing liability on State actors and institutions for actions committed by private individuals with or without actual governmental authorisation. Additionally, such claims are meant to operate in parallel with traditional private law claims over the same set of facts. This parallel, complementary jurisdiction in essence recognises two independent rights *and duties of care* in any ordinary tort law action.⁶³ The first is a traditional duty of care owed by the private actor in his/her private capacity to the victim; and the second is now a new structural (ie, constitutional) duty owed by a State entity to that same victim. While the victim is at liberty to pursue either action, or indeed both, enforcing the structural duty is consciously rendered easier and more expeditious; meaning that individuals have every incentive to pursue a public law claim to the exclusion of a private law one. In effect, then, tort law claims have their duty of care bifurcated into a purely private one (owed by an individual) and a structural one (owed by the State).

The analytic bifurcation of the duty is, of course, beneficial to litigants in practice. As a systemic matter, however, it interferes with the fundamental normative premises of tort law. According to a dominant school of thought, tort law's principal purpose is thought to lie in its ability to deter socially harmful behaviour of different kinds, by forcing defendants to internalise the costs of their actions.⁶⁴ For this purpose to work, however, it is obviously crucial that the actor saddled with the costs have the actual ability to change its behaviour (and the outcome) in future cases. The deterrent function thus works because a careless driver is in a position to drive more carefully, in anticipation of (or in reaction to) having to bear the costs of carelessness. When the individual/entity on whom the costs are imposed has no ability to change the primary behaviour that is causally responsible for those costs, liability is incapable of producing deterrence. In addition, it emboldens risk taking by the causally responsible actor, since that actor now knows that the costs will be borne by someone else. This is the basic idea of a 'moral hazard' and is common in the context of insurance.⁶⁵ Imposing liability on an independent State actor, and thereby eliminating (or reducing) a claimant's need for commencing an action against the private actor that is causally responsible for the harm, generates a distinct moral hazard. Thus, having a government health department compensate a claimant for the negligent behaviour of a doctor employed at a government

hospital without the doctor himself/herself being held liable in his/her individual capacity is unlikely to deter future negligent behaviour,⁶⁶ and might indeed serve to induce such behaviour, since the claim effectively operates as a mechanism of insurance for individual action. In short, while victims might be made better off by public-law-based compensatory mechanisms, so too are actual and potential tortfeasors, since the costs of their behaviour are borne by an altogether distinct State actor.

4. Claim Impersonalisation

Even if one rejects the idea that tort law's primary purpose lies in deterring behaviour, and locates it instead in the realisation of corrective justice, the analytic bifurcation of duty created by the Indian higher judiciary remains equally problematic. In the corrective justice view, the institution of tort law operates by recognising that a defendant's harm-producing actions require correction not just through the payment of compensation, but in addition by ensuring that such compensation comes from the actual wrongdoer who is directly responsible for the wrong.⁶⁷ Central to this understanding is therefore a concept described by corrective justice theorists as the idea of 'personality', which refers to the actors' capacity for purposiveness in their actions.⁶⁸ It is only because an actor is capable of purposive action—to avoid the injustice that is causally produced—that tort law's ascription of responsibility becomes defensible under the corrective justice idea.⁶⁹ In other words, an actor's direct ability to alter the injury-causing behaviour is critical even to tort law's goal of corrective justice. When this attribute is eliminated, tort law ceases to work as an institution of corrective justice, and instead becomes a mechanism of mere distributive justice, where the system's principal goal lies in redistributing the benefits and burdens of society.⁷⁰

Consequently, while the bifurcation of the duty may ensure payment *to* the victim, the fact that it comes *from* an actor other than the immediate wrongdoer undermines the goal of corrective justice. With compensation being readily obtained in public law actions, tort victims have little incentive to bring private law claims premised on the same set of facts. In the absence of such claims, the Indian hybrid public law/tort law claim effectively impersonalises the injury as well as the claim in its compensatory zeal, thereby eliminating corrective justice from the system.

V. CONCLUSION

Much has been written about the virtues of India's constitutional rights revolution. Prior to its advent, access to courts was seen as largely illusory. In seeking to remedy this, the phenomenon of public interest litigation has come to play a fairly important role within the overall legal system. All the same, it has

come at a rather significant cost: the entrenchment of the legal system's disdain for the extant processes and instrumentalities of justice. By shifting attention, decision making, and recourse to itself in the exercise of its writ jurisdiction the Indian higher judiciary has only rendered more salient the ineffectiveness of India's lower courts, and the adversarial processes that they employ.

Nowhere is this truer than in relation to standard tort claims in India. By developing a parallel jurisprudence of public wrongs that are adjudicated as public law claims, the higher judiciary has successfully relegated to constitutional law matters that in most countries form the core of private law adjudication. Courts, lawyers, and litigants today celebrate this development as representing a high point in India's constitutional development. While they may indeed have something to celebrate in terms of the system's efficacy, simplicity, and transparency, these very virtues hide important fault lines that the courts' jurisprudence has produced. The system's efficacy has compromised on the traditional legal rules of evidence presentation and causal inference; its simplicity has for no independently justifiable reason successfully obfuscated various substantive tort law doctrines; and its supposed transparency has made much of the system 'discretionary' at the remedial and adjectival levels. Every revolution has its casualties; and one prime casualty of India's rights revolution in this regard has been its already ailing private law apparatus.

* Many thanks to participants at the Roundtable organised by the editors of this volume in New Delhi, for valuable comments and suggestions.

¹ Michael Rosenfeld, 'Rethinking the Boundaries between Public Law and Private Law for the Twenty-first Century: An Introduction' (2013) 11 *International Journal of Constitutional Law* 125, 126; Alon Harel, 'Public Law and Private Law' in Markus D Dubber and Tatjana Hörnle (eds) *The Oxford Handbook of Criminal Law* (Oxford University Press 2015) 1040–63.

² Rosenfeld ([n 1](#)) 125.

³ Ralf Michaels and Nils Jansen, 'Private Law Beyond the State? Europeanization, Globalization, Privatization' (2006) 54 *American Journal of Comparative Law* 843, 847 (discussing the traditional coverage of the term 'private law'); Rosenfeld ([n 1](#)) 125; Harel ([n 1](#)) (adding tax law to the substantive areas covered by public law).

⁴ For early important work: Roscoe Pound, 'Public Law and Private Law' (1939) 24 *Cornell Law Quarterly* 469; John Henry Merryman, 'The Public Law–Private Law Distinction in European and American Law' (1968) 17 *Journal of Public Law* 3. For more recent work: Daniel Friedmann and Daphne Barak-Erez (eds) *Human Rights in Private Law* (Hart Publishing 2001); Michael Faure and Andre van der Walt (eds) *Globalization and Private Law* (Edward Elgar 2010); Aharon Barak, 'Constitutional Human Rights and Private Law' (1996) 3 *Review of Constitutional Studies* 218 (1996); Peter Goodrich, 'The Political Theology of Private Law' (2013) 11 *International Journal of Constitutional Law* 146.

⁵ Stephen Gardbaum, 'The "Horizontal Effect" of Constitutional Rights' (2003) 102 *Michigan Law Review* 387.

⁶ Constitution of the Republic of South Africa 1996, s 12(2): '[T]he Bill of Rights binds a natural or a

juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.’

⁷ Barak describes this as the ‘application to the judiciary model’ of having public law ideals influence private law. Barak ([n 4](#)) 226, 238–43.

⁸ Erwin Chemerinsky, ‘Rethinking State Action’ (1985) 80 Northwestern University Law Review 503.

⁹ 334 US 1 (1948), 17–19. For an excellent discussion of the case and its connection to equality, see Mark Tushnet, ‘Shelley v. Kraemer and Theories of Equality’ 33 (1988) New York Law School Law Review 383.

¹⁰ Even accounts that are critical of the rights revolution tend to ignore the effects on India’s private law system. See eg, SK Das, *India’s Rights Revolution: Has it Worked for the Poor?* (Oxford University Press 2013).

¹¹ See eg, WW Buckland, *A Manual of Roman Private Law* (Cambridge University Press 1939).

¹² Michaels and Jansen ([n 3](#)) 847 (discussing the traditional coverage of the term ‘private law’); Rosenfeld ([n 1](#)) 125; Harel ([n 1](#)) (adding tax law to the substantive areas covered by public law).

¹³ John CP Goldberg, ‘Introduction: Pragmatism and Private Law’ (2012) 125 Harvard Law Review 1640, 1640.

¹⁴ This idea is best captured by the civil recourse theory of private law. As one scholar aptly puts it, in tort law (and all of private law) ‘[t]he state does not impose liability on its own initiative ... [i]t does so in response to a plaintiff’s suit demanding that the defendant be so required’. Benjamin C Zipursky, ‘Civil Recourse, Not Corrective Justice’ (2003) 91 Georgetown Law Journal 695, 699.

¹⁵ Stephen A Smith, ‘The Normativity of Private Law’ (2011) 31 Oxford Journal of Legal Studies 215, 221–29.

¹⁶ See eg, Michaels and Jansen ([n 3](#)) (providing an overview of this disagreement).

¹⁷ See generally, Whitley Stokes, *The Anglo-Indian Codes*, vol 1 (Clarendon Press 1887).

¹⁸ Mathias Reimann, ‘The Historical School Against Codification: Savigny, Carter, and the Defeat of the New York Civil Code’ (1989) 37 American Journal of Comparative Law 95, 96; Wienczyslaw J Wagner, ‘Codification of Law in Europe and the Codification Movement in the Middle of the Nineteenth Century in the United States’ (1952) 2 St Louis University Law Journal 335.

¹⁹ Stokes ([n 17](#)) ix.

²⁰ Frederick Pollock, *The Law of Torts: A Treatise on the Principles of Obligations Arising from Civil Wrongs in the Common Law* (Stevens and Sons 1887) 556–58 (detailing the idea behind the Bill, and expressing frustration at its failure to be enacted).

²¹ For an account of how this worked in the context of Indian property law, see Shyamkrishna Balganesh, ‘Codifying the Common Law of Property in India: Crystallization and Standardization as Strategies of Constraint’ (2015) 63 American Journal of Comparative Law 33.

²² Constitution of India 1950, art 372(1): ‘[A]ll the laws in force in the territory of India immediately before the commencement of this Constitution shall continue in force therein until altered or repealed or amended by a competent Legislature or other competent authority.’

²³ See eg, PP Craig and SL Deshpande, ‘Rights, Autonomy and Process: Public Interest Litigation in India’ (1989) 9 Oxford Journal of Legal Studies 356; Jamie Cassels, ‘Judicial Activism and Public Interest Litigation in India: Attempting the Impossible?’ (1989) 37 American Journal of Comparative Law 495 (1989).

²⁴ Craig and Deshpande ([n 23](#)); Cassels ([n 23](#)).

²⁵ Constitution of India 1950, art 32.

²⁶ Craig and Deshpande ([n 23](#)) 359–64.

²⁷ Constitution of India 1950, art 226(1).

²⁸ See eg, Robert Moog, ‘Delays in the Indian Courts: Why the Judges Don’t Take Control’ (1992) 16 The Justice System Journal 19.

- ⁴² *Association of Victims of Uphaar Tragedy* ([n 41](#)) [55].
- ²⁹ *SP Gupta v Union of India* (1981) Supp SCC 87.
- ³⁰ *Bandhua Mukti Morcha v Union of India* (1984) 3 SCC 161 [14].
- ³¹ (1983) 4 SCC 141.
- ³² *Rudul Sah* ([n 31](#)) [10].
- ³³ See eg, *Bhim Singh v State of Jammu & Kashmir* (1984) Supp SCC 504; *Sebastian M Hongray v Union of India* (1984) 1 SCC 339; *Nilabati Behera v State of Orissa* (1993) 2 SCC 746.
- ³⁴ *Paschim Banga Khet Mazdoor Samity v State of West Bengal* (1996) 4 SCC 37.
- ³⁵ See eg, *Hamid Raza v Superintendent, Central Jail* 1985 Cri LJ 642 (Madhya Pradesh High Court); *Thressia v KSEB* AIR 1988 Ker 206; *Kalawati v State of Himachal Pradesh* (1988) 2 ACC 192 (Himachal Pradesh High Court); *R Gandhi v Union of India* (1988) 2 MLJ 493 (Madras High Court); *Jyoti Sharma v State of Rajasthan* (1991) 2 WLN 507 (Rajasthan High Court).
- ³⁶ (2000) 2 SCC 465.
- ³⁷ *Chandrima Das* ([n 36](#)) [9].
- ³⁸ *Chandrima Das* ([n 36](#)) [11].
- ³⁹ *Chandrima Das* ([n 36](#)) [12].
- ⁴⁰ *Chandrima Das* ([n 36](#)) [38]–[42].
- ⁴¹ *Association of Victims of Uphaar Tragedy v Union of India* (2003) 104 DLT 234.
- ⁴³ *Ramar v Director of Medical and Rural Health Services* (2011) 1 MLJ 1409 (Madras High Court); *Thangapandi v Director of Primary Health Services* (2011) 1 MLJ 1329 (Madras High Court).
- ⁴⁴ *Rajesh Kumar v Himachal Pradesh Electricity Board* 995 ACJ 1146 (Himachal Pradesh High Court).
- ⁴⁵ *Shobha v Government of NCT of Delhi* (2006) 3 ACC 145 (Delhi High Court).
- ⁴⁶ *Vijaya v Chairman, Singareni Collieries Company Ltd* (2002) 1 ACC 32 (Andhra Pradesh High Court).
- ⁴⁷ *Behera v DRM East Coast Railway* AIR 2012 Ori 62.
- ⁴⁸ *Kumari v State of Tamil Nadu* (1992) 2 SCC 223.
- ⁴⁹ *Chairman, Grid Corporation of Orissa Ltd v Sukamani Das* (1999) 7 SCC 298; *Tamil Nadu Electricity Board v Sumathi Das* (2000) 4 SCC 543.
- ⁵⁰ *Sukamani Das* ([n 49](#)) [7].
- ⁵¹ Constitution of India 1950, art 142.
- ⁵² *Sumathi Das* ([n 49](#)) [10].
- ⁵³ One astute High Court's effort to supplement its factual record by choosing to exercise its writ jurisdiction and then referring the factual dispute to a court-appointed arbitrator was met with disapproval by the Supreme Court, which viewed the very acknowledgement of the factual dispute as necessitating a decline of jurisdiction. *Sumathi Das* ([n 49](#)) [12].
- ⁵⁴ Madhav Khosla, 'Making Social Rights Conditional: Lessons from India' (2010) 8 International Journal of Constitutional Law 739, 756: 'Within Indian legal scholarship, there has been no effort to understand such [public interest litigation] cases as involving tort actions.'
- ⁵⁵ Law Commission of India, *Reform of Judicial Administration* (Law Com No 14, vol 1, 1958) 487 <<http://lawcommissionofindia.nic.in/1-50/Report14Vol1.pdf>>, accessed November 2015.
- ⁵⁶ For an excellent account, see Marc Galanter, 'Legal Torpor: Why So Little Has Happened in India After the Bhopal Tragedy' (1985) 20 Texas International Law Journal 273, 275: 'the absence of tort claims is reinforced by, and reinforces, the absence of tort doctrine'.
- ⁵⁷ See generally, Jamie Cassels, *The Uncertain Promise of Law: Lessons from Bhopal* (University of

Toronto Press 1993).

⁵⁸ This is somewhat perplexing and is yet to be examined in any detail by scholars. One suspects that it is largely because Indian lower courts are not ‘courts of record’ under the Indian constitutional structure.

⁵⁹ For the doctrinal confusion that the area has engendered, see *Jacob Matthew v Union of India* (2005) 6 SCC 1; *Martin F D’Souza v Mohd Ishaq* (2009) 3 SCC 1; *B Jagadish v State of Andhra Pradesh* (2009) 1 SCC 681; *Nizam’s Institute of Medical Sciences v Prasanth S Dhananka* (2009) 6 SCC 1; *V Krishan Rao v Nikhil Super Specialty Hospital* (2010) 5 SCC 513.

⁶⁰ In a recent landmark case, *Balram Prasad v Kunal Saha* (2014) 1 SCC 384, the Court ordered a private actor to pay out an uncharacteristically large sum of money, based on the earning potential of the victim. The case garnered much publicity, principally because it was a major deviation from how courts had approached damage awards in such cases for years. Gayathri Vaidyanathan, ‘A landmark turn in India’s medical negligence law’ *The New York Times* (New York, 31 October 2013) <http://india.blogs.nytimes.com/2013/10/31/a-landmark-turn-in-indias-medical-negligence-law/>, accessed November 2015.

⁶¹ *Association of Victims of Uphaar Tragedy* (n 41).

⁶² To be sure, I am not claiming that this has already occurred as an empirical matter. Given that lower court opinions are yet to be systematically reported and published in India, validating this concern is impossible at this stage. Yet, my claim is that the risk of this occurring is pervasive, since the higher judiciary generates more decisions that fall into the public law/tort law category than those that fall into the category of strict private law actions.

⁶³ See generally, John CP Goldberg and Benjamin C Zipursky, ‘Shielding Duty: How Attending to Assumption of Risk, Attractive Nuisance, and Other “Quaint” Doctrines Can Improve Decisionmaking in Negligence Cases’ (2006) 79 Southern California Law Review 329.

⁶⁴ Gary T Schwartz, ‘Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?’ (1994) 42 UCLA Law Review 377.

⁶⁵ Steven Shavell, ‘On Moral Hazard and Insurance’ (1979) 93 Quarterly Journal of Economics 541; Steven Shavell, ‘On Liability and Insurance’ (1982) 13 Bell Journal of Economics 120.

⁶⁶ What complicates this particular scenario is, of course, the presence of criminal liability for medical negligence in India.

⁶⁷ Ernest J Weinrib, *Corrective Justice* (Oxford University Press 2012) 3–4.

⁶⁸ Weinrib (n 67) 21–29.

⁶⁹ Weinrib (n 67) 25: ‘[P]ersonality as the capacity for purposiveness contains the indispensable conditions for the ascription of responsibility for the effects of one’s actions.’

⁷⁰ John Gardner, ‘What is Tort Law For? Part 2. The Place of Distributive Justice’ in John Oberdiek (ed) *Philosophical Foundations of the Law of Torts* (Oxford University Press 2014) 335.

PART VII

RIGHTS—SUBSTANCE AND
CONTENT

CHAPTER 39

EQUALITY

legislative review under Article 14

TARUNABH KHAITAN^{*}

I. INTRODUCTION

THIS chapter provides an analytical overview and limited evaluation of the grounds of *legislative* review under the general constitutional guarantee of the right to equality under Article 14. It excludes legislative review for other reasons (such as for violation of other constitutional rights or because of lack of legislative competence). Also outside its immediate focus are the (woefully underdeveloped)¹ anti-discrimination provisions in Articles 15(1), 16(2), and 29(2)—they are referred to only when they illuminate the content of Article 14. Other chapters in this Handbook deal with administrative review, affirmative action, and gender equality.

Within the context of Article 14, my focus will only be on *legislative* review. What this entails is not quite as straightforward as might first seem. To begin with, I use ‘legislative review’ to mean review *of* legislative acts *by* judges, rather than review *by* the legislature. In its adjectival form, ‘legislative’ could characterise at least three distinct things. First, it may be a qualifier that describes an action based on *who* the actor is—anything that is done by the legislature is, in this sense, legislative (actor sensitive). This will include not only primary statutes but also non-statutory actions of a legislature, such as the adoption of resolutions and procedural rules, or orders punishing someone for its contempt. It will not include executive ordinances.

In the second sense, an action can be described as legislative depending on *how* it was done (process sensitive). Legislation is a particular mode of decision making, which usually includes consultation, review in standing committees, debate and deliberation, and voting.² Often, legislative decisions have to be made democratically—that is, by democratically elected representatives through an open, fair, and democratic process. There may, however, be occasions when a statute is enacted by a legislature without any consultation, committee review, debate, or deliberation,³ and therefore may not be described as adequately

legislative in this second sense. Colonial statutes are less ‘legislative’ than post-Independence statutes, and (because of inadequate media and civil society oversight) State statutes tend to be less legislative in this process-sensitive sense than Central ones.⁴ Ordinances issued by the political executive suffer from this lacuna even more deeply. Thus, one could ask not only whether an act is legislative, but also the extent to which it is so. Whether an action has been legislative in the procedural sense is likely to be relevant to the *standard* of review applied, rather than constitute a *ground* of review.

In the third sense, the adjective describes actions based on *what* they entail (product sensitive). In this sense, what makes an act legislative is its substance. A legislative act comprises *general* rules enacted to guide specified conduct.⁵ In this sense, it may be distinguished from rule application, which is an essentially administrative exercise looking at particular cases. ‘Legislation’ then is enacted not just by the legislature, but also by the executive (especially in the form of secondary rules using authority delegated by statutes, but also as ordinances and policy documents). Even judges legislate (less controversially) when they determine the procedural rules that ought to govern their own functioning.⁶

These three senses have respectively been characterised as actor-sensitive, process-sensitive, and product-sensitive understandings of the term ‘legislative’. Delineating these three senses of the term is helpful for the discussion that is to follow. My focus in this chapter remains on the *grounds* of legislative review, particularly in the actor-sensitive and product-sensitive sense. However, a full story of legislative review under Article 14 will need to consider the *standards* of review debate as well.⁷

This chapter explores the two doctrines that have evolved to test the constitutionality of a measure when faced with an Article 14 challenge: the ‘classification test’ or the ‘old doctrine’ (which I have labelled ‘unreasonable comparison’) and the ‘arbitrariness test’ or the ‘new doctrine’ (labelled ‘non-comparative unreasonableness’). I will show that (a) the classification test (or the unreasonable comparison test) continues to be applied for testing the constitutionality of classificatory rules (whether or not legislative in character); (b) it is a limited and highly formalistic test applied differentially; (c) the arbitrariness test is really a test of unreasonableness of measures which do not entail comparison (hence labelled non-comparative unreasonableness); (d) its supposed connection with the right to equality is based on a conceptual misunderstanding of the requirements of the rule of law; and (e) courts are unlikely to apply it to legislative review (in the actor-sensitive sense). The way forward is to beef up the classification doctrine to realise its true potential, and

abandon the arbitrariness doctrine with respect to actor-sensitive legislative review.

Writing about Indian constitutional law poses a difficult methodological problem—a staggering judicial output, contradictory and precedent-blind decisions in constitutionally significant cases by benches of two or three judges, and under-reasoned judgments make the scholastic task very difficult.⁸ In this chapter, I focus primarily on Article 14 cases decided by a bench of five or more judges. These cases constitute a more manageable dataset, tend to give more attention to doctrine and precedent, and are constitutionally recognised as being more authoritative than cases decided by benches of lesser strength.⁹ This focus is but a guideline—it is impossible to ignore some other significant cases.

II. THE TRADITIONAL NARRATIVE

Traditionally, many commentators and judges have told a story about the transformation of Article 14 along these lines: in its early years, inspired by the US jurisprudence under the Fourteenth Amendment, the Supreme Court—led primarily by Das J—devised the classification test to determine a law’s compliance with Article 14.¹⁰ Effectively, this entailed the Court asking two questions: (i) whether the classification made by the law in question was based on an intelligible differentia; and (ii) whether the classification had a reasonable nexus with the object the law sought to achieve. The obvious assumption behind asking these questions was that the right to equality under Article 14 is engaged only when the law makes a classification (or, arguably, when it fails to make a classification). The essence of the right to equality was assumed to be comparative. The next stage in the story involves the characterisation of this inquiry as ‘old’, ‘doctrinaire’, ‘positivist’, ‘narrow’, etc—an image of a pedantic, unreconstructed, slightly reactionary, and decidedly unfashionable old man is presented. The traditional narrative then projects the elevation of the administrative law standard¹¹ of ‘non-arbitrariness’ to a distinct ground of constitutional review under Article 14 in the 1970s as a fresh, progressive, development that unfettered Article 14 from its older doctrinaire confinement.¹² There have, of course, been discordant voices, which have challenged this dominant narrative forcefully. Even so, the story has come to acquire significant currency, not least because of its frequent parroting from the bench.¹³ And yet, the old doctrine refuses to go away.¹⁴

The reason for its stubborn persistence is down to the fact that the old doctrine is conceptually distinct from the new doctrine, and cannot be subsumed simply as an instance of the latter. The following subsections will explain that the main analytical difference between the two doctrines lies in the fact that the classification doctrine is essentially *comparative*, whereas the arbitrariness doctrine is not essentially so. What this means is that there must be some comparatively differential treatment between two persons or two classes of persons before the classification doctrine is even engaged. The arbitrariness doctrine, on the other hand, can be invoked for any sufficiently serious failure to base an action on good reasons. To put it differently, the classification doctrine interrogates *unreasonable comparisons*, whereas the arbitrariness doctrine's unique contribution is to bring *non-comparative unreasonableness* within the ambit of Article 14. Let us now understand each of these doctrines better, in the context of legislative review.

III. UNREASONABLE COMPARISON

The classification doctrine—meant to attack unreasonable comparison between persons or classes of persons—is founded upon a highly deferential, remarkably limited, and formalistic equal treatment principle governing State action. Each of these features is worth emphasising. First, it is based on an equal *treatment* principle governing State *action*. Only a State *action* that either classifies persons or fails to classify them can be attacked under this doctrine. The ‘failure-to-classify’ aspect of the doctrine should not be read to include all omissions. Only when the State fails to classify *when performing some act* is the doctrine attracted. In the absence of any relevant State action, no *treatment* has been meted out to anyone. It is an action-regarding doctrine, which makes essential reference to something *done*. Note that this comment applies only to the classification doctrine. The alternative, a non-action-regarding equal *situation* principle, which could have tackled an unequal state of affairs rather than merely unequal treatment, plays no role in the way the old doctrine operates. It may well be that the right to equality and non-discrimination guaranteed by the Constitution (including the provisions on affirmative action) taken as a whole does entail both equal treatment and equal situation principles. But as far as the classification doctrine is concerned, it only incorporates an equal treatment principle.

Secondly, the doctrine relates to *State* action alone, primarily governing

vertical relationships between an individual and the State (although the relationship between two State bodies is technically within its ambit). What remain outside its scope are horizontal relationships between private persons. Due to the historically extensive State ownership and funding of industry, the Court has been able to apply the mandate of Article 14 to State owned or funded airlines, universities, and banks.¹⁵ As the Indian State continues to liberalise and roll back, the number of institutions governed by Article 14 will continue to decrease. At first blush, the text of Article 14—‘The State shall not deny ...’—seems to invite this vertical interpretation. However, the second part of the clause requiring the State to not deny ‘equal protection of the laws’ could easily have been interpreted to impose some sort of duty on the State to protect persons from horizontal violations of the right to equality, at least in the limited way recognised by the US Supreme Court in the landmark case of *Shelley v Kraemer*. In that case, the US Court held that the judiciary, as a constituent part of the State, cannot enforce racist covenants in private housing contracts prohibiting the sale of a property to blacks.¹⁶ In a comparable case, the Indian Supreme Court came to the opposite conclusion, and in the absence of a law prohibiting discrimination in the housing sector upheld a discriminatory private arrangement as constitutionally valid.¹⁷ What’s more, even the more explicitly horizontally worded provisions such as Article 15(2), which the founders unambiguously intended to have horizontal effect, have received little judicial notice.¹⁸

Thirdly, the classification doctrine entails an *equal* treatment principle. We cannot confidently say the same for the arbitrariness doctrine. Like other fundamental values such as liberty, fraternity, and dignity, the meaning and scope of equality is contested. Many different conceptions of equality—formal, substantive, results oriented, opportunity focused, treatment based—have been proposed. What is common to all these conceptions is that equality entails comparison.¹⁹ One can only be equal to someone or something, and one can meaningfully talk only of equality *between* at least two entities. It is conceptually sensible to talk of a person as being free or dignified, without invoking any relationship that she may have with another. It is nonsensical, however, to speak of a person being equal without referring to at least one other being. Fraternity is perhaps even more deeply relational, inasmuch as it requires the existence of some form of a community. In requiring the presence or absence of some form of classification, the classification doctrine is an egalitarian doctrine. To give but one example, Mukherjea J found the mere existence of two different criminal procedures to attract Article 14—the fact that both procedures constituted fair trial and would not have violated any constitutional right

independent of the right to equality was quite irrelevant to this determination.²⁰ The conception of equality that informs the classification doctrine may be weak, formalistic, and misguided, but it is a principle of *equality*.

Fourthly, this doctrine is highly *deferential* in the sense that the Court gives a lot of weight to the State's claim about what the facts are, how they ought to be evaluated, and whether they breach certain norms. To give one extreme, but not entirely atypical, example, in *Air India*, the Court found a government declaration to the effect that different wages for air hostesses and assistant flight pursers was not based on sex as 'presumptive proof', which 'completely conclude[d] the matter'.²¹ In some recent cases, the Court seems to have invoked the 'strict scrutiny' or the 'proportionality' standard, but there are good reasons to think that in many of these cases these invocations are merely rhetorical cloaks for the continued use of a highly deferential standard of review.

Finally, and perhaps most significantly, I have claimed that the old doctrine is *limited* and highly *formalistic*. The doctrine is limited because it asks only two of the whole range of questions it could ask about a classificatory rule. We have seen that these questions are: (i) whether the classification made by the rule is based on an intelligible differentia; and (ii) whether this differentia has a rational nexus with the object that the rule seeks to achieve. The doctrine is formalistic because these two questions are largely content with the *prima facie* formulation of the rule, and ignore its real-world impact on persons and groups.

The apparent limitations and formality of the doctrine will become clear once we examine the whole range of questions that *could* be asked—and that judges in other jurisdictions often do ask—about a classifying rule. Before we proceed, however, it is important to note that despite its apparent limitations and formality, many Indian judges have often *misapplied* the test to reach the right outcome. In its current form, the test poses a difficult dilemma to a conscientious judge: if she prioritises fidelity to law, unjust outcomes come about; on the other hand, if she prioritises fidelity to justice between parties, she often has to distort and misapply the doctrine, incurring a legality cost. The dilemma is, of course, not unique to Article 14 cases, and judges do occasionally (and sometimes justifiably) fudge legal doctrine to arrive at the just conclusion.²² But when this happens all too frequently, it is time that legal doctrine evolved. Bhagwati J was responding to these infirmities in the old doctrine when he (mis)prescribed the arbitrariness doctrine as a cure.

But we are getting ahead of ourselves. Let us go back to the possible inquiries that can be conducted with respect to a classificatory rule. The list that follows is not meant to suggest that all of these questions ought necessarily to be asked by

judges when testing the constitutionality of a classificatory rule under Article 14. It is provided simply to demonstrate the questions that judges do not currently ask (except, sometimes, by stealth) and thereby to demonstrate the limitations and formality of the current doctrine.

It may also be noted that some of these questions go into the *ground* of review, others concern setting the appropriate *standard* of review and the incidence of the *burden* of proof. Whether the classification makes an intelligible differentia, for example, concerns the ground of review in the sense that the answer to this question (along with the answers to other ground-related questions) directly determines the constitutionality of the rule. A different question, say whether the differentia is presumptively impermissible (perhaps because it is based on a ground specified in Article 15), may primarily relate to how anxiously the Court ought to review the rule or how weighty the State's justificatory burden ought to be to save the rule.

For any classificatory rule, we can usually identify at least four distinct elements:

1. Right: is the right to equality engaged?
2. Differentia: what classes does the rule create?
3. Objective: what end does it seek to achieve?
4. Impact: what consequences does it subject each of these classes to?

To give an example, let us imagine a rule which says that 'A contract of employment shall stand terminated if the employee becomes pregnant.'²³ First, the right to equality is clearly engaged because of the differential comparative treatment of the two classes. The differentia created by this rule is between those employees who become pregnant and those who don't (or can't). Its objective is not evident from the rule itself, but let us assume that the admitted objective is to avoid the expense and inconvenience involved in organising replacement cover for the pregnant employee for the period that she needs to go on maternity leave. Finally, the immediate and direct impact of the rule is that the employment of pregnant employees is terminated. This, however, only presents a relatively superficial analysis of the classificatory rule. For each of these elements of the rule, further questions may be asked.

1. The Right

With respect to the first element, it is clear that if the rule makes a classification, the right to equality is engaged. But sometimes it is also engaged when, even if the rule does not make any classification on the face of it, it has a disproportionate impact on different classes of persons (ie, the classification is made not by the rule's formal requirements but because of their operation in the real world). Courts across the democratic world have recognised this as the principle prohibiting disparate impact or indirect discrimination, although Indian courts have been slow to update the doctrine in this regard. In our pregnancy example, the rule makes a direct classification on the basis of pregnancy. But it also makes an indirect classification based on sex, since it is only women who can become pregnant and will therefore be disproportionately affected by the rule. Another example of an indirectly discriminatory law would be one that requires bike-riders to wear a close-fitting hard helmet. Such a law, even though neutral on its face, will have a disproportionate impact on those Sikh men who believe it is their religious duty to wear a turban. The law may yet be justified given its objectives—the point simply is that its operation makes a classification between Sikh men and other people. We will return to the issue of impact in due course.

Furthermore, with regard to the first element, we could ask not only whether the right to equality is engaged but also whether any other right or value is engaged. This inquiry is possible because equality is a parasitic right—its engagement often entails the engagement of another interest, which may sometimes be an important right or value. The rule may not in fact 'violate' this other right or value, the mere fact that it is engaged could be relevant—inequality with respect to a fundamental right is surely a more serious matter than inequality with respect to a mundane interest. Let me provide an example to make things clearer. In *Anwar Ali Sarkar*, the classifying rule dealt with criminal trials. It was common ground that neither of the two rules constituted a violation of the right to fair trial, but the fact that the differential treatment was connected with a key fundamental right ought to be an important consideration.²⁴ Another example may be seen in *Re The Kerala Education Bill* reference, where the classification engaged (although it was held not to violate) the freedoms granted to religious minorities.²⁵ In *Subramanian Swamy*, the classification was sensitive to the significant value of corruption-free governance.²⁶ These cases are clearly different from a classificatory rule of the sort in the *Re Natural Resources*

Allocation reference,²⁷ which engaged the fairness of the method of allocation of natural resources: an important State interest, but one that does not constitute a fundamental value or right of the sort engaged in the other three mentioned cases. The European Court of Human Rights has been particularly sensitive to this parasitic dimension of equality, since Article 14 of the European Convention of Human Rights only guaranteed that ‘The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination.’ It was only in 2000 that Protocol 12 to the Convention expanded the protection against discrimination to cases where fundamental rights were not engaged. Prior to this Protocol (and even today for members who haven’t ratified it), the engagement of another fundamental right by the rule was a jurisdictional prerequisite before Article 14 could be invoked, and therefore went into the ground of review. The Indian Article 14 (quite sensibly) never had this jurisdictional restriction, so Indian courts did not feel the need to make this inquiry. However, the engagement of equality with another fundamental right could be a reason to invoke a higher standard of review.

2. The Differentia

For the second element—differentia—at least two further inquiries may be made: its intelligibility and its normative permissibility. One could ask whether the differentia is clear or vague; that is, whether there could be reasonable disagreement over whether a person falls within one group or another. This is probably what the courts seem to inquire into when they ask if the differentia is *intelligible*. Most cases concerning the delegation of excessive and unguided power by the legislature to the executive are best understood as cases where the intelligibility of the differentia has not been established—in other words, a *failure* to classify cases where the discretion should be exercised and those where it shouldn't also violates Article 14.²⁸

One could also evaluate the differentia normatively. Most liberal societies have come to accept that there are certain types of differentia that should not, barring exceptional circumstances, be used as a basis of legal classification. This is in fact what seems to have been the founders' intention behind the non-discrimination clauses in Articles 15(1), 16(2), and 29(2)—to render the specified differentia (based on sex, race, caste, religion, and other similar personal status) presumptively impermissible. It is often said that these non-discrimination guarantees merely instantiate the violations of the right to equality under Article 14.²⁹ This may well be true, but it is hard to believe that the drafters formulated these provisions simply as illustrations of Article 14, and that they add nothing to what Article 14 is capable of doing on its own. This scepticism is strengthened by legislative history. In the earlier drafts of the Constitution, a prototype of Article 15(1) was all there was under the guarantee of the right to equality. Article 14, in its generality, was added later.³⁰ Surely, the non-discrimination clauses must have *some* content independent of Article 14. In particularly spelling out certain differentia as impermissible, the drafters must have had their presumptive unacceptability in mind.

Bose J probably also had the normative acceptability of certain differentia in mind when he exhorted the courts to ask whether the classification would 'offend the conscience of a sovereign democratic republic', viewed in the background of our history.³¹ Although this normative inquiry did not become part of the crystallised doctrine, Bose J was surely right. We generally accept that differentia based on certain personal characteristics—usually constituting a valuable fundamental choice (such as religion) or which lying outside one's

effective control (such as caste)—are normatively irrelevant.³² A law that classifies the sellers of tea and those of coffee into two different groups and imposes differential tax liabilities on them is clearly less problematic than a law which imposes differential tax liability on Hindus and Muslims (this, incidentally, is exactly the effect of the income tax law's recognition of the Hindu Undivided Family as a separate legal person, allowing it to claim tax deductions not available to non-Hindus). The obvious corollary is that there should be a higher standard of review for these special cases of classification: an implication that Indian courts have failed to recognise.³³

3. The Objective

Further inquiries can also be made with respect to the third element—the *objective* of the rule. One set of questions concerning the objective relate to its genuineness. Is the stated or apparent objective masking another, more sinister, one? This consideration was clear in Sastri CJ's judgment in *Anwar Ali Sarkar*, where he held that if the law is 'designed' to be administered in a discriminatory way, or is actually 'administered' (rather than merely 'applied' once in a while) in a discriminatory way, it will be caught by Article 14, which does not allow 'colourable legislative expedient'.³⁴ This dictum, however, sits uncomfortably with the judicial reluctance to inquire into legislative motives in the context of Article 14.³⁵

Apart from this evidential inquiry into its genuineness, one could also inquire into the normative legitimacy and the importance of the objective. An objective to establish a theocratic state will not be constitutionally legitimate (employing *constitutional* rather than *popular* morality standards).³⁶ The objective of administrative efficiency is legitimate, but less weighty than (say) the pursuit of universal health care. Next, we can also ask whether there is a rational connection between the impugned measure and the objective in question. As part of this inquiry, judges have often inquired into the over-inclusiveness and under-inclusiveness of the measure in seeking the stated objective, although they have generally been tolerant of a considerable degree of misfit.³⁷ We could further ask after the extent to which the measure is likely to achieve this objective. It may sometimes be the case that the objective is very weighty, but a classificatory measure achieves it to such a small degree that any benefits may be outweighed by the harm of classification. Finally, we could ask if the same objective could be pursued (to a comparable degree) using means that do not restrict fundamental rights. If it can be, it is not necessary to use the rights-infringing means. Foreign courts typically ask these deeper nexus questions when conducting a proportionality analysis.

4. The Impact

With respect to impact, one could inquire into the *immediate* impact of the rule (in our pregnancy example, the termination of employment), and *further* material and expressive, if less direct, implications of the classifying rule on individuals as well as on the groups to which they belong. The severity of these impacts may also be looked into. Take, for example, the rule in the *Air India* case, whose immediate impact was to retire air hostesses at 35 (with the possibility of annual extensions up to ten years), whereas assistant flight pursers retired at 58.³⁸ The Court's typically formal inquiry ignored the impact analysis altogether. The following are the impact-related questions that could be asked.

First, the immediate impact of this rule is on those air hostesses who lose their job at the age of 35. Compulsory retirement at an age when one is in the prime of one's life, especially in light of the fact that the right to livelihood is a fundamental right flowing from Article 21, makes this a particularly severe impact.

Secondly, one could inquire into the further impact of the rule on the individuals concerned. Given that these air hostesses are likely to have spent most of their adult lives in this profession, they are unlikely to have the skills for a different type of job. At an age when most people are busy climbing the career ladder, they are faced not just with unemployment, but unemployability. They are likely to lose all financial independence and, if they are married, become dependent on their spouses. The rule therefore has very serious implications for their ability to lead an autonomous life.

Thirdly, the impact is not limited to the individuals concerned, but extends to women as a whole. The rule reduced the already limited employment opportunities available to women, even educated, middle-class women, who are likely to have been air hostesses. It contributed to the forced dependence of women on their fathers, husbands, and sons and contributed—in a small but significant way—to the continued tyranny of patriarchy. It is this implication that makes the rule discriminatory on the grounds of sex, since it has a disproportionate (and serious) impact on women as a group. The air hostesses' argument that the real discrimination is sex based, 'which is sought to be smoke-screened by giving a halo of circumstances other than sex', was considered (and dismissed on flimsy grounds) only in the context of the Equal Pay Act 1976, and not tested on Article 14.³⁹

Finally, one could ask what social meaning a rule such as this expresses.⁴⁰

The rule in question sent a social message that the right place for adult women is in their homes, rather than in the formal economy, and that it is appropriate to objectify young women for enjoyment of the (mostly male) gaze of air passengers. This message was strengthened by the fact that pregnancy and marriage also incurred possible loss of employment for air hostesses in that case. The rule echoed (and, to some extent, concretised) the idealisation of the role of Indian women as mothers, wives, and daughters; a phenomenon which has adverse implications for their financial independence and autonomy. Given that these patriarchal assumptions are already entrenched in our society and that they sustain the social evil of patriarchy, these expressive implications are very significant.

These questions concerning the impact of the classifying rule concern its operation in the real world and its effect on real lives. The old doctrine completely ignores the impact question, and is therefore thoroughly formalistic.

5. A Summary

We can now summarise all the possible questions a court *could* ask with respect to a classificatory rule:

1. *Right*: is the right to equality engaged by the rule?
 - a. Does the rule have a disproportionate impact on different classes of persons?
 - b. Was another fundamental right, principle, or value engaged?
2. *Differentia*: what classes does the rule create?
 - a. Is the differentia intelligible?
 - b. Is the differentia presumptively impermissible?
3. *Objective*: what end does the rule seek to achieve?
 - a. Is the apparent objective genuine?
 - b. Is the objective legitimate?
 - c. Is the objective sufficiently weighty?
 - d. Is there a rational connection between the impugned measure and the objective?
 - e. To what extent is the impugned measure likely to achieve the objective?
 - f. Is the measure necessary to achieve the objective?
4. *Impact*: what consequences does the rule subject each of these classes to?
 - a. What immediate consequences does the rule prescribe for the individuals addressed by it?
 - b. What are the further material consequences the rule is likely to have for:
 - those particular individuals directly addressed by the rule?
 - any group to which (most of) the affected persons belong?
 - c. What are the likely expressive consequences of the rule?
 - d. How serious are these impacts?

6. Reassessing the Old Doctrine

Some of these questions relate to the ground of review, others concern the appropriate standard of review and the burden of proof. Of all these possible questions a court could ask when inquiring into the constitutionality of a classificatory rule, with respect to a classificatory rule, the traditional classification doctrine only asks the following three:

1. Is the right to equality engaged?
- 2(a). Is the differentia intelligible? and
- 3(d). Is there a rational connection between the impugned measure and the objective?

Any classificatory rule satisfies the first question by definition, and at any rate the Court does not ask it probingly (say, by inquiring into 1(a)). The only real inquiry is therefore into 2(a) and 3(d)—these together constitute the two limbs of the classification test.⁴¹ It may well be defensible to focus only on these two questions. It is certainly not my case that a court ought to inquire into all of the other questions in all, or even in any, case. But choosing which questions ought to be asked is an interpretive choice, one that calls for public justification. Unfortunately, no such justification has been forthcoming, either from the Court or from scholars, who defend the doctrine in its current form. The inquiry under the classification test, at least in theory, remains extremely limited. It is also formalistic because it completely ignores the actual impact of the rule on individuals as well as groups. The focus remains on the formal elements of the rule—differentia and rational nexus. Since the classification doctrine does not invite inquiry into any of the other potentially relevant questions listed above, some judges have been tempted to cheat by somehow incorporating these other dimensions into the two available to them.⁴²

For example, Gupta J's dissent in the *RK Garg* case was really based on the finding that the rule engaged (and breached) another important principle: that dishonesty ought not to be rewarded. Since he could not directly access this additional dimension independently, he sought to fit it within both elements of the available test. He claimed that the classification between dishonest and honest taxpayers was not intelligible, and that this differentia did not have any rational connection with the objective (to unearth black money).⁴³ As the majority judgment clearly showed, he was wrong on both counts. The classification was clear and intelligible; what Gupta J was trying to do was to update the intelligibility test and turn it into a normative inquiry, by asking if a

reasonable fair-minded person would find it intelligible.⁴⁴

A similar attempt to fudge the tests to get the desired result was more successful in *Subramanian Swamy*. In this case, the objective of the rule requiring prior governmental sanction for an inquiry into allegations of corruption against senior bureaucrats was to shield them from harassing lawsuits so that they could exercise their discretionary powers without fear.⁴⁵ There was much that was wrong with the rule, but inasmuch as lower-ranking bureaucrats do not wield wide discretionary powers, the classification between senior and junior officers was clearly intelligible and rationally connected with the stated objective. The Court struck down the rule, holding that there was no intelligible differentia.⁴⁶ The Court could not have found absence of intelligibility in a classification between higher-and lower-ranking officials unless it was asking it in the normative fashion that Gupta J had done decades ago. The problem in this case, like the *RK Garg* case, was that another important value—the importance of corruption-free administration—was involved. The right way to go about it would have been to recognise the entanglement of this value with the right to equality and use that as a basis to conduct a more demanding review. It conducted a strict review anyway, but instead of justifying it on proper bases and developing the limited doctrine on Article 14, it tried to force a square peg in a round hole—thereby exacerbating doctrinal confusion.

The Supreme Court has itself recognised that ‘the rule of equality before the law of Article 14’ cannot be equated with ‘broad egalitarianism’.⁴⁷ Even so, the rule in Article 14 need not remain so astonishingly limited, formalistic, and confused. It is high time the doctrine evolved. The Court needs to consider all the questions it *could* ask under the classification doctrine, and take a considered view on which of these it *should* ask in particular categories of cases.

IV. NON-COMPARATIVE UNREASONABLENESS

The ills of the old doctrine have been long recognised. It was in response to these ills that the ‘new’ doctrine was developed. This second doctrinal test to determine the constitutionality of a measure under Article 14 is called the ‘arbitrariness test’. In a much-quoted paragraph in *Royappa* (which incidentally concerned executive action and could have been treated as a matter of administrative law), Bhagwati J famously railed against the classification doctrine and ‘emancipated’ the principle of equality from its confinement by

holding that mere ‘arbitrariness’ will suffice to constitute a violation of Article 14.⁴⁸ The ‘new’ doctrine laid down in *Royappa* has been affirmed by several subsequent judgments.⁴⁹ But controversies continue to dog the doctrine, especially with respect to its application to legislative review. It seems that Bhagwati J diagnosed the disease correctly, but prescribed the wrong medicine. Before we delve into it deeper, note that the new doctrine created a new *ground* of review under Article 14. It is in the context of a *standard* of review that the distinctions between reasonableness, proportionality, strict scrutiny, and similar concepts become moot.

The content of the arbitrariness doctrine remains unclear. This should hardly be surprising, given the indeterminacy of the term ‘arbitrary’. Non-arbitrariness was a particularly ill-advised choice of a test if the purpose of the new doctrine was, as Pal J writing extrajudicially thought it was, ‘to crystallize a vague generality like Article 14 into a concrete concept’.⁵⁰ Strictly speaking, arbitrariness is not the same thing as unreasonableness. Sometimes, it is reasonable to be arbitrary. At other times, one can be unreasonable without being arbitrary. A decision is reasonable if it is supported by legitimate and relevant reasons of sufficient weight. A choice between two or more options is arbitrary only when there is no relevant ground to prefer one option over the other. A decision based on relevant but illegitimate reasons, or one based on insufficient reasons, would not be arbitrary.

Consider a rule that fixes the age of consent for sex to be 16 (rather than, say, 15 or 17). Such a law is clearly arbitrary. In fact, it is impossible to fix any single age as the age of consent for all persons without it being arbitrary, for the simple reason that different persons reach sexual and emotional maturity at different ages (the main relevant consideration in determining the age of consent). The only non-arbitrary way to fix the age of consent would be to individualise it, such that every teenager’s level of sexual and emotional maturity is constantly evaluated, and only when he or she becomes sufficiently mature that a competent authority declares him or her to have the capacity to consent to sex. The clear unreasonableness of the alternative—inasmuch as it entails a serious intrusion into privacy, will lead to great uncertainty in already unstable teenage lives, and will require a cumbersome and expensive bureaucracy to administer—should leave us in no doubt that the arbitrary fixing of the age of consent for everyone at 16 is reasonable.⁵¹ In *Raju*, the Supreme Court rightly accepted the constitutionality of an arbitrary age of majority in another context.⁵² The same will be true of a law fixing the age of consent at 15 or 17. Reason underdetermines where we ought to draw a line. But some lines are clearly not

just arbitrary but also unreasonable—a rule that fixes the age of sexual consent at 35 is an example.

Take another example. In *Javed*, a law disqualified anyone with more than two living children from holding any office in local government.⁵³ One of the arguments mooted before the Court was that the legislative choice of basing the disqualification on *two* (rather than one or three, for example) children made it arbitrary. This is a classic example of a rule that is conceptually arbitrary, but not unreasonable (on the ground that the disqualification proceeded on having two rather than three children—the law may well be unreasonable on other grounds, such as excessive intrusion on privacy). The Court held the legislative choice of two children was not arbitrary.⁵⁴

We have seen that not everything that we would call arbitrary is also unreasonable. The converse is also true: an action can be unreasonable without being arbitrary. In *Anuj Garg*, for example, the impugned law prohibited women from working as bartenders. The law was not arbitrary in the sense that it lacked any basis in reason. In the context of a deeply patriarchal society where women are often seen merely as objects of male desire, and where bars tend to be overwhelmingly male spaces, the probability that the patrons will harass women bartenders is high. The problem with the decision to ban women from working as bartenders was not that there was no reason backing it up, but that it was an *illegitimate* reason, which further entrenched patriarchy by denying employment to women. The Court rightly held that the right response would have been to ensure the security of women bartenders rather than to reduce the already limited options that women have.⁵⁵ Thus, we have a good example of an unreasonable rule that is not arbitrary.

Another example of such a provision is to be found in the *Air India* case. One of the rules challenged in the case discriminated on the ground of pregnancy in providing for the termination of the employment contract of an air hostess if she became pregnant. It is clear why the airline had such a rule—pregnancy of employees is expensive because the airline has to find replacement services and provide maternity leave. The rule is based on relevant reasons and is not arbitrary in the conceptual sense. The rule is clearly unreasonable, for it is based on constitutionally unacceptable reasons. As the Court held, the rule was ‘extremely detestable and abhorrent to the notions of civilised society’ and ‘smacked of utter selfishness’.⁵⁶ The Court, failing yet again to appreciate the distinction between arbitrariness and unreasonableness, held the rule to be arbitrary and declared it unconstitutional for that reason.

What we should surmise from these cases is that what the Court means by

‘arbitrariness’ is really ‘unreasonableness’. The new doctrine has read into the right to equality a right against unreasonable State action. As a freestanding constitutional right, this is a remarkable development. Of course, constitutional law traditionally insists on reasonableness *when* an important constitutional right or value is interfered with by State action. A reasonableness inquiry usually requires an external trigger—say, a restriction on the right to free expression under Article 19(1)(a), or a restriction on personal liberty under Article 21, or even a classification of persons into different groups for unequal treatment. When these key rights are restricted, the Constitution demands that the restriction must be reasonable. Thus, in constitutional law, the right against unreasonableness has traditionally been a parasitic right, piggybacking on other fundamental rights. What the new doctrine has done is to elevate an administrative law reasonableness standard into a self-standing constitutional ground for review, without the need for any crutches in the form of other rights or values. This elevation may have implications for legislative review.

1. Equality, Arbitrariness, and the Rule of Law

Scholars have pointed out several deficiencies in the new doctrine of non-arbitrariness.⁵⁷ It has been criticised for its vagueness and for its possible implications for the balance of powers between the judiciary and the legislature. For our purposes, the most relevant criticism concerns the logical possibility of locating a freestanding right against unreasonableness within the right to equality. The problem is that the new doctrine does not require any classification to trigger its inquiry, whereas the right to equality, whatever else it might be, must essentially be comparative.⁵⁸ Seervai best articulated this criticism by suggesting that ‘The new doctrine hangs in the air, because it propounds a theory of equality without reference to the language of Art. 14.’⁵⁹ It is this claim that we must now investigate.

This is how Bhagwati J sought to establish the connection between the new doctrine and the right to equality:

[E]quality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Art. 14.⁶⁰

Possibly, this passage seeks to establish a historical connection between equality

and non-arbitrariness—via the rule of law. The right to ‘equality before the law’, which constitutes the first part of Article 14, has been variously attributed to the English common law and to the Irish Constitution.⁶¹ Insofar as its roots can be traced back to the English common law, the right to equality before the law can be seen to manifest itself most securely in the second principle of the rule of law that the British jurist Dicey articulated thus:

We mean in the second place, when we speak of the ‘rule of law’... not only that with us no man is above the law, but ... that here every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals.⁶²

This rule was, quite literally, a manifestation of equality before the law—everyone was to be subject to the same law administered by the same courts. Dicey explained further that:

In England the idea of legal equality, or of the universal subjection of all classes to one law administered by the ordinary Courts, has been pushed to its utmost limit. With us every official, from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen.⁶³

So far, we can see a historical connection between equality before the law and a particular aspect of the rule of law that concerns itself with *who is governed* by the law. This principle of the rule of law has little to do with arbitrariness. A legal system that exempts public officials from the operation of ordinary laws is not *arbitrary* for that reason, even as it violates Dicey’s second principle of the rule of law. It engages the right to equality because it classifies people into two groups—those who are public officials and those who are not—and prescribes starkly different consequences for each group for legal breaches. The second principle deems this unacceptable because this form of unequal treatment is unreasonable. But there is nothing arbitrary about the distinction.

The principle of arbitrariness is instead to be found in Dicey’s first principle of the rule of law, concerning not who is governed but *how they are governed*. This principle, often articulated as ‘the rule of law, not men’, was expressed by Dicey thus:

We mean, in the first place, that no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary Courts of the land. In this sense the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint.⁶⁴

This first principle prohibits the State’s interference with any person without the authority of law. In our democratic times, it may seem to be unexceptionable. But at a time when monarchs were used to mete out favours and penalties on

whim, this republican principle⁶⁵ of legality must have been revolutionary. In the *Case of Prohibitions*, the British King James I placed himself as a judge in a dispute. Standing up to the monarch, a courageous judge insisted that ‘The King in his own person cannot adjudge any case, either criminal or betwixt party and party; but it ought to be determined and adjudged in some Court of Justice, according to the law and custom of England.’⁶⁶ This insistence on legality reduces arbitrariness in the State’s treatment of its subjects because of certain features that law tends to possess: law tends to be (and ought normally to be) general, published, prospective, and stable.⁶⁷ These features of law—especially when it is administered by independent, professional, technically trained enforcement bodies—ensures that personal fortunes are not subject to the whims and fancies of monarchs. The second rule of law principle embodies an element of non-arbitrariness. But even this first principle of the rule of law is not interchangeable with the principle of non-arbitrariness. It only obviates one form of arbitrariness—one that proceeds from whimsical executive determination of rights and liabilities without any basis in general, published, prior law. It does not, in itself, protect a person from arbitrariness when it is embedded in the law itself.

This brief historical summary shows that the Court arrived from the right to equality to a general self-standing principle of non-arbitrariness by exploiting an ambiguity between two different principles of the rule of law (concerning equality and legality, respectively) and by extending significantly the principle of legality. The connection between equality and non-arbitrariness was therefore based on a conceptual confusion between different meanings of the rule of law.

If one was less charitable, this judicial manoeuvre could be seen not simply as a misreading of the historical connections between concepts, but also as a deliberate and unjustified appropriation of power. After all, Pal J did publicly acknowledge that rights like the right to equality were ‘empty vessels’ into which ‘each generation pours its content by judicial interpretation’.⁶⁸ This remarkable suggestion leaves no role for constitutional text whatsoever. Rights like that to equality are reduced to mere place holders, which can be filled in, ironically, by whatever the judge arbitrarily thinks is appropriate. What makes the claim even more startling is that an admittedly vague right to equality has been sought to be concretised by a similarly vague right to non-arbitrariness.

The connection between the right to equality and the new doctrine becomes even more dubious in light of our knowledge that the right against arbitrariness is in reality a right against unreasonableness. Not all forms of unreasonableness entail inequality. Torture is unreasonable, but the wrongness of torture is not due

to it being inegalitarian. The same is true of a whole range of unreasonable acts—prohibition of criticism of government, ban on religious conversion, denial of access to courts, prescription of a uniform for citizens, or prohibition on the drinking of tea. All these acts are unreasonable, but their unreasonableness has little, if anything, to do with inequality. The new doctrine therefore completely ignores the text of Article 14 and the concept of equality. Equality may mean many things, but it cannot mean *anything*. An inquiry into the reasonableness of State action under the new doctrine no longer requires a prior demonstration that some form of inequality is involved, as was the case with the old classification doctrine. In the garb of the right to equality, the new doctrine tries to institute an independent constitutional right against unreasonableness.

The right against unreasonable administrative action is hardly novel. It has been a recognised right in administrative law at least since the famous British decision in the *Wednesbury* case.⁶⁹ What is remarkable about the new doctrine is that it elevates this freestanding administrative law right against (a high-threshold) unreasonableness to a constitutional fundamental right, potentially against all forms of State action. One implication of this move is that a challenge to unreasonable State action, even if it is only an administrative action, can only be made by following the procedure prescribed for a fundamental rights claim—that is, by filing a writ in a constitutional court. This constitutionalisation of administrative law ignores its common law roots, and results in a top-heavy system where constitutional courts come to arrogate all administrative review powers.

2. Legislative Review and the New Doctrine

The more relevant implication for our purpose is the potential expansion of the unreasonableness claim to legislative action. In English common law, *Wednesbury* unreasonableness was available only against administrative acts. As a self-standing constitutional right in India, it can, at least theoretically, extend to legislative action. Let us recall the different senses in which we understood the term ‘legislative’ at the start of this chapter. It is abundantly clear that the Supreme Court has been applying the right to reasonableness to straightforwardly administrative acts.⁷⁰ But does it apply to primary legislation enacted by a legislature and to delegated legislation or ordinances enacted by the executive?

Let us first deal with whether the new doctrine can be applied to legislative

enactments by legislatures. There are five relevant Supreme Court rulings on the issue: *McDowell*,⁷¹ *Malpe Vishwanath*,⁷² *Mardia Chemicals*,⁷³ *Re Natural Resources Allocation* (hereinafter *2G Reference*),⁷⁴ and *Subramanian Swamy*.⁷⁵ The evolving doctrinal position appears to be that the new doctrine does not apply to legislation enacted by a legislature, but one cannot yet assert this with too much certainty.

In *McDowell*, a three-judge bench refused to test a legislative provision under the new doctrine. Recognising the distinction between testing the reasonableness of a measure *if* it restricts a fundamental right and testing its reasonableness *per se*, Jeevan Reddy J said, '[i]t is one thing to say that a restriction imposed upon a fundamental right can be struck down if it is disproportionate, excessive or unreasonable and quite another thing to say that the court can strike down enactment if it thinks it unreasonable, unnecessary or unwarranted'.⁷⁶ The corollary was that '[n]o enactment can be struck down by just saying that it is arbitrary or unreasonable. Some other constitutional infirmity has to be found before invalidating an Act'.⁷⁷ Statutes violate Article 14 only in the context of a classification.⁷⁸ However, in *Malpe Vishwanath*, another three-judge bench held that a statutory provision had become arbitrary (unreasonable) due to changed circumstances with the passage of time since its enactment.⁷⁹ The third case in our quintet is *Mardia Chemicals*. Here, yet another three-judge bench struck down a statutory provision as unreasonable.⁸⁰ None of these cases involved any classification. It would have seemed that *McDowell* was dead.

McDowell was nonetheless resurrected by a five-judge bench in its opinion in the *2G Reference* case. The Court quoted extensively from it with approval, and concluded that 'A law may not be struck down for being arbitrary without the pointing out of a constitutional infirmity.'⁸¹ The trouble is that the *2G Reference* did not involve legislative review, and therefore its resurrection of *McDowell* remains obiter.

Finally, another five-judge bench in *Subramanian Swamy* was pressed to confirm that arbitrariness is not available as a ground for legislative review. Because the impugned provision was found to violate the classification doctrine in any case, the Court's observations on the new doctrine again amount to obiter dicta. Even so, the Court ruled out its application indirectly, but setting out the list of grounds that were available to review legislation:

The fundamental nature and importance of the legislative process needs to be recognized by the Court and due regard and deference must be accorded to the legislative process. The two dimensions of Article 14 in its application to legislation and rendering legislation invalid are now well recognized and these are (i) discrimination, based on an impermissible or invalid classification and

(ii) excessive delegation of powers; conferment of uncanalised and unguided powers on the executive, whether in the form of delegated legislation or by way of conferment of authority to pass administrative orders—if such conferment is without any guidance, control or checks, it is violative of Article 14 of the Constitution.⁸²

Thus, the Court suggests that there are only two grounds to challenge legislation (or, at least legislation that has been enacted by the traditional legislative process). These grounds are unreasonable classification and excessive delegation. I have already argued that the excessive delegation doctrine is best understood as the flip side of the classification doctrine. It is simply a *failure* to classify when classification is warranted: the legislature fails to indicate the distinction between cases where the delegated power ought to be exercised from those where it ought not to be. The implication of the *2G Reference* and *Subramanian Swamy* is that the new doctrine is not available for legislative review. The judicial trend is one of hostility to the application of the arbitrariness doctrine to legislation (enacted by a legislature). The doctrine can, however, be clarified only after this hostility forms part of the ratio of a case decided by a constitutional bench.

What about legislation by the executive? It isn't clear whether the review of ordinances is any different in this regard from that of primary legislation. But there is some jurisprudence on the review of secondary legislation enacted by the executive under powers delegated by a statute. The most important authority on the point is the *Air India* case, where a rule requiring the termination of the services of an air hostess on her pregnancy was struck down as arbitrary.⁸³ The authority of the case, however, is hardly clear. The case involved a clear classification between employees who become pregnant and those who do not. Although the Court found the rule to be arbitrary per se, it also went on to hold that pregnancy discrimination was an instance of sex discrimination, and therefore unconstitutional—thereby admitting the classificatory nature of the rule.⁸⁴ What complicates matters further is that *McDowell* specifically confined the exclusion of the new doctrine to 'an Act made by the legislature. [It expressed] no opinion insofar as delegated legislation is concerned.'⁸⁵ The *2G Reference* opinion, however, misread *McDowell*: 'cases where legislation or rules have been struck down as being arbitrary in the sense of being unreasonable ... only on the basis of "arbitrariness" ... have been doubted in McDowell's case'.⁸⁶

But *McDowell* quite explicitly refused to doubt the application of the unreasonableness test to delegated legislation. This doctrinal messiness is a result of the lack of clarity over the distinctiveness of *legislation* (in the product-

sensitive sense) from the *legislature* (in the actor-sensitive sense). The question of the applicability of the ‘arbitrariness test’ to the review of legislation needs settling.

V. CONCLUSION

The following conclusions emerge: (a) the ‘classification test’ (or the unreasonable comparison test) continues to be applied for testing the constitutionality of classificatory rules; (b) it is a limited and highly formalistic test applied deferentially; (c) the ‘arbitrariness test’ is really a test of unreasonableness of measures which do not entail comparison (hence labelled non-comparative unreasonableness); (d) its supposed connection with the right to equality is based on a conceptual misunderstanding of the requirements of the rule of law; and (e) courts are unlikely to apply it to legislative review (at least in the actor-sensitive sense). Article 14 has become a victim of the weak ‘old’ doctrine and the over-the-top ‘new’ doctrine. The former needs expansion and substantiation, the latter relegation to its rightful place as a standard of administrative review.

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¹ India has tended to focus on affirmative action rather than anti-discrimination. See Tarunabh-Khaitan, ‘Transcending Reservations: A Paradigm Shift in the Debate on Equality’ (2008) 43(38) *Economic and Political Weekly* 8; Tarunabh Khaitan, ‘The Architecture of Discrimination Law’ in Vidhu Verma (ed) *Unequal Worlds: Discrimination and Social Inequality in Modern India* (Oxford University Press 2015).

² In *Malpe Vishwanath Acharya v State of Maharashtra* (1998) 2 SCC 1 [16]–[17], the Court noted the extensive consultation that preceded the legislation. See generally, Jeff King, ‘Deference, Dialogue and Animal Defenders International’ (*UK Constitutional Law Blog* 25 April 2013) <<http://ukconstitutionallaw.org/2013/04/25/jeff-king-deference-dialogue-and-animal-defenders-international/>>, accessed November 2015.

³ Twenty-seven per cent of the Bills passed in the Lok Sabha in 2009, PRS Legislative Research has calculated, were discussed for less than five minutes in the House.

⁴ *State of West Bengal v Anwar Ali Sarkar* AIR 1952 SC 75 [22], [25]: Fazal Ali J said that a legislation copied verbatim from a pre-constitutional ordinance could not have borne the Constitution in mind. See also Goutham Shivshankar, ‘Naz and the Need to Rethink the Presumption of Constitutionality’ (*Law and Other Things* 13 December 2013) <<http://lawandotherthings.blogspot.co.uk/2013/12/naz-and-need-to-rethink-presumption-of.html>>, accessed November 2015.

⁵ *Chiranjit Lal Chowdhuri v Union of India* AIR 1951 SC 41.

⁶ See Constitution of India 1950, art 145(1). Cases involving review of judicial rules are rare, and will

not inform the discussion in this chapter.

⁷ In general, the standard of review in India has been low and the burden of proving unconstitutionality always falls on the complainant.

⁸ Tarunabh Khaitan, 'Koushal v Naz: A Legislative Court and the Recriminalisation of Homosexuality in India' (2015) 78(4) Modern Law Review 672. See also [Chintan Chandrachud, 'Constitutional Interpretation'](#) (chapter 5, this volume), discussing *panchayati* adjudication.

⁹ See Constitution of India 1950, art 145(3).

¹⁰ On Das J's role in the consolidation of the classification test, see PK Tripathi, *Some Insights into Fundamental Rights* (Bombay University Press 1972) 52f.

¹¹ The constitutionalisation of administrative law has done considerable damage to both constitutional law and administrative law in India. See generally, Farrah Ahmed and Tarunabh Khaitan, 'Constitutional Avoidance in Social Rights Litigation' (2015) 35 Oxford Journal of Legal Studies 607.

¹² *EP Royappa v State of Tamil Nadu* (1974) 4 SCC 3.

¹³ *Om Kumar v Union of India* (2001) 2 SCC 386 [59]: the non-arbitrariness 'principle is now uniformly followed in all Courts more rigorously than the one based on classification'.

¹⁴ *Subramanian Swamy v Central Bureau of Investigation* (2014) 8 SCC 682 [58].

¹⁵ *Ajay Hasia v Khalid Mujib Sehravardi* (1981) 1 SCC 722; *Air India v Nargesh Meerza* (1981) 4 SCC 335; *Javed Abidi v Union of India* (1999) 1 SCC 467; *Githa Hariharan v Reserve Bank of India* (1999) 2 SCC 228.

¹⁶ *Shelley v Kraemer* 334 US 1 (1948). See also Nicholas Bamforth, 'The True "Horizontal Effect" of the Human Rights Act 1998' (2001) 117 Law Quarterly Review 34.

¹⁷ *Zoroastrian Cooperative Housing Society v District Registrar* (2005) 5 SCC 632. There was, of course, a material difference between the *Shelley* and *Zoroastrian Housing* cases. In *Shelley*, the target of the discriminatory covenant was a disadvantaged racial minority. In *Zoroastrian Housing*, it was a religious minority that wanted to exclude those belonging to other religions. The role that this distinction might have played in the reasoning of the Supreme Court is debatable, but it is possible for the Court to distinguish *Zoroastrian Housing* if a *Shelley*-type case comes before it.

¹⁸ *Constituent Assembly Debates*, vol 3 (Lok Sabha Secretariat 1986) 427, 29 April 1947 (RK Sidhwa); *Constituent Assembly Debates*, vol 7 (Lok Sabha Secretariat 1986) 651, 657, 661, 29 November 1948 (KT Shah, S Nagappa, BR Ambedkar).

¹⁹ This claim does not entail the corollary that *discrimination* necessarily involves comparison. In fact, the essential competitiveness of equality is precisely the reason that has led some scholars to see equality and non-discrimination as distinct ideals. See generally, Elisa Holmes, 'Anti-Discrimination Rights Without Equality' (2005) 68 Modern Law Review 175.

²⁰ *Anwar Ali Sarkar* ([n 4](#)) [49].

²¹ *Nargesh Meerza* ([n 15](#)) [67].

²² Joseph Raz, *The Authority of Law* (2nd edn, Oxford University Press 2009) ch 10.

²³ A similar rule was struck down by a three-judge bench in *Nargesh Meerza* ([n 15](#)).

²⁴ *Anwar Ali Sarkar* ([n 4](#)).

²⁵ *Re The Kerala Education Bill* AIR 1958 SC 956.

²⁶ *Subramanian Swamy* ([n 14](#)) [63].

²⁷ *Re Natural Resources Allocation* (2012) 10 SCC 1.

²⁸ Contrast *Anwar Ali Sarkar* ([n 4](#)) and *Special Reference No 1 of 1978* (1979) 1 SCC 380.

²⁹ *Indra Sawhney v Union of India* (1992) Supp (3) SCC 217 [262].

³⁰ *Constituent Assembly Debates*, vol 3 (Lok Sabha Secretariat 1986) 410, 29 April 1947.

- ³¹ Anwar Ali Sarkar ([n 4](#)) [95].
- ³² John Gardner, 'On the Ground of Her Sex(uality)' (1998) 18 Oxford Journal of Legal Studies 167.
- ³³ Tarunabh Khaitan, 'Beyond Reasonableness: A Rigorous Standard of Review for Article 15 Infringement' (2008) 50 Journal of the Indian Law Institute 177; Tarunabh Khaitan, 'Reading *Swaraj* into Article 15: A New Deal for all Minorities' (2009) 2 NUJS Law Review 419.
- ³⁴ Anwar Ali Sarkar ([n 4](#)) [12].
- ³⁵ In *Re The Kerala Education Bill* ([n 25](#)), for example, the Court refused to inquire into whether the Bill was designed to target Christian schools.
- ³⁶ *Naz Foundation v Union of India* (2009) 160 DLT 277 [79]—although the judgment of the High Court has been overruled, the constitutional morality point is eminently sensible.
- ³⁷ See *Special Reference No 1 of 1978* ([n 28](#)) [134]–[136]; *Ram Krishna Dalmiya v Justice SR Tendolkar* AIR 1958 SC 538 [16].
- ³⁸ *Nargesh Meerza* ([n 15](#)).
- ³⁹ *Nargesh Meerza* ([n 15](#)) [64].
- ⁴⁰ Tarunabh Khaitan, 'Dignity as an Expressive Norm: Neither Vacuous Nor a Panacea' (2012) 32 Oxford Journal of Legal Studies 1.
- ⁴¹ Tripathi complains that even these two inquiries have sometimes been confused. Tripathi ([n 10](#)) 58–59.
- ⁴² See Tripathi ([n 10](#)) 59f.
- ⁴³ *RK Garg v Union of India* (1981) 4 SCC 675 [26]–[31].
- ⁴⁴ *RK Garg* ([n 43](#)) [31].
- ⁴⁵ *Subramanian Swamy* ([n 14](#)) [63].
- ⁴⁶ *Subramanian Swamy* ([n 14](#)) [68].
- ⁴⁷ *Sanjeev Coke v Bharat Coking Coal* (1983) 1 SCC 147 [17].
- ⁴⁸ *EP Royappa* ([n 12](#)) [85].
- ⁴⁹ *Maneka Gandhi v Union of India* (1978) 1 SCC 248; *Ajay Hasia* ([n 15](#)).
- ⁵⁰ Ruma Pal, 'Judicial Oversight or Overreach' (2008) 7 SCC J 9, J16.
- ⁵¹ I am not defending this as an optimal policy choice. A better alternative is a rolling age-of-consent regime, which only prohibits sexual liaisons involving a young person if the age gap between the parties is more than three or four years. However, even this more reasonable regime will need to arbitrarily determine who counts as a 'young person' and what gap in the ages of the parties is too much for the law to tolerate.
- ⁵² *Subramanian Swamy v Raju* (2014) 8 SCC 390 [63]: Article 14 will tolerate 'the inclusion of all under 18 into a class "juveniles" '.
- ⁵³ *Javed v State of Haryana* (2003) 8 SCC 369.
- ⁵⁴ *Javed* ([n 53](#)) [8].
- ⁵⁵ *Anuj Garg v Hotel Association of India* (2008) 3 SCC 1 [33], [36].
- ⁵⁶ *Nargesh Meerza* ([n 15](#)) [82].
- ⁶⁰ *EP Royappa* ([n 12](#)) [85].
- ⁵⁷ HM Seervai, *Constitutional Law of India*, vol 1 (4th edn, Universal Law Publishing 2002) 438; TM Andhyarujina, 'The Evolution of Due Process of Law by the Supreme Court' in BN Kirpal and others (eds) *Supreme But Not Infallible* (Oxford University Press 2004) 193, 205–11; BN Srikrishna, 'Skinning a Cat' (2005) SCC J 3, J9–11.
- ⁵⁸ Tripathi ([n 10](#)) 101.
- ⁵⁹ Seervai ([n 57](#)) 438.

⁶¹ In *Anwar Ali Sarkar* ([n 4](#)) [43], Mukherjea J identified the English Constitution as the source of the phrase ‘equality before the law’. In *Special Reference No 1 of 1978* ([n 28](#)) [72], Chandrachud CJ described it as a basic principle of republicanism, and attributed its source to the Irish Constitution.

⁶² Albert Dicey, *Introduction to the Study of the Law of the Constitution* (9th edn, Macmillan 1939) 193.

⁶³ Dicey ([n 62](#)) 193.

⁶⁴ Dicey ([n 62](#)) 188.

⁶⁵ *Subramanian Swamy* ([n 14](#)) [38].

⁶⁶ *Case of Prohibitions* [1607] EWHC J23 (KB).

⁶⁷ Joseph Raz, ‘The Rule of Law and its Virtue’ (1977) 93 *The Law Quarterly Review* 195.

⁶⁸ *Ruma Pal* ([n 50](#)) J15, quoting Learned Hand J.

⁶⁹ *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223 (CA).

⁸² *Subramanian Swamy* ([n 14](#)) [49].

⁷⁰ *EP Royappa* ([n 12](#)); *Ajay Hasia* ([n 15](#)). Affirmed in *State of Andhra Pradesh v McDowell & Co* (1996) 3 SCC 709 [43].

⁷¹ *McDowell* ([n 70](#)).

⁷² *Malpe Vishwanath Acharya* ([n 2](#)).

⁷³ *Mardia Chemicals v Union of India* (2004) 4 SCC 311.

⁷⁴ *Re Natural Resources Allocation* ([n 27](#)).

⁷⁵ *Subramanian Swamy* ([n 14](#)).

⁷⁶ *McDowell* ([n 70](#)) [43].

⁷⁷ *McDowell* ([n 70](#)) [43]. Reddy J confuses *grounds* of review (such as the classification or the arbitrariness doctrine) with possible *remedies*. Striking down an unconstitutional provision is but one possible remedy. Often, radical reinterpretation or reading down of a provision to make it constitutionally compatible will suffice: *Githa Hariharan* ([n 15](#)) [9]; *Danial Latifi v Union of India* (2001) 7 SCC 740 [33]; *Naz Foundation* ([n 36](#)) [132]. Rarely, a court may even be justified in simply making a declaration of unconstitutionality and leaving it for the legislature to fix the infirmity: *Malpe Vishwanath Acharya* ([n 2](#)) [31].

⁷⁸ *McDowell* ([n 70](#)) [43]–[44].

⁷⁹ *Malpe Vishwanath Acharya* ([n 2](#)) [27], [31].

⁸⁰ *Mardia Chemicals* ([n 73](#)) [64]. See Abhinav Chandrachud, ‘How Legitimate is Non-Arbitrariness? Constitutional Invalidation in the Light of *Mardia Chemicals v Union of India*’ (2008) 2 *Indian Journal of Constitutional Law* 179.

⁸¹ *Re Natural Resources Allocation* ([n 27](#)) [105].

⁸³ *Nargesh Meerza* ([n 15](#)) [82].

⁸⁴ *Nargesh Meerza* ([n 15](#)) [84]–[87].

⁸⁵ *McDowell* ([n 70](#)) [46].

⁸⁶ *Re Natural Resources Allocation* ([n 27](#)) [106] (emphasis added).

CHAPTER 40

RESERVATIONS

VINAY SITAPATI

I. INTRODUCTION

FEW debates excite as much passion in India as those on reservations.¹ Alongside land redistribution and judicial independence, reservation policies have seen the most tussles between the courts and legislatures. These disputes can veer between two extremes. They either invoke abstract ideals that obscure the fact that reservations are concrete policy that have reshaped the public sphere, or they focus on the minutiae without a larger constitutional narrative. In contrast, this chapter surveys the constitutional provisions, cases, legislation, and parliamentary debates on reservations in a way that provides both intricate detail and the larger visions that animate a ‘branch of Indian constitutional law [that] was built from scratch ... with little guidance or borrowing from abroad’.² This chapter is, accordingly, divided into four components: ‘who’ benefits; ‘where’ do reservations extend; ‘how’ do they work in practice; and finally, ‘why’ are reservations required?

II. WHO

The Indian Constitution recognises three main beneficiary groups of reservation policy: Scheduled Castes (SCs), Scheduled Tribes (STs), and a third group termed ‘Other’ Backward Classes (OBCs). This section analyses the legal construction of these categories, the attempts at better targeting, and some other beneficiary groups recognised in the Constitution.

1. Scheduled Castes and Tribes

The original beneficiaries of reservations under the Indian Constitution are SCs and STs. SCs were first mentioned in British India's Government of India Act 1935,³ and were provided benefits by the British colonial government and some Princely States.⁴ In independent India, SCs and STs are explicitly mentioned in twelve separate Articles of the Indian Constitution.⁵

SCs number 16.6 per cent of the population, and include 1,206 main castes⁶ that were considered untouchable⁷ within the stratified Hindu caste system. These castes have at different points in history been referred to as 'Depressed Classes' and 'Harijan', and are currently referred to as 'Dalits'. There is much scholarship on Dalits as a social and political category.⁸ But Scheduled Caste is a legal category of reservation beneficiaries, and only those Dalits who are Hindu, Sikh, or neo-Buddhist are considered Scheduled Caste;⁹ Christian and Muslim Dalits do not qualify. The Supreme Court is yet to decide on the constitutionality of this exclusion. STs, on the other hand, consist of 701 tribes¹⁰ and constitute 8.6 per cent of India's population. They have been referred to in various Supreme Court judgments as 'adivasi' and 'girijans', and are present mainly in central, southern, and northeastern India.¹¹ Unlike SCs, STs can be of any religion.

The Constitution grants the power to the Union executive¹² to define castes and tribes as SC¹³ or ST.¹⁴ The Supreme Court has held that this power is not subject to judicial review.¹⁵ The central executive has exercised its power to revise the SC and ST list by adding multiple castes and tribes over the years, but there have been few, if any, occasions where a caste or tribe has ever been removed from the list. Since the Constitution and case law unambiguously recognise SCs and STs as a legal category, and since they have distinct social identities, their categorisation has proved less controversial.

2. Other Backward Classes

More controversial is the third category to benefit from reservations. Since SCs and STs were originally thought of as ‘Backward Classes’, this third group is referred to as ‘Other’ Backward Classes or OBCs. Unlike SCs and STs, OBCs are not a distinct social group. A simple way to think of them is as middle castes within (mainly) Hinduism, in between upper castes and SCs. Some of these castes are numerically large and control agricultural land, and are thus politically dominant, but they are under-represented in higher education and the professions.

There is much confusion about the social location of OBCs, given that, by one estimate, they number 52 per cent of the Indian population,¹⁶ and sociologists have argued that they consist of socially and economically heterogeneous castes.¹⁷ This chapter avoids these social nuances, focusing instead on four constitutional nuances regarding OBCs. First, they have different meanings in different sections of the Constitution. Secondly, different States and the Centre identify different caste groups as ‘backward’. Thirdly, the definition of ‘backward’—particularly the use of caste as the sole criterion—is heavily debated. And fourthly, there is confusion over empirical data on the nature and number of caste groups considered OBCs. We explore these four nuances in the paragraphs below.

a. Provisions Use Term Differently

OBCs are defined by different phrases in different parts of the Constitution. Article 15(4) refers to special provisions for ‘Socially and Educationally Backward Classes’, while Article 16(4) refers merely to ‘Backward Classes’. Some court decisions have held this to be an immaterial difference,¹⁸ while others have stressed that Article 15(4) specifically refers to ‘educational’ backwardness while Article 16(4) is only concerned with ‘social’ backwardness.¹⁹ Besides, some have argued that a backward class under Article 15 (education) could well be a numerical majority, but Article 16 (employment) requires inadequate representation. In practice, however, government policy has treated these different phrases the same, evolving a single criterion for Backward Classes for the purposes of education and employment.

b. *Different Central and State Lists*

The second nuance is that unlike SCs/STs, Union and State governments define OBCs differently. The Union List, to which the phrase OBCs typically refers, applies to Union employment and education. But ‘other’ backward classes can also be defined by the States for the purposes of reservations in State education and employment. There are plenty of caste groups that are backward class in one State, but not in another State, nor according to the Union government. These different lists were also drawn up at different times. Southern States such as Tamil Nadu pushed for State backward class reservations in their own States in the 1950s.²⁰ But it was only in 1991 that reservations for ‘other backward classes’ were implemented in Union employment. The courts have held that these Union and State Lists are not permanent and need to be constantly revised,²¹ though in practice this is far from the case.

c. *Caste as Sole Definition*

The third—and critical—nuance on OBCs is the centrality of caste in defining a group as backward. The legal situation today is that the Union and State Governments have defined ‘backward class’ solely in terms of caste. The Constitution does not mandate this, but the question to the Court has always been whether the Constitution *enables* this. While the Supreme Court has ultimately endorsed these caste-based definitions as constitutional, judicial confusion stems from judges emphasising different criteria, sometimes even within the same judgment.²² From amidst this confusion, three judicial ‘standards’ on the use of caste in defining ‘backward classes’ have emerged. I categorise these standards as ‘relevant’, ‘sole’, or ‘dominant’. The first judicial standard, exemplified by the *MR Balaji* case,²³ has been to hold that caste could not be the sole or dominant criterion, but that caste could be a ‘relevant’ factor in determining backwardness. This was because ‘social backwardness is in the ultimate analysis the result of poverty to a very large extent’.²⁴ This judicial standard was more likely to invalidate reservation policies, but soon gave way to a second judicial standard, exemplified by the *NM Thomas* case.²⁵ The majority judgment in this case held that caste could be used as the sole criterion to identify a backward class.²⁶ A third standard, the current one, is typified by the majority judgment in *Indra Sawhney*²⁷ and all five judges in *Ashoka Kumar*

Thakur.²⁸ This standard is that while caste cannot be the sole criterion in determining backward classes, it can be used, even as the dominant criterion. As the majority judgment in *Indra Sawhney* put it, ‘a caste can be and often is a social class in India’.²⁹ Since *Indra Sawhney*, the most important Court judgment on reservations in India, will reappear many times in this chapter, it is perhaps useful to lay out its structure. Nine judges heard the case, seven of whom authored separate judgments. The majority judgment is thus not obvious, but there is generally a divide between the six judges who held that caste could form the basis for assessing backwardness—what I term the ‘dominant’ standard—and the three-judge minority which argued that economic criteria alone should be the measure of backwardness. Jeevan Reddy J’s judgment is generally considered the leading judgment within the majority, and this chapter—and indeed later Supreme Court judgments—relies on this judgment. The *Indra Sawhney* standard, though it stresses factors other than caste, has had the effect of permitting all caste-based definitions of backward class in government policy.

d. *Data on Who are the OBCs*

A final debate is data on OBCs: the actual state of backwardness of these castes, and their numerical percentage. The Constitution enables the Central executive to appoint a ‘commission to investigate the conditions of backward classes’.³⁰ The government has appointed two commissions³¹ thus far, neither of which gathered any new data on the number and socioeconomic conditions of OBCs. The most famous of these was the Mandal Commission, which used data from the 1931 census. It is this extrapolated data that forms the basis for the OBC reservation policy of the Union government. This use of 1931 census data to determine twenty-first-century policy has been heavily criticised. However, supporters justify its use, arguing that even if the OBC percentage is not 52 per cent—as the Mandal Commission claims—it is surely more than 27 per cent, which is the extent of OBC quota. A recent attempt at data collection was in the aftermath of the Union government’s decision to extend OBC reservations in Union education institutions in the mid-2000s. In this instance too, the Supreme Court asked for better data, yet upheld the government policy for which better data was required.³² The one recent exception to this judicial deference, despite poor data, concerns OBC reservations for Jats. Jats are a socially and politically (though not educationally) powerful landed caste in northern India. In 2014, the

Union Government, in the face of intense political lobbying, notified Jats as ‘OBCs’ in nine states, despite a contrary recommendation from the National Commission for Backward Classes (NCBC). In response, the Supreme Court struck down the government notification, terming the original NCBC recommendation ‘adequately supported by good and acceptable reasons’.³³ The Court reiterated that outdated statistics could not be used to establish backwardness, as there was a presumption of general advancement over time. The Court also emphasised that the government should be alive to new kinds of backwardness—such as of transgenders—rather than just focusing on older forms of disadvantage. Regardless of which side of the reservation debate you take, it is striking that the government has promulgated such profound policies with so little updated information.

3. Targeting Techniques: List Revision, Creamy Layer and Sub-Classification

The 2011 Indian census categorised 1,206 castes as SCs and 701 tribes as Scheduled Tribes. Together they constitute 25.2 per cent of the population. This wide range of groups and individuals means that some are less ‘backward’ than others, whether on income, education, land access, representation in the public sphere, or social status. As a result, some castes and the wealthy within each caste disproportionately corner benefits. The few empirical studies there are confirm this.³⁴ Both opponents and proponents of reservations accept this as a legitimate concern, but are divided over solutions. Some of these solutions, present in case law and scholarly debate, are: to declassify castes and tribes disproportionately benefiting from reservations; to exclude wealthy (creamy layer) individuals within these groups from benefits; and to create sub-quotas for especially disadvantaged groups within the quota. These are examined below.

a. List Revision

The first technique is to remove castes or tribes that have disproportionately benefited from the SC, ST, or OBC lists. Several Supreme Court judgments refer to this. In practice, there are few, if any, castes or tribes that have been removed completely from this list. On the other hand, the lists have been frequently

amended to add castes and groups. While the Supreme Court has not questioned this policy, it is slowly being challenged in politics. Caste or tribe groups that are already benefiting from quotas fear that new additions will deny their group members reserved seats. Conflicts such as these will intensify over the coming years. But their mediation is likely to be through electoral politics, not through the courts.

b. Sub-classification

The second way is through sub-classification, what is colloquially called ‘quota within quotas’. This is to ensure that, in the words of the Supreme Court, ‘one or two such classes do not eat up the entire quota leaving the other backward classes high and dry’.³⁵ The Supreme Court has held that neither the State nor the Court can sub-classify within the SC/ST list.³⁶ On the other hand, the Court has permitted, even encouraged, sub-classification of OBCs on the basis of ‘social backwardness’.³⁷ Several State governments, such as Andhra Pradesh and Tamil Nadu, do this. Politically, the demand for sub-classification has picked up, and is part of the basic logic of reservations in India. Some State governments sub-classify, others provide additional benefits to the ‘most backward’ amongst the OBC castes, and some have even attempted schemes for the more backward among SCs. In the coming years, this will be a significant issue, but will be driven more by electoral politics than by judicial construction.

c. Creamy Layer

A third technique to exclude the better off from reservation benefits is the concept of the ‘creamy layer’. The phrase was first used in the *NM Thomas* judgment, and describes those individuals within the backward classes who are themselves advanced. Unlike list revision and sub-quota, this targets individual—not group—beneficiaries. In the *Indra Sawhney* case, the Supreme Court held that this creamy layer should be excluded from the benefits of reservation, since ‘After excluding them alone, would the class be a compact class. In fact, such exclusion benefits the truly backward.’³⁸ The courts have not provided a clear definition of ‘creamy layer’,³⁹ but have struck down government definitions for being unreasonably high or absent,⁴⁰ since creamy layer exclusion is a necessary

part of the principles of equality articulated in Articles 14 and 16. One uncertainty over the creamy layer doctrine is whether it applies only to OBCs, or to SCs and STs also. A five-judge bench in the *Nagaraj* case—dealing with SC/ST quotas—had stated that the creamy layer concept was part of the constitutional principle of equality. But a later Court in *Ashoka Kumar Thakur* has held that the creamy layer does not apply to SCs and STs.^{[41](#)}

4. Other Beneficiaries

Apart from reservations for SCs, STs, and OBCs, the Constitution also permits reservations for other groups, such as women. Another category is reservations for religious groups, but this remains constitutionally contested. These categories are only illustrative; the State can make special provisions for those not specifically mentioned, where there is ‘reasonable classification’. Reservations for women and religious groups (ie, Muslims) are described below.

a. *Women*

Article 15(3) of the Constitution permits the State to make ‘special provision’ for women (and children). The Supreme Court has interpreted this Article to allow for all forms of affirmative action for women, including reservations.⁴² In practice, the government has chosen to enact reservations for women in very few instances. This is perhaps because gender is not as salient a political identity as caste is in India—despite women numbering 48 per cent of the population. An exception to this political disinterest despite judicial assent is the Women’s Reservation Bill, which mandates 33 per cent reservations for women in the Lok Sabha and in State legislative assemblies (with a sub-quota for women within the SC/ST quota).⁴³ The Bill has since lapsed.

b. *Muslims and Other Religious Groups*

While reservation beneficiaries have been defined by the government—and permitted by the courts—to be solely on the basis of caste, reservations based solely on religion have faced judicial resistance. Reservations already extend to some members of non-Hindu religions. For instance, several State governments classify some Muslim sub-groups as ‘backward castes’ and as such eligible for reservations—the argument being that caste hierarchies extend beyond Hinduism to other religions in India.⁴⁴ The courts have generally upheld the principle of OBC sub-quotas for some ‘backward’ Muslim groups, though they have quashed specific policies on technical grounds.⁴⁵ More controversial are quotas solely

based on religion. The constitutional founders were well aware that special provisions for Muslims such as separate electorates were precursors to the division of India. Yet, post-Independence, some State governments have sought reservations for all Muslims. This is partly driven by the electoral need for Muslim votes. But it is also driven by the fact that Muslims—as a whole—are under-represented in government services, and have worse socioeconomic indices compared to even Scheduled Castes and Tribes (who are beneficiaries of reservations).⁴⁶ The courts have generally opposed these attempts at reservations for all Muslims. The Andhra Pradesh High Court has repeatedly held them to be unconstitutional, and the Supreme Court has not quashed this.⁴⁷ Unlike caste-based reservations—for which there is broad political consensus—religion-based reservations are politically disputed, with several parties—notably the BJP—opposing it. This makes it a key political and legal debate in the years to come.

III. WHERE

1. Public (State) Education

Article 46 of the Indian Constitution directs the State to promote with ‘special care the educational and economic interests of the weaker sections of the people’, including SCs and STs. But this is a non-enforceable directive principle, and the constitutional provision from which the State has derived the power to mandate reservations in education is Article 15(4), and now (5). Article 15(4) permits ‘special provision’ for SCs, STs, and ‘socially and educationally backward classes’. Though the clause does not explicitly mention public education, this has been interpreted to constitutionally protect reservations in public education from the equality clauses of Articles 15(1) and 29(2). Clause (4) of Article 15 was not part of the original Constitution, but was inserted as part of the First Amendment to the Indian Constitution in 1951. This amendment was in response to the Supreme Court judgment in *State of Madras v Champakam Dorairajan*,⁴⁸ where a seven-judge bench of the Supreme Court invalidated the ‘communal order’ of the Madras State, reserving seats for various caste groups in State educational institutions. The Madras State justified the order on the basis of Article 46, a Directive Principle of State Policy. Speaking for the Court, Das J held that a non-enforceable directive could not override a

fundamental right. He also held that the framers had specifically provided for affirmative action in public employment through clause (4) to Article 16, but had omitted this from Articles 15 and 29. ‘It may well be’, he reasoned, ‘that the intention of the Constitution was not to introduce at all communal considerations in matters of admission into any educational institution maintained by the State or receiving aid out of state funds.’⁴⁹ Parliament’s response, through the First Amendment, was to invalidate this judgment and permit reservations in public education for SC, STs, and ‘socially and educationally backward classes’.

Since then, the principle of reservations in education for these three groups has been judicially accepted. This general constitutional allowance is subject to three caveats. First, reservations do not apply to minority educational institutions. Secondly, the Court has sought to limit reservations in superspecialty education. Thirdly, the extension of reservations in public education has been gradual: from the States to the Centre, from SC/STs to OBCs, and from higher education to schools. Let us explore these caveats below.

a. Minority Institutions

Parliament has chosen not to apply reservations to educational institutions established by linguistic or religious minorities. These minority educational institutions enjoy special autonomy under Article 30 of the Indian Constitution.⁵⁰ Various Supreme Court decisions have interpreted this autonomy to include administration, fees, curriculum, and internal quotas.⁵¹ These are not available to other non-minority institutions. While amending the Constitution to permit reservations in aided and unaided educational institutions, Parliament has exempted minority educational institutions from reservations.⁵²

b. Superspecialty Posts

The Court has opposed reservations in superspecialty posts (higher medical degrees, for example).⁵³ The reason for this is that superspecialty posts are more vital for the requirements of ‘efficiency’ under Article 335. A recent five-judge bench of the Court reiterated this view,⁵⁴ and in 2014, another five-judge bench chose to withstand executive pressure and declined to review that judgment. This might well be one of the few instances where the courts have stood up to State

pressure.

c. Gradual Extension

Reservations in public education have come to be extended in three ways: from the States to the Centre, from SC/STs to OBCs, and from higher education to primary education. Reservations for SCs and STs have existed since the enactment of the Constitution, that is, 1950. Reservations for ‘backward classes’ began in some States—notably the southern States—in the 1950s, and was instituted by some northern Indian States by the 1980s. In 2005, the Union executive extended quotas for OBCs to Union government educational institutions—such as the Indian Institutes of Technology. This has been held to be constitutionally valid by the courts.⁵⁵ A final extension of reservations in education has been from higher education to schools, as we discuss later in this chapter.

2. Public (State) Employment

For much of the time since Indian Independence, a small private sector and diminishing returns on land made public employment one of the few ways of social mobility. Even today, government salaries—especially at the lower end—are much higher than their private equivalent. Constitutional protections for government employees also make them hard to fire, providing job stability, which is rare in other forms of employment. These factors have made public employment a prized object of redistributive politics in democratic India.

The constitutional provisions allowing for reservations in public employment are Articles 16(4) for SCs, STs, and ‘Backward Classes’, and 335 for only SCs and STs. Unlike Article 15(4)—which has been inserted later to permit reservations in education—Article 16(4) was part of the original Constitution of India. So was Article 335, which permits reservations for SCs and STs, and Article 15(3), which has been interpreted by the courts to permit reservations for women in employment. It is important to note that these are enabling provisions, conferring discretionary power on the State to mandate a variety of measures. In practice, the State has used this provision to mandate one particular form of affirmative action: reservations. A key judicial debate has been whether Article

16(4), which permits reservations in public employment, is an exception to Article 16(1), or merely an illustration of it. As we shall see later in this chapter, this distinction matters in providing logic to numerical limits on quotas.

Studies have shown that reservations in entry-level government jobs have been well implemented, especially in recent times.⁵⁶ For instance, a survey of class 1 officers found that 12.4 per cent of all posts were occupied by SC candidates—close to the quota mandate of 15 per cent.⁵⁷

The principle of reservations in public employment is subject to the following caveats. First, the courts have used the limitations of ‘efficiency of administration’ contemplated in Articles 335 to prohibit reservations in public services that require the ‘highest level of intelligence, skill, and excellence’.⁵⁸ Secondly, the courts have prohibited reservations for single-post jobs, and thirdly, the courts have limited reservations in the judiciary. Regarding the lower judiciary, the Supreme Court has held that this must be done in consultation with the High Court,⁵⁹ and the power of the government to mandate reservations in the higher judiciary is limited by various provisions and case law that safeguard the independence of the judiciary. This is unlikely to change in the coming years, though political pressure for a more ‘representative’ judiciary may well see the judge’s caste being an informal factor in judicial appointments.

These caveats are puzzling. Since all jobs in public employment, by definition, are offices of public trust that mould multitudes, why should efficiency matter in some posts and not in others? A judge, for instance, no more requires ‘efficiency in administration’ than, say, a bureaucrat in charge of a district. Proponents of reservations use this inconsistency to argue that reservations should extend to every sphere of public employment. But another conclusion is that this doctrinal inconsistency typifies the judicial approach to reservations policy.

3. Private Sector

Reservations in the private sector are one of the most contested political issues in India. Economic reforms since the 1990s have led to a growing number of jobs in the private sector, while government jobs have stagnated in terms of number and income. Private schooling and higher education has also boomed, with several studies showing that it has outstripped State-funded education in both quantity and quality. This has led political parties and other proponents to argue for reservations in all parts of the private sector. Given below is the legal architecture—recent in origin—to deal with reservations in private colleges, schools, and employment.

a. *Private Colleges*

The Supreme Court had initially held that mandating reservations in private colleges was unconstitutional. This was enunciated by an eleven-judge bench in *TMA Pai Foundation v State of Karnataka* in 2002,⁶⁰ and clarified by a five-judge bench in *Islamic Academy of Education v State of Karnataka*⁶¹ and by a seven-judge bench in *PA Inamdar v State of Maharashtra*.⁶² In *PA Inamdar*, the Court held that ‘the imposition of quota seats in unaided professional institutions are acts constituting serious encroachment on the right and autonomy of private professional educational institutions’.⁶³ The Court held that this was a violation of the private institutions’ ‘right to occupation’ protected under Article 19(1)(g) of the Constitution, and reservations were not a reasonable restriction within the meaning of Article 19(6). Parliament responded with the Ninety-third Amendment to the Constitution, introducing clause (5) to Article 15. Among other things, this clause constitutionally enables the State to mandate reservations in private educational institutions, effectively overriding the *PA Inamdar* judgment. However, this clause does not apply to minority educational institutions, which are protected by Article 30(1) of the Constitution. As legal scholar Rajeev Dhavan demonstrates in his study of the legislative passage of this amendment, no party objected to this effective nationalisation of the private educational sector, the only objections being to exemptions for minority institutions.⁶⁴ In a subsequent Supreme Court judgment, the *Ashoka Kumar Thakur* case,⁶⁵ four out of the five judges left the issue open as to whether the

part of clause (5) that enabled reservations in private educational institutions was constitutionally valid, while one judge clearly held that such a provision violated the basic structure of the Constitution.⁶⁶ However, a recent judgment of a five-judge bench of the Supreme Court has ended this ambiguity by holding Article 15(5) in its entirety to be valid and not a violation of the basic structure of the Constitution.⁶⁷

b. Private Schools

Reservations in private schools is a recent phenomenon. The Right of Children to Free and Compulsory Education Act 2009 mandates 25 per cent reservations for weaker sections and disadvantaged groups in private unaided schools.⁶⁸ Its validity was questioned before a three-judge bench of the Supreme Court. In response, the two-judge majority upheld the validity of the Act and its application to unaided private schools—though all three judges had held it inapplicable to unaided minority educational schools that were protected under Article 30(1) of the Constitution.⁶⁹ The constitutionality of the enabling amendment (Article 21A)—especially its application to private unaided educational institutions—was once again challenged before a five-judge bench of the Supreme Court as being a violation of the private educational institutions’ fundamental right under Article 19(1)(g).⁷⁰ In response, the Court upheld Article 21A, holding that:

[S]o long as such law forces admission of children of poorer, weaker and backward sections of the society to a small percentage of the seats in private educational institutions to achieve the constitutional goals of equality of opportunity and social justice set out in the Preamble of the Constitution, such a law would not be destructive of the right of the private unaided educational institutions under Article 19(1)(g) of the Constitution.⁷¹

c. Private Employment

Political parties have long advocated reservations in private employment. But there is currently no constitutional provision that allows for it, no Supreme Court judgment on the subject, and no government Bill pending. Proponents see this as the logical culmination of India’s extensive reservation policy. They argue that, with the economic reforms of the 1990s, it is the private sector that has seen the

biggest growth in jobs, while government jobs (for which there are reservations) has shrunk. They also point to studies suggesting that private sector employers discriminate on the basis of caste while selecting employees.⁷² To pre-empt this move, some industry groups have accepted forms of ‘voluntary affirmative action’, and some companies have showcased schemes to provide special training to candidates from disadvantaged groups to help them in private employment. Opponents of reservations in the private sector, on the other hand, argue that there is no systematic caste discrimination in the profit-driven private sector.⁷³ More crucially, they argue, such a move would hurt the economy—driven, as it is, by private sector growth—and the global competitiveness of Indian industry. This last factor is likely to play an important role, in the near future, in preventing the State from mandating reservations in the private sector.

4. Legislature

Articles 330, 332, and 334 enable reservations of seats in the Union and State legislatures for SCs and STs. This has happened in the Lok Sabha and in legislative assemblies in direct proportion to the population of SCs and STs. In the current (sixteenth) Lok Sabha, for instance, out of a total of 543 seats, 79 have been reserved for SCs and 41 for STs. This is, of course, in addition to non-reserved seats, which SCs and STs can also contest. Constituencies are chosen as reserved if they have a relatively large proportion of SCs or STs. The Seventy-third Amendment to the Constitution also provides for reservations in local representative bodies such as *panchayats* and municipalities for SCs, STs, women, and OBCs.⁷⁴ Apart from reservations of seats, SC and ST candidates also enjoy other benefits, for instance lower election deposits.

This general description needs four qualifications. First, this idea was extensively debated in the Constituent Assembly, and it was agreed—and stated in Article 334—that these reservations would be phased out after twenty years. In practice, Article 334 has been repeatedly amended to extend these reservations, and it is unlikely to be discontinued. Secondly, reservations in legislature have helped create a consolidated political block for laws that are perceived to be in the interests of SCs and STs—such as reservations in promotion. This is inevitable; the sixteenth Lok Sabha, for instance, has 120 seats reserved for SCs and STs (from all parties), while the second largest (Congress) party has a mere 44 seats. This is not necessarily a criticism, but merely to point out that representation creates its own reality. Thirdly, OBCs do not have reservations in the Union and State legislature, despite demands for it. However, Articles 243-D(6) and 243-T(6) of the Constitution enable reservations for ‘backward classes’ in local representative bodies. A five-judge bench of the Supreme Court upheld this in 2010.⁷⁵ Fourth and finally, while reservations for women do exist in local bodies, there is a move to introduce 33 per cent reservation for women in the national and State legislatures, as we have discussed earlier in this chapter.

IV. HOW

Perhaps the most controversial aspect of affirmative action is the method it has

taken. With some exceptions, affirmative action has taken the form of numerically mandated quotas, extends to both entry-level positions as well as promotions with consequential seniority, and requires no minimum standards for the beneficiary to conform to. While it is generally limited to 50 per cent of all seats, unfilled seats from one year can 'carry forward' to the next, even if the total exceeds 50 per cent, and States have avoided this limit by placing legislation in the Ninth Schedule of the Constitution, rendering it immune from judicial review. This part provides an overview of how various constitutional provisions have been interpreted by the courts and amended by Parliament to permit these methods.

1. Entry-level Reservations

The most prominent examples of affirmative action in India are entry-level quotas. Articles 15(4) and (5) have been interpreted to permit entry-level quotas in public and private educational institutions, and Article 16(4) permits entry-level quotas in public employment. As pointed out earlier, there are currently no entry-level quotas in private employment. It is important to note that these constitutional provisions do not use the phrase ‘quotas’ or ‘reservations’. The phrase used in the Constitution is ‘special provision’. But the executive and legislature have defined this phrase almost solely in terms of numerically mandated quotas, and the Supreme Court has validated this interpretation.

This general allowance of entry-level quotas in public employment and education is subject to a few caveats. First, as we have seen earlier, the Court has resisted entry-level quotas in certain specialised posts (such as in the defence services). Secondly, the Court has banned entry-level quotas in single posts. Thirdly, the Court has permitted unfilled quota seats from one year to be filled in the next year. This is the ‘carry-forward rule’ that we shall examine later in this chapter. Fourth and critically, the Court has permitted the executive not only to prescribe a general percentage to be filled in each form of employment (say, a percentage of all university faculty), but to prescribe for specific positions (say, a post meant for an administrative law teacher). This is known as the ‘roster’ system, and has led to particularly anomalous consequences.

While the principle of entry-level quotas is by now judicially uncontroversial, the two controversies are on quota limits and relaxation of minimum standards. We discuss these in the next two subsections.

2. Quota Limits

Since the debate over quota limits is a key feature of reservations in India, it is important to separate and analyse four different questions. First, what is the 50 per cent rule? Secondly, are ‘carry-forwards’ allowed, and are they subject to the 50 per cent rule? Thirdly, what happens when a reserved category candidate gets a general category seat? And fourthly, what explains why States such as Tamil Nadu have 69 per cent quotas?

a. *Fifty Per Cent Rule*

The logic of the 50 per cent rule is based on three different visions of the relationship between affirmative action and the equality provisions of the Indian Constitution. The first vision is what I term one of ‘balance’ between competing constitutional principles of formal equality, social justice, and efficiency. This is explained in much detail in the final section of this chapter. One consequence of this vision is to see Article 16(4)—which permits reservations in employment—as being an exception to the formal equality provision of Article 16(1). Since the exception cannot be greater than the rule, reservations could not exceed 50 per cent. This was the vision of the framers of the Constitution such as BR Ambedkar—as the legal scholars HM Seervai⁷⁶ and Anirudh Prasad⁷⁷ point out. It was also the vision in early Supreme Court judgments such as *Balaji*.⁷⁸ A second vision is to see the Constitution as enunciating the principle of substantive equality—a vision I elaborate upon in the final section of this chapter. Under this vision, Article 16(4) is merely an elaboration of 16(1), which includes within it the idea that unequals cannot be treated equally. Seen this way, reservations do not limit the equality provisions of the Constitution, but merely elaborate upon them. Therefore, a 50 per cent limit has no constitutional justification. This second vision is seen in the Supreme Court judgments of *NM Thomas*⁷⁹ and *ABSK Sangh (Railways)*.⁸⁰ A third vision, articulated in *Indra Sawhney*, seeks—in a style ubiquitous to Indian jurisprudence—to harmonise these two visions into a third one. In this case, the majority judgment held that Article 16(4) was merely an elaboration of 16(1). But it also held that balancing various provisions of the Constitution meant that total quotas could not cross 50 per cent in any given year. The effect of *Indra Sawhney* has been to reiterate the

principle of *NM Thomas* with the consequences of *Balaji*. Since the percentage of central reservations for SCs and STs is 22.5 per cent, this has meant that OBC reservations cannot exceed 27 per cent (bringing the total to 49.5 per cent).

b. *Carry-forward*

Closely linked to the 50 per cent rule is the debate over ‘carry-forward’. The phrase applies to reserved seats in an institution that are not filled in a given year. The question is whether these unfilled seats can ‘carry forward’ to the next year as reserved seats in addition to the seats reserved for that year. The issue becomes controversial, since while the seats reserved for a given year might be within the 50 per cent limit mandated by the courts, the additional ‘carry-forward’ reserved seats might push the total seats in a given year to more than 50 per cent. A five-judge bench of the Supreme Court in the *Devadasan* case first debated the issue in 1964.⁸¹ A four-judge majority held the very concept of ‘carry-forward’ to be unconstitutional,⁸² while the sole minority opinion argued that while unfilled seats could ‘carry forward’, the total number had to be ‘reasonable’ and could not exceed 50 per cent in any given year.⁸³ In a later judgment, *Indra Sawhney*, the Court overruled this majority judgment in *Devadasan* with a ruling that followed instead the logic of the minority view—permitting ‘carry-forwards’ but subjecting them to the 50 per cent rule in any given year.⁸⁴ But even this balance was deemed insufficiently protective of ‘the interest of the Scheduled Castes and the Scheduled Tribes’ by Parliament,⁸⁵ which chose to amend the Constitution for the eighty-first time to permit ‘carry-forwards’ even if the total exceeded 50 per cent.⁸⁶ The problem, the amending Bill points out, was heightened by the introduction of 27 per cent quotas for OBCs due to the implementation of the Mandal Commission report in 1991. Since the total was now close to 50 per cent, it was inevitable that any carry-forward seats would cross the 50 per cent limit. The amending Bill was hardly debated and overwhelmingly voted for in both houses. Interestingly, the only vote against the Bill in the Lok Sabha was by Prakash Ambedkar, an SC leader and grandson of Dr BR Ambedkar,⁸⁷ who was worried that SCs and STs were becoming political pawns.

c. General Seats for Reserved Candidates

Another feature of the 50 per cent rule is that SC, ST, or OBC candidates who get seats in the general category are not considered reserved candidates. In practice, this has led to seats for reserved groups—especially OBC candidates who more often make it to the general list—to be expanded, and seats available for individuals from non-reserved groups to be limited. This seems another case of confused adjudication. One justification for reservations is often that the beneficiary group is under-represented. If that is the justification, then it matters not if the beneficiary group is represented in reserved or general seats. A competing justification is the ‘backwardness’ of the caste or tribe. But if individuals from a ‘backward’ group systematically get general category seats, it calls into question whether that particular group should be classified as ‘backward’ in the first place.

d. Ninth Schedule

A final feature of the 50 per cent rule is that some legislation have been considered immune from it. The Supreme Court’s decision in *Indra Sawhney* placed reservations in States like Tamil Nadu, where quotas extend to 69 per cent, in jeopardy.⁸⁸ To protect these reservations, Parliament placed the enabling Tamil Nadu State legislation in the Ninth Schedule to the Constitution.⁸⁹ Laws placed in the Ninth Schedule were thought to be immune from judicial review, but a recent Supreme Court judgment has held that even laws in the Ninth Schedule are subject to judicial review to ascertain whether they comply with fundamental rights and the basic structure of the Constitution.⁹⁰ However, the Supreme Court is yet to apply this judgment to the Tamil Nadu law, and the Court is yet to determine whether other States like Andhra Pradesh and now Maharashtra—that have State quotas that exceed 50 per cent, but that are not in the Ninth Schedule—are constitutionally compliant. These exceptions to so extensively considered a judicial concept leads to the question: have the courts mattered at all in shaping reservations policy?

3. Promotion

Reservations in promotions are one of the most controversial aspects of affirmative action policy in India, and go some way in explaining its underlying rationale. The judiciary has broadly opposed the principle of reservations in promotion. While in the *Rangachari* case,⁹¹ the Court held that the Constitution permitted reservations not only in entry-level posts but also in promotions, the matter was conclusively decided (or so the Court thought) in *Indra Sawhney*.⁹² Here, the Court unambiguously held that reservations in promotions were unconstitutional. The Court gave a five-year deadline to the State to phase out existing policies of promotions in reservation. Three years later (in 1995), Parliament invalidated this judicial decision by inserting clause (4A) to Article 16, in order to permit reservations in promotion.⁹³ The statement of objects and reasons of the amending Bill states that its purpose was to strike down the *Indra Sawhney* judgment, ‘in view of the commitment of the Government to protect the interests of the Scheduled Castes and Scheduled Tribes’.⁹⁴ Like other amendments invalidating judicial decisions on reservations, this one too was not debated with any seriousness in Parliament; the main criticism was that the benefits not be limited to only SCs/STs, but also include OBCs.⁹⁵ In response to this (and other amendments on promotion that we will examine), the Supreme Court, in *Nagaraj*,⁹⁶ held these promotion amendments to be valid. But it also held that every particular policy of the State with respect to reservations in promotions would have to pass individual constitutional muster, with each policy requiring the demonstration of backwardness, inadequacy of representation, and maintenance of efficiency. This allowance of judicial review over individual promotion policies has led to courts invalidating particular policies requiring reservations in promotions, while upholding the general principle. In response, a Bill was introduced in the Rajya Sabha in 2012 seeking to invalidate *Nagaraj* and limit judicial review of reservation in promotion policies.⁹⁷ This Bill has since lapsed.

a. Consequential Seniority

A related issue is whether reservations in promotion would extend to consequential seniority. This matters because promotions in the bureaucracy are

made after factoring in the number of years of service. A reserved candidate who is promoted to one post may not be eligible for a second promotion because he may have fewer years of experience than a competing candidate from the general category. The Supreme Court has been divided over the validity of consequential seniority being assumed for reserved candidates.⁹⁸ But all its delicate arguments balancing the political push for accelerated seniority with the demands of constitutionalism have been rendered naught by amendment. The Eighty-fifth Amendment to the Constitution expressly sought to overturn judicial decision making in this regard by providing accelerated seniority to promoted reserved candidates without any caveats whatsoever. This was hardly debated in the Lok and Rajya Sabha before being passed with overwhelming vote. As in the case of reservations in promotion, any judicial attempt to balance has come to naught in the face of determined political will.

b. Relaxation of Minimum Standards

In *S Vinod Kumar v Union of India*,⁹⁹ the Supreme Court had held that relaxation of minimum standards during promotions of reserved candidates was not permissible due to the requirements of efficiency in Article 335 of the Constitution. The judgment followed *Indra Sawhney*, which had also held that ‘lower qualifying marks or lesser level of evaluation’ in matters of promotion was constitutionally impermissible.¹⁰⁰ In response to *S Vinod Kumar*, Parliament amended the Constitution for the eighty-second time, inserting a proviso to Article 335 permitting the State to make ‘any provision’ for SCs and STs for ‘relaxation in qualifying marks in any examination or lowering the standards of evaluation, for reservation in matters of promotion to any class or classes of services or posts’.¹⁰¹ As the statement of objects of the amending Bill make clear, this was an explicit response to the judgments of the Supreme Court in *S Vinod Kumar* and *Indra Sawhney*. The Eighty-second Amendment was passed with minimal debate and overwhelming support: the Rajya Sabha passed the Bill 139–nil, while the Lok Sabha passed it 340–nil.¹⁰² In a 2014 judgment, *Rohtas Bhankhar v Union of India*,¹⁰³ the Supreme Court has confirmed that relaxation of minimum standards for reservations in promotions is now constitutionally permissible. It not only relied on the Eighty-second (post-*Vinod Kumar*) Amendment, but interpreted the (pre-*Vinod Kumar*) clause (4A) to Article 16 to permit the relaxation of minimum standards for reservations in promotions. In

doing so, the Court in *Rohtas Bhankhar* held that *S Vinod Kumar* was *per incuriam*’ (ie, made without due regard to the law). This is yet another instance where any attempt of the courts to balance various provisions of the Constitution has been overturned by amendment.

c. Organisational Efficiency

The debate over reservations in promotion is a good place to grasp just how unique affirmative action policy in India is. Reservations in promotion are qualitatively different from reservations in entry-level positions. All organisations are structured around hierarchies, of which a prominent factor is the number of years the person has spent in an organisation. This is particularly true in Indian public employment, where it is known for officers to resign if they are superseded (on merit) by an officer from a junior batch. As the sociologist Max Weber has pointed out, this strict hierarchy ironically creates a strong sense of cadre—key to the organisational efficiency that Article 335 mandates. Reservations in promotions have a strong effect on this principle. As many examples presented before the courts have pointed out,¹⁰⁴ reservations in promotion have led to candidates who joined at the same time—and consider each other as equals within the organisation—being treated unequally, with one being promoted over the other solely on the basis of caste. In no organisation in the world would such a principle be justified as promoting efficiency.

4. Other Forms

Reservations in employment and education for SCs, STs, and OBCs are the primary mode of affirmative action in India. But other forms exist. There are reservations in government contracts. Many State governments also provide scholarships, special hostels, and schools for children exclusively from these groups. There are also reservations in the allotment of government land, subsidies, and State-provided goods such as petrol pumps. These examples reiterate just how ubiquitous affirmative action has become in every aspect of public life in India.

V. WHY

In trying to explain a constitutional logic for reservations in India, it is important to avoid utopias. The question is not what is the best constitutional model of reservations there should be. It is what is the best description of the constitutional vision of a policy that exists. Put simply, the debate is not over whether the ‘carry-forward’ rule is correct; it is over deciphering the constitutional vision that enables and justifies this rule. This section begins by examining the two competing notions of constitutional equality that are used to explain reservations policy. It ends by providing a different—and in my view more accurate—way of explaining the policy: as the demands of a democratic majority.

1. Balancing Equality, Social Justice, Efficiency

The initial understanding of reservations policy in India was that it balanced the competing constitutional aims of formal equality, social justice, and efficiency. Articles 14, 15(1), 16(1), and 29(2) embodied the general principle of formal equality for every individual. Articles 15(4), 16(4), and 46 pushed for social justice and were exceptions to this general principle, while Article 335 sought to balance social justice with the ‘maintenance of efficiency of administration’. These principles were not a seamless web. As the scholar Anirudh Prasad puts it, any form of protective discrimination would inevitably clash with principles of

‘merit and efficiency’.¹⁰⁵ Reservations policy would thus have to balance these principles, curbing each while preventing one from dominating. This was the vision of the framers of the Constitution during the assembly debates. Some early Supreme Court judgments also justified reservations policies as shaped by this constitutional theory of balance between competing imperatives, for instance holding Article 16(4) to be an exception to 16(1).

The problem with this argument is that the Constitution of 2014 looks very different from the Constitution of 1950. The kind of constitutional balance the framers had in mind has clearly proved inadequate to deal with reservations policy sixty years later. This logic of balance has also been repudiated by other judgments, most clearly in *NM Thomas*, where the Court put forward a parallel vision of substantive equality that saw no clash between these competing values.¹⁰⁶ Judicial attempts at balancing have also been erratic and whimsical. As even one of the most sympathetic observers of the Supreme Court, Marc Galanter, puts it: ‘(t)here is a problem not of questionable doctrine but of the absence of doctrine’.¹⁰⁷ The less sympathetic have been even more critical of judicial arbitrariness in the name of balancing.¹⁰⁸

But the clearest invalidation of the theory of balance is the role played by Parliament. As we have seen in this chapter, reservations have been shaped by the legislature and executive, not by the courts. The executive orders and parliamentary debates on reservations rarely—if ever—mention formal equality and efficiency as values that limit their desire for social justice (as they see it). While some judges may still pay lip service to this theory, it does not explain reservations policy any more.

2. Substantive Equality

A more sophisticated explanation for reservations in India is through the doctrine of substantive equality that is entrenched in the Constitution. The emphasis of this doctrine is not to claim equality by transcending caste, but by claiming equality by recognising caste.¹⁰⁹ In doing so, proponents of this vision say, reservations policy has reduced caste inequalities in various ways: for instance, reducing the education gap between SCs/STs and others,¹¹⁰ creating a Dalit middle class,¹¹¹ and increasing the transfer of wealth to lower castes.¹¹²

The classic exposition of this logic by the Supreme Court is provided in *NM Thomas*. As Ray CJ put it in his majority opinion, the ‘question of unequal treatment does not really arise between persons governed by different conditions and different sets of circumstances’.¹¹³ The implication of this doctrine is that it does not consider social justice to be constitutionally limited by values of formal equality or efficiency, but a ‘seamless web’ where these values are in harmony. This is what drives the logic that Article 16(4) is merely an ‘illustration’ of 16(1),¹¹⁴ or that Article 15(5) only reiterates the principles of 15(4).¹¹⁵ This logic of holding that prima facie clashing values in the constitutional text are in perfect harmony with each other is a distinctive form of adjudication by the Indian Supreme Court. It can be seen not just in equality cases, but also in the way the Supreme Court has sought to reconcile the constitutional imperative of religious freedom with that of secularism.

While this substantive equality is a persuasive way to think of the constitutional vision for reservations policy in India, I would disagree for five reasons.

First, even those who argue that caste is the primary social reality of India would agree that there are multiple other inequities—as the Court has argued on multiple occasions. In practice, government policy has not taken these other factors into account. Their lordships may hem and haw about caste being only one of many criteria, but in practice it is the sole criterion. Secondly, beneficiary groups—especially OBCs—are large enough to contain several homogeneous ‘classes’ within them, with individuals within each ‘class’ also varying from each other. Attempts to treat these classes differently—part of the logic of substantive equality—have largely failed. Creamy layer exclusion is patchily implemented and confined to OBCs; list revisions have rarely, if ever, led to a group being removed; and sub-classification is still some way from ubiquity.

Thirdly, the absence of data is telling. Substantive equality requires evidence that groups being treated unequally are in reality unequal. While unofficial studies have shown that SCs, STs, and OBCs are, in general, backward, there is little comprehensive official data on this. Fourthly, while the argument for substantive equality is more plausible for SCs and STs, its appropriation by OBCs—causing unequal groups to be treated equally—goes against the essence of substantive equality. Finally—and this argument is similar to the one against a theory of balance—reservations policy has been largely driven by Parliament. Since parliamentary debates on reservations reveal no vision of substantive equality, it seems presumptuous to attribute doctrine after the fact.

3. Democracy by Majority Rule

Given the deficiency of theories of constitutional balance and substantive equality in explaining reservations in India, what do we have left? I end by arguing that the most coherent argument *for* reservations is one that evokes a procedural notion of democracy defended by political philosophers such as Jeremy Waldron,¹¹⁶ Robert Dahl,¹¹⁷ and Joseph Schumpeter.¹¹⁸ As numerically significant but socially and educationally disadvantaged groups have begun to exercise political power in India, they have used reservations through elected representatives to gain educational and professional power. These are groups (or more precisely, elites *within* disadvantaged groups) working in concert to form a majority, and then pushing their collective will through elected institutions. The effect of this majoritarian politics may well be—and it most certainly has been—to make India less unequal in some ways. But these improvements in inequality are effects rather than drivers of policy. The real driver is the constitutionally permitted principle of rule by majority—with its virtues and vices—rather than any coherent legal doctrine.

That reservations, covering around 77 per cent of the population, benefit the majority in India is clear. This is obvious for OBCs, who some say number 52 per cent of the population.¹¹⁹ But even Scheduled Castes are large political blocks in India's fragmented polity, forming an effective interest group in politics. That it is this majoritarian urge that drives reservation policy is also clear from the fact that the Court has shaped little. Contentious issues like 'backward class' definitions, promotions, and the carry-forward rule have been solved by legislative fiat. The only two areas where the courts have somewhat shaped policy is through the creamy layer concept and the 50 per cent rule—both of which, as this chapter shows, permit plenty of exceptions. Even the timing of reservation policies in India speaks of electoral politics rather than the evolutionary role of legal precedent.

Accepting this pushes the debate away from the realm of equality doctrines to that of democratic theory. The debate is not between constitutional visions of balance or substantive equality. India's reservation policy is neither. The real debate should be between those who support reservation policies as furthering a procedural definition of democracy that emphasises preference aggregation and supports majority will, and those who either question majority rule or argue that policies mediated through a constellation of group interests need not necessarily reflect the will of the majority. Framing the debate this way solves an important

anomaly in current discourse on reservations in India. This is the inconsistency that those who tend to support reservation policies also typically tend to decry majoritarian tyranny in favour of constitutional rights, while those opposing reservations tend to emphasise majority rule in other contexts. These positions—on both sides of the political divide—contradict themselves. Many of the coming controversies—over women’s reservations, reservations in the private sector, or sub-classification—will be better explained through the majority-rule framework. These controversies will be resolved by party politics, not by the courts. It will prove futile, and likely irrelevant, to explain them by conjuring constitutional visions of normative balance or substantive equality. The vision supporters of reservations should conjure is one of second-principles-based democratic negotiation based on universal adult franchise, a vision at the core of the Indian Constitution.

The arguments *against* reservations policy in India should, accordingly, subject this ‘democratic negotiation’ defence to two critiques. The first is that reservation policies reflect the contingencies of party and group interests rather than the permanent will of the majority. A second critique is that even if these second-principles-based policies reflect majority will, they violate first-principle constitutional rights of non-beneficiaries (for instance, upper castes or non-Hindus) in a way that amounts to the tyranny of the majority. In the process, India risks ‘losing the identity of non-reservational equality’;¹²⁰ that is, the hard-won constitutional notion of formal individual equality. The debate worth having is between those who envision a Constitution that enables the pursuit of power through democratic negotiation and redistribution, and those who see this pursuit as being at odds with a liberal vision of the Constitution.

¹ ‘Affirmative action’ is not a phrase used in India, nor is it particularly helpful in explaining the scale and nature of schemes. The Constitution uses the phrase ‘special provision’, and some use the phrase ‘compensatory discrimination’ or ‘preferential treatment’. Indian newspapers simply use ‘reservations’ or ‘quotas’, though affirmative action in India extends beyond quotas. For simplicity alone, I use the phrase ‘reservations’ in this chapter.

² Marc Galanter, *Competing Equalities: Law and the Backward Classes in India* (Oxford University Press 1991) 361.

³ Government of India Act 1935, Sch 1 brought for the first time the term ‘Scheduled Castes’.

⁴ Galanter ([n 2](#)) 18–40.

⁵ Constitution of India 1950, arts 15, 16, 46, 164, 330, 332, 334, 335, 338, 341, 342, and 366.

⁶ ‘Census of India 2011’ <<http://www.censusindia.gov.in/2011census/PCA/presentation.pdf>>, accessed November 2015.

⁷ The Indian Constitution has abolished untouchability, and makes its practice a criminal offence: Constitution of India 1950, art 17.

⁸ The introduction to Dalits as a social and political category is best provided by Sudha Pai, *Dalit Assertion* (Oxford University Press 2013).

⁹ Constitution (Scheduled Castes) Order 1950, para 3.

¹⁰ Census of India 2011 <<http://www.censusindia.gov.in/2011census/PCA/presentation.pdf>>, accessed November 2015.

¹¹ For a short introduction to the political conditions of tribals in India, see Ramachandra Guha, 'Adivasis, Naxalites and Indian Democracy' (2007) 42(32) *Economic and Political Weekly* 3305.

¹² The power is formally granted to the 'President', but it is to be exercised upon the aid and advice of the cabinet.

¹³ Constitution of India 1950, art 341.

¹⁴ Constitution of India 1950, art 342.

¹⁵ *Shree Surat Valsad Jilla KMG Parishad v Union of India* (2007) 5 SCC 360.

¹⁶ Government of India, Report of the Backward Classes Commission (1980) <http://www.ncbc.nic.in/User_Panel/UserView.aspx?TypeID=1161>, accessed November 2015.

¹⁷ The best research on the social condition of the backward classes is by the sociologist Andre Beteille. See eg, the dated but conceptually superb book André Bêteille, *The Backward Classes in Contemporary India* (Oxford University Press 1992).

¹⁸ *Janki Prasad Parimoo v State of Jammu & Kashmir* (1973) 1 SCC 420.

¹⁹ *Indra Sawhney v Union of India* (1992) Supp (3) SCC 217 [786]–[789], summarised in [859(3)(c)] (Jeevan Reddy J).

²⁰ This provides the political context to the case *State of Madras v Champakam Dorairajan* AIR 1951 SC 226, which led to the First Amendment to the Constitution—developments we discuss later in this chapter.

²¹ See eg, *Indra Sawhney* (n 19) [847] (Jeevan Reddy J); *Jagdish Negi v State of Uttar Pradesh* (1997) 7 SCC 203.

²² *KC Vasanth Kumar v State of Karnataka* (1985) Supp SC 714.

²³ *MR Balaji v State of Mysore* AIR 1963 SC 649.

²⁴ *MR Balaji* (n 23) [23].

²⁵ *State of Kerala v NM Thomas* (1976) 2 SCC 310.

²⁶ *NM Thomas* (n 25).

²⁷ *Indra Sawhney* (n 19) (Jeevan Reddy J).

²⁸ *Ashoka Kumar Thakur v Union of India* (2008) 6 SCC 1.

²⁹ *Indra Sawhney* (n 19) [859 (3)(a)], referring to [746]–[779] ((Jeevan Reddy J).

³⁰ Constitution of India 1950, art 340.

³¹ The Kaka Kalelkar Commission of 1955 and the Mandal Commission of 1980.

³² As we see later, one exception to this general judicial attitude is in the case of reservations in promotion, where the Court has insisted on empirical data.

³³ *Ram Singh v Union of India* (2015) 4 SCC 697.

³⁴ *Galanter* (n 2).

³⁵ *Indra Sawhney* (n 19) (1992) Supp (3) SCC 217 [860] (Jeevan Reddy J).

³⁶ *EV Chinnaiah v State of Andhra Pradesh* (2005) 1 SCC 394.

³⁷ *Indra Sawhney* (n 19) [797] (Jeevan Reddy J).

³⁸ *Indra Sawhney* (n 19) [792] (Jeevan Reddy J).

³⁹ Jeevan Reddy J in *Indra Sawhney* provided one clear example of creamy layer exclusion: if the

candidate's parents were grade A (eg, IAS, IPS) officers in the All-India Services. *Indra Sawhney* (n 19) [792] (Jeevan Reddy J).

⁴⁰ *Indra Sawhney v Union of India* (2000) 1 SCC 168.

⁴¹ *Ashoka Kumar Thakur* (n 28) (KG Balakrishnan CJ).

⁴² *Government of Andhra Pradesh v PB Vijayakumar* (1995) 4 SCC 520.

⁴³ Constitution (One-hundred-and-eighth Amendment) Bill 2008.

⁴⁴ Muslims benefit from affirmative action mainly as 'backward castes', and in rare cases, as STs, but never as SCs.

⁴⁵ In *T Muralidhar Rao v State of Andhra Pradesh* (2010) 2 ALD 492, a seven-judge bench of the Andhra Pradesh High Court struck down a State OBC sub-quota for some Muslim groups on the grounds that there was no proper empirical investigation, and such an investigation should investigate 'backwardness' among all religions (and not Islam alone). However, in *Sanjeet Shukla v State of Maharashtra* (2015) 2 Bom CR 267, the Bombay High Court has permitted 5% quotas in Maharashtra State owned or aided higher education for fifty Muslim sub-castes on the grounds that data shows that they are educationally under-represented.

⁴⁶ Prime Minister's High Level Committee, Cabinet Secretariat, Government of India, 'Social, Economic and Educational Status of the Muslim Community of India: A Report' (2006) <http://www.minorityaffairs.gov.in/sites/upload_files/moma/files/pdfs/sachar_comm.pdf>, accessed November 2015.

⁴⁷ *B Archana Reddy v State of Andhra Pradesh* (2005) 6 ALD 582.

⁴⁸ AIR 1951 SC 226.

⁴⁹ *Champakam Dorairajan* (n 20) [12].

⁵⁰ See Vivek Reddy, 'Minority Educational Institutions' (chapter 51, this volume).

⁵¹ Reddy (n 50).

⁵² Ninety-third Amendment to the Constitution (2005) introducing clause 5 to art 15.

⁵³ See eg, *Dr Jagadish Saran v Union of India* (1980) 2 SCC 768; *Dr Pradeep Jain v Union of India* (1984) 3 SCC 654; *Indra Sawhney* (n 19).

⁵⁴ *Faculty Association of AIIMS v Union of India* (2013) 11 SCC 260.

⁵⁵ *Ashoka Kumar Thakur* (n 28).

⁵⁶ Ashwini Deshpande, 'Social Justice Through Affirmative Action in India: An Assessment' in Jeannette Wicks-Lim and Robert Pollin (eds) *Capitalism on Trial: Explorations in the Tradition of Thomas Weisskopf* (Edward Elgar 2013) 7–8.

⁵⁷ Deshpande (n 56) 7–8.

⁵⁸ *Indra Sawhney* (n 19) [840] (Jeevan Reddy J). The Court has provided examples (which are not exhaustive) of such jobs such as defence services, superspecialty in medicine and pilots.

⁵⁹ *State of Bihar v Bal Mukund Shah* (2000) 4 SCC 640.

⁶⁰ (2002) 8 SCC 481.

⁶¹ (2003) 6 SCC 697.

⁶² (2005) 6 SCC 537.

⁶³ *PA Inamdar* (n 62) [125].

⁶⁴ Rajeev Dhavan, *Reserved! How Parliament Debated Reservations 1995–2007* (Rupa 2008) 119–20.

⁶⁵ The five-judge bench in this case provided four separate judgments. In order to prevent confusion, they also signed a separate, short order, which states this.

⁶⁶ *Ashoka Kumar Thakur* (n 28) [636] (Dalveer Bhandari J).

⁶⁷ *Pramati Educational Trust v Union of India* (2014) 8 SCC 1.

- ⁷¹ *Pramati Educational Trust* ([n 67](#)) [51].
- ⁶⁸ Right of Children to Free and Compulsory Education Act 2009, s 12(1)(c).
- ⁶⁹ *Society for Unaided Private Schools of Rajasthan v Union of India* (2012) 6 SCC 1.
- ⁷⁰ *Pramati Educational Trust* ([n 67](#)).
- ⁷² Ashwini Deshpande and Katherine Newman, 'Where the Path Leads: The Role of Caste in Post University Employment Expectations' (2007) 42(41) *Economic and Political Weekly* 4133. See also Surinder Jodhka and Katherine Newman, 'In the Name of Globalisation' (2007) 42(41) *Economic and Political Weekly* 4125.
- ⁷³ Here is an example of a study that finds no evidence of caste discrimination in hiring at call centre jobs: Abhijeet Banerjee and others, 'Labor Market Discrimination in Delhi: Evidence from a Field Experiment' (2009) 37 *Journal of Comparative Economics* 14.
- ⁷⁴ Constitution of India 1950, arts 243-D and 243-T. For a well-researched study of the impact of these reservations in local bodies, see Raghabendra Chattopadhyay and Esther Duflo, 'Impact of Reservation in Panchayati Raj: Evidence from a Nationwide Randomised Experiment' (2004) 39(9) *Economic and Political Weekly* 979.
- ⁷⁵ *K Krishna Murthy v Union Of India* (2010) 7 SCC 202.
- ⁷⁶ HM Seervai, *Constitutional Law of India*, vol 1 (4th edn, Universal Book Traders 2002) 551.
- ⁷⁷ Anirudh Prasad, *Reservation Policy and Practice in India: A Means to an End* (South Asia Books 1991) 118.
- ⁷⁸ *MR Balaji* ([n 23](#)).
- ⁷⁹ *NM Thomas* ([n 25](#)).
- ⁸⁰ *Akhil Bharatiya Soshit Sangh (Railways) v Union of India* (1981) 1 SCC 246.
- ⁸¹ *T Devadasan v Union of India* AIR 1964 SC 179.
- ⁸² *T Devadasan* ([n 81](#)) (Mudholkar J).
- ⁸³ *T Devadasan* ([n 81](#)) (Subba Rao J).
- ⁸⁴ *Indra Sawhney* ([n 19](#)) [859] (Jeevan Reddy J).
- ⁸⁵ Constitution (Eighty-first Amendment) Act 2000, Statement of Objects and Reasons.
- ⁸⁶ Clause 4B to art 16 was inserted through the Constitution (Eighty-first Amendment) Act 2000.
- ⁸⁷ Dhavan ([n 64](#)) 56.
- ⁸⁸ Tamil Nadu Backward Classes, Scheduled Castes and Scheduled Tribes (Reservation of Seats in Educational Institutions and of Appointments or Posts in the Services Under the State) Act 1993.
- ⁸⁹ Constitution (Seventy-sixth Amendment) Act 1994.
- ⁹⁰ *IR Coelho v State of Tamil Nadu* (2007) 2 SCC 1.
- ⁹¹ *General Manager, Southern Railway v Rangachari* AIR 1962 SC 36.
- ⁹² *Indra Sawhney* ([n 19](#)) (Jeevan Reddy J).
- ⁹³ Constitution (Seventy-seventh Amendment) Act 1995.
- ⁹⁴ Constitution (Seventy-seventh Amendment) Act 1995, Statement of Objects and Reasons.
- ⁹⁵ Dhavan ([n 64](#)) 33.
- ⁹⁶ *M Nagaraj v Union of India* (2006) 8 SCC 212.
- ⁹⁷ Constitution (One-hundred-and-seventeenth Amendment) Bill 2012.
- ⁹⁸ *Ajit Singh Januja v State of Punjab* (1996) 2 SCC 715; *Ajit Singh (II) v State of Punjab* (1999) 7 SCC 209.
- ⁹⁹ (1996) 6 SCC 580.
- ¹⁰⁰ *Indra Sawhney* ([n 19](#)) [831] (Jeevan Reddy J).

- ¹⁰¹ Constitution of India 1950, art 335.
- ¹⁰² Dhavan ([n 64](#)) 98–102.
- ¹⁰³ (2014) 8 SCC 872.
- ¹⁰⁴ Arun Shourie, *Falling Over Backwards: An Essay on Reservations and on Judicial Populism* (HarperCollins 2012) 256, 309–11.
- ¹⁰⁵ Prasad ([n 77](#)) 40.
- ¹⁰⁶ NM Thomas ([n 25](#)).
- ¹⁰⁷ Galanter ([n 2](#)) 537.
- ¹⁰⁸ For the least sympathetic portrait, see Shourie ([n 104](#)).
- ¹⁰⁹ Sudipta Kaviraj, ‘Democracy and Inequality in India’ in Francine Frankel and others (eds) *Transforming India: Social and Political Dynamics of Democracy* (Oxford University Press 2005) 89–119.
- ¹¹⁰ Deshpande ([n 56](#)) 16.
- ¹¹¹ Deshpande ([n 56](#)) 12–13.
- ¹¹² Marianne Bertrand, Rema Hanna, and Sendhil Mullainathan, ‘Affirmative Action in Education: Evidence from Engineering College Admissions in India’ (2010) 94 National Bureau of Economic Research 16; Aimee Chin and Nishith Prakash, ‘The Redistributive Effects of Political Reservation for Minorities: Evidence from India’ (2011) 96(2) Journal of Development Economics 265.
- ¹¹³ NM Thomas ([n 25](#)) [31].
- ¹¹⁴ Indra Sawhney ([n 19](#)) [859] (Jeevan Reddy J).
- ¹¹⁵ Ashoka Kumar Thakur ([n 28](#)).
- ¹¹⁶ See Jeremy Waldron, ‘Rights and Majorities: Rousseau Revisited’ in *Liberal Rights: Collected Papers 1981–1991* (Cambridge University Press 1993). For a summary of his arguments made against judicial review, see Jeremy Waldron, ‘The Core of the Case Against Judicial Review’ (2006) 115 Yale Law Journal 1346.
- ¹¹⁷ Robert Dahl, ‘Procedural Democracy’ in *Democracy, Liberty, & Equality* (Oxford University Press 1988).
- ¹¹⁸ Joseph Schumpeter, *Capitalism, Socialism, and Democracy* (Kessinger Publishing 2010).
- ¹¹⁹ Government of India, Report of the Backward Classes Commission (1980) <http://www.ncbc.nic.in/User_Panel/UserView.aspx?TypeID=1161>, accessed November 2015.
- ¹²⁰ Prasad ([n 77](#)) xvi.

CHAPTER 41

GENDER EQUALITY

RATNA KAPUR

I. INTRODUCTION

IN this chapter, I address the issue of equality in the context of post-colonial India and some of the structural and normative obstacles encountered by women when bringing constitutional challenges in the bid for greater equality. These challenges cannot be measured in terms of whether women in the post-colonial world are better off or worse off. Such evaluative judgments tend to reinforce an 'us and them' binary, where the situation of women in the west is regarded as the civilisational and cultural standard to be achieved. Such a position obscures the ways in which the history of the colonial encounter has partly produced this binary that continues to inform the contemporary responses to gender in the post-colonial world, as well as the ways in which global economic structures and neo-liberal models are implicated in producing and reinforcing some of the gender stereotypes that we are witnessing in the workplace both here and there.

I examine efforts at using law, and particularly constitutional equality rights, to challenge laws that discriminate on the basis of sex in India. I examine some of the efforts to use fundamental rights to equality as guaranteed by Articles 14, 15, and 16 of the Constitution to challenge legal rules and provisions that are alleged to discriminate against women. The effort is to reveal the extent to which judicial approaches to equality, sex discrimination, and gender difference have limited the role that constitutional rights have played in the promotion of women's substantive equality.

In the first part of this chapter, I review the competing approaches to equality, and to gender difference. I argue that the judicial approach has been overwhelmingly influenced by a formal approach to equality, and a protectionist approach to gender difference. The formal approach, in which equality is equated with sameness, and the protectionist approach to gender difference, in which women are understood as weak and in need of protection, have operated to limit the efficacy of these constitutional challenges.

In the second part of this chapter, I draw attention to how familial ideology has informed the judiciary's approach to gender difference, and the ways in

which the governing norms that privilege women's familial roles have operated to limit the attempts to use constitutional equality rights to challenge laws that discriminate against women. In particular, I argue that the discourses through which women are seen as mothers and wives with particular social roles and responsibilities are important in constituting women as 'different'. Treating women differently in law is not seen as discrimination but as protecting and promoting women's natural roles in the family.

I provide examples to illustrate how fundamental rights challenges have often operated to reinscribe the very familial and legal discourses that have constituted women as different, and as subordinate, looking at the issues of domestic violence, maintenance, sexual expression, and sexual harassment. The analysis is not intended as a comprehensive review of gender equality in Indian constitutional law, but is illustrative of the normative and structural constraints that are encountered in legal discourse when addressing gender equality.

My focus is to examine how equality discourses have operated with dominant familial discourses at times to preclude effective constitutional challenges on the basis of sex discrimination.¹ It is not the only factor, nor even the most important factor, in these decisions, but simply that it is *a* factor that needs to be taken into account. In other words, in evaluating the potential for equality rights strategies to challenge rules, regulations, and practices that discriminate against women, familial ideology needs to be considered.

II. FORMAL VERSUS SUBSTANTIVE EQUALITY

Equality rights are formally guaranteed in Articles 14, 15, and 16 of the Indian Constitution. But the Constitution tells us very little about the specific content of equality rights. The general principle of equality and non-discrimination is nowhere defined in the Constitution. I briefly discuss two different approaches to equality through which the constitutional guarantees can be understood: a formal approach to equality, and a substantive approach to equality.² While the formal approach to equality has been dominant within Indian constitutional law, fragments of the substantive approach have from time to time been identifiable. I discuss this briefly and then examine the question of the relevance of gender difference within these models of equality.

In the formal approach, equality is seen to require equal treatment—all those who are the same must be treated the same. It is based on treating likes alike. The constitutional expression of this approach to equality in American and

subsequently Indian equal protection doctrine is in terms of the similarly situated test—that is, the requirement that ‘those [who are] similarly situated be treated similarly’.³ Only individuals who are the same are entitled to be treated equally—that is, ‘[a]ll persons are to be treated alike, except where circumstances require different treatment’.⁴ If the individuals or groups in question are seen as different, then no further analysis is required, even if the differences among them are the product of historic or systemic discrimination; difference justifies the differential treatment. As Dwivedi states, ‘among equals law should be equal and equally administered’.⁵ This initial definitional step can preclude any further equality analysis. As Brodsky and Day have argued in the context of equality under the Canadian Charter, ‘The way the court defines a class, or its willingness to recognize a class, can make the difference between winning and losing. The Court can justify making a comparison between classes or refusing to make a comparison by the way they define the class, or whether they recognize it at all.’⁶ Accordingly, when groups are not similarly situated, then they do not qualify for equality, even if the differences among them are the product of historic or systemic discrimination. In exploring the problematic connection between equality and sameness, Minow has observed: ‘The problem with this concept of equality is that it makes the recognition of difference a threat to the premise behind equality. If to be equal you must be the same, then to be different is to be unequal.’⁷

In contrast, the focus of a substantive equality approach is not simply with the equal treatment of the law, but rather with the actual impact of the law. ‘Such inequality results from provisions which though seemingly neutral in their application (and therefore conforming to notions of formal equality) in reality result in discrimination. Certain provisions have the effect of discriminating between men and women because in practice they only affect women.’⁸ It seeks to eliminate substantive inequality of disadvantaged groups in society. The objective of substantive equality is the elimination of the substantive inequality of disadvantaged groups in society.⁹ Parmanand Singh describes this approach as one of equality in fact or compensatory discrimination. The focus of the analysis is not on sameness or difference, but rather on disadvantage. The central inquiry of this approach is whether the rule or practice in question contributes to the subordination of the disadvantaged group. Within this approach, discrimination consists of treatment that disadvantages or further oppresses a group that has historically experienced institutional and systemic oppression.

The shift in focus from sameness and difference to disadvantage significantly broadens equality analysis. For example, within a formal equality model, the

difference between persons with physical disabilities and persons without disabilities could preclude an equality challenge. Because disabled persons are different, they do not have to be treated equally. Within a substantive equality model, however, the focus is not on whether disabled persons are different, but rather on whether their treatment in law contributes to their historic and systemic disadvantage. Differences do not preclude an entitlement to equality, but rather are embraced within the concept of equality. Within this model of equality, differential treatment may be required ‘not to perpetuate the existing inequalities, but to achieve and maintain a real state of effective equality’.¹⁰ Thus, the failure of a rule or practice to take into account the particular needs of disabled persons, and thus perpetuate the historic disadvantage of this group, would constitute discrimination, and violate their equality rights.

III. FORMAL EQUALITY IN INDIAN CONSTITUTIONAL LAW

Indian constitutional law has been overwhelmingly informed by a formal approach to equality. Article 14 guarantees equality before the law and equal protection under the law. The Supreme Court of India has held that the equality guarantees do not require that the law treat all individuals the same, but rather that any classifications made between individuals be reasonable. According to the Supreme Court, the classification must meet two conditions in order to be found reasonable:

- (i) ... the classification must be founded on an intelligible differentiation which distinguishes persons or things that are grouped together from others left out of the group (ii) that differentia must have a rational relation to the object sought to be achieved by the statute in question.¹¹

According to the doctrine of reasonable classification, only those individuals who are similarly situated must be treated the same in law.¹² Within this doctrine, equality does not require that all individuals are treated the same, but only those individuals who are the same. Equality is thus equated with sameness—and sameness is the prerequisite for equality.

This formal approach to equality spills over into the judicial approaches to Articles 15 and 16 of the Constitution and the particular doctrinal tests that have been developed in relation to these rights to non-discrimination. Article 15 prohibits discrimination on the ground of religion, race, caste, sex, and place of birth. Article 15(3) allows the State to make special provisions for women. Article 15(3) has largely been interpreted as an exception to the principle of non-

discrimination guaranteed by Article 15(1), or what has been described as ‘positive discrimination’.¹³ Special treatment is an exception to equality, rather than a necessary dimension of it. In contrast, in the substantive equality approach, Article 15(3) has been interpreted as part of the equality provisions as a whole, so that the differential treatment authorised by this Article is not an exception to, but a part of, equality. This approach was endorsed in *Dattatraya Motiram More v State of Bombay* (hereinafter *Dattatraya*),¹⁴ wherein the Bombay High Court stated:

The proper way to construe Article 15(3) in our opinion is that whereas under Article 15(1) discrimination in favour of men only on the ground of sex is not permissible, by reason of Article 15(3) discrimination in favour of women is permissible, and when the State does discriminate in favour of women, it does not offend against Article 15(1).¹⁵

This second approach goes some distance towards a substantive model of equality, insofar as difference and special treatment do not preclude equality, but rather are embraced within it.

This modest shift towards substantial equality in the *Dattatraya* case is limited, however, by the extent to which the principle of non-discrimination remains overwhelmingly influenced by formal equality. Discrimination has primarily been interpreted as any classification or distinction on the grounds prohibited by Article 15(1). Again, we can see the extent to which the approach is based on a formal model of equality, in which any distinction or differential treatment is seen as a violation of equality. Article 15(3) is thereby interpreted as authorising the State to discriminate in favour of women. In *Dattatraya*, for example, the Court states: ‘The proper way to construe Article 15(3) ... is that ... discrimination in favour of women is permissible, and when the State does discriminate in favour of women, it does not offend against Article 15(1).’ In contrast, a substantive approach to equality would interpret discrimination in terms of whether the treatment of a particular group of persons contributed to their historic and systemic subordination or to overcoming this subordination. Again, the emphasis of substantive equality is not on sameness or difference, but on disadvantage.

Some inroads have been made towards a substantive model of equality, most notably in relation to the equality of opportunity guarantees in relation to employment and the provision for reservations contained in Article 16.¹⁶ In *State of Kerala v NM Thomas* (hereinafter *Thomas*),¹⁷ the Supreme Court addressed the question of the appropriate relationship between Articles 16(1) and 16(4). The Court held that Article 16(4) was not an exception to Article 16(1), and held that Articles 15 and 16 must be seen as facets of Article 14. Further, in *Thomas*,

the Supreme Court began to articulate a substantive model of equality.¹⁸ The clearest statement of this doctrinal shift is found in the judgment of Mathew J, who noted that the formal approach to equality requires criteria by which differences, and thus differential treatment, can be justified. He observed that '[t]he real difficulty arises in finding out what constitutes a relevant difference'.¹⁹ Mathew J goes on to state, 'Though complete identity of equality of opportunity is impossible in this world, measures compensatory in character and which are calculated to mitigate surmountable obstacles to ensure equality of opportunity can never incur the wrath of Article 16(1).'²⁰

In *Indra Sawhney v Union of India*,²¹ the Supreme Court again emphasised that equality of opportunity may require treating persons differently in order to treat them equally. Although the continued use of the language of formal equality—of the similarly situated test, and of classification—in some ways limits the development in the majority decision, the minority decision of Sawant J went considerably further in articulating a more substantive vision of equality. According to Sawant J, equality 'is a positive right, and the State is under an obligation to undertake measures to make it real and effectual ... [t]o enable all to compete with each other on an equal plane, it is necessary to take positive measures to equip the disadvantaged and the handicapped to bring them to the level of the fortunate advantaged'.²²

Some courts have recognised the doctrinal shift in *Thomas*.²³ In *Roop Chand Adlakha v Delhi Development Authority*,²⁴ the Court was critical of the doctrine of classification within formal equality, observing that the process of classification could obscure the question of inequality. The Supreme Court held that 'to justify classification cannot rest on merely differentials which may, by themselves be rational or logical, but depends on whether the differences are relevant to the goals to be reached by the law which seeks to classify'.²⁵

Similarly, in *Marri Chandra Shekhar Rao v Dean, Seth GS Medical College*,²⁶ where the Supreme Court recognised that disadvantaged persons may have to be treated differently in order to be treated equally:

Those who are unequal, in fact, cannot be treated by identical standards; that may be equality in law but it would certainly not be real equality ... The State must, therefore, resort to compensatory State action for the purpose of making people who are formally unequal in their wealth, education or social environment, equal in specified areas.²⁷

Notwithstanding the important developments in the Supreme Court jurisprudence of equality as including compensatory State action for historically and socially disadvantaged groups, formal equality continues to dominate much

judicial thinking on constitutional equality rights. As I demonstrate in subsequent sections, the courts' approach to equality has been, and remains, overwhelmingly formal, with its focus on sameness and equal treatment.

IV. EQUALITY AND GENDER DIFFERENCE

The debate over the meaning of equality is further complicated in the context of women, and gender equality.²⁸ The prevailing conception of equality as sameness has led to a focus on the relevance of gender difference. If women and men are different, then how can they be treated equally? But if they are treated differently, then what becomes of the principle of non-discrimination on the basis of sex? Do the constitutional guarantees require that women and men be treated the same?

Three very different approaches to the question of gender difference have been developed: protectionist, sameness, and compensatory. In the first approach, women are understood as different from men—more specifically, as weaker, subordinate, and in need of protection. In this approach, any legislation or practices that treat women differently from men can be justified on the basis that women and men are different, and that women need to be protected. Any differential treatment of women is virtually deemed to be intended to protect, and thus benefit, women. This approach tends to essentialise difference—that is to say, to take the existence of gender difference as the natural and inevitable. There is no interrogation of the basis of the difference, nor consideration of the impact of the differential treatment on women. In the name of protecting women, this approach often serves to reinforce their subordinate status.

The second approach is an equal treatment or sameness approach. In this approach, women are understood as the same as men—that is to say, for the purposes of law, they are the same, and must be treated the same. In this approach, any legislation or practice that treats women differently from men is seen to violate the equality guarantees. This sameness approach has been used to strike down provisions that treat women and men differently. It has, however, also been used to preclude any analysis of the potentially disparate impact of gender-neutral legislation. According to the sameness approach, it is sufficient that women and men be treated formally equal. Any recognition of gender difference in the past has been perceived as a tool for justifying discrimination against women.

In the third approach, women are understood as a historically disadvantaged

group, and as such, in need of compensatory or corrective treatment. Within this approach, gender difference is often seen as relevant, and as requiring recognition in law. It is argued that a failure to take difference into account will only serve to reinforce and perpetuate the difference and the underlying inequalities. In this approach, rules or practices that treat women differently from men can be upheld, if such rules or practices are designed to improve the position of women. If, however, the legislation or practice is based on a stereotype or assumption that women are different, weaker, or in need of protection, it would not be upheld.

Proponents of this compensatory approach attempt to illustrate how the ostensibly gender-neutral rules of the formal equality approach are not gender neutral at all—but rather, based on male standards and values. In such a model, women will only qualify for equality to the extent that they can conform to these male values and standards. Thus, the compensatory approach argues that gender differences must be taken into account in order to produce substantive equality for women.

The judicial approach to sex discrimination in India is overwhelmingly influenced by a formal approach to equality, and often, a protectionist approach to gender difference that has operated to preclude any entitlement to equality. And this problematic approach to gender is often informed by familial ideology, and an understanding of women's gender difference in terms of the sexual division of labour within the family. At the same time, it is important to recognise that the judicial approaches to equality and gender difference are neither homogeneous nor static, but a site of contest, in which the different visions of equality and gender difference compete.

V. GENDER EQUALITY IN JUDICIAL DECISIONS

In this section I discuss specific cases to illustrate how gender equality plays out in judicial discourse.

1. Domestic Violence

The Protection of Women Against Domestic Violence Act 2005 (PWDVA) is one of the most progressive laws enacted in favour of women's rights in recent times. But it has also encountered a barrage of legal challenges. In 2008, a case was brought before the Delhi High Court to challenge the PWDVA as being *ultra vires* the Constitution on the grounds that it accords protection only to women and not to men.²⁹ The writ petition was filed by the mother-in-law for quashing of the proceedings initiated against her under the PWDVA in a lower court. The Delhi High Court upheld the Act, stating that 'the lot and fate of women in India is an abjectly dismal one, which requires bringing into place, on an urgent basis, protective and ameliorative measures against exploitation of women'.³⁰

The Court held that classifying women as a class in need of protection under this Act was not unconstitutional. While cases of men being subjected to domestic violence did occur, these cases were very few in number and did not call for the same protection under the Act.

The petitioner further challenged the Act on the grounds that it provided equal rights to those couples who were married and to those in a live-in relationship, even though the two were not alike. The Court held that just like the 'abjectly dismal' lot of the married woman,³¹ women in live-in relationships were in need of protection as such relationships were 'invariably initiated and perpetuated by the male' and the 'social stigma always sticks to the women and not to the men' in such relationships.³²

While the Court did not strike down this very progressive legislation, we still have to question the reasoning on which this holding is based. The case operates within the framework of formal equality—men and women are not treated the same way under this Act, as they are perceived differently whether in a marriage or in a live-in relationship. While no stigma attaches to a man who is a part of a relationship in the nature of marriage, the woman who enters such a relationship is often stigmatised. The Court constructs the woman as a hapless participant in the live-in relationship 'perpetuated' by a man and thus in need of protection.

Familial ideology operates to portray the wife as someone who is dependent and in need of support when she is abused. A similar logic is extended into the non-marital relationship, where women are again viewed as entering into such relationships through coercion rather than choice, and rendered even more vulnerable because of the stigma attached to such relationships, especially if it

does not result in marriage. The case provides an example of reinforcing gender stereotypes in familial relationships while also protecting the legislation, which, in contrast, is based on rights to bodily integrity and sexual autonomy. It is an important example of how we need to take a step back and examine what has been lost when we experience a victory in the courtroom, as well as what has been won when we experience a defeat.

2. Maintenance

Constitutional challenges have been directed to the maintenance provisions of several family law statutes. The Criminal Procedure Code contains provisions that direct a man to provide alimony to a woman who is divorced or separated. The provision was challenged as violating Article 15, which prohibits discrimination on the basis of sex. In the case of *Purnananda Banerjee v Swapna Banerjee*,³³ the wife had filed for divorce on the grounds of cruelty and also filed an application for alimony *pendete lite* under Section 36 of the Special Marriage Act 1954. The husband opposed the application and challenged the constitutional validity of the section. The High Court of Calcutta upheld the maintenance law on the grounds that it did not discriminate only on the basis of sex, but rather provided maintenance where the wife had no independent income sufficient for her support.³⁴ The Court further held that even if the provision under challenge did discriminate on the basis of sex alone, it would be protected by Article 15(3), which enables the State to make special provisions for women.³⁵

The Court approached the question of the constitutionality of the law from the perspective of formal equality. Article 15 is seen as prohibiting any classification based on sex—or more specifically, any classification based ‘only on the ground of sex’. In order to uphold the section, the Court had to find that the section did not discriminate only on the ground of sex, but on other grounds as well. In the Court’s view, the classification was based not only on sex, but on a wife’s need for economic support where she had no independent means of support. Women’s economic dependency within the family is thereby separated from sex, for the specific purpose of upholding legislation intended to address this economic dependency.

The case is an interesting example of the judicial gymnastics made necessary by the formal model of equality. The technical approach of ‘only on the ground of sex’ is used to uphold legislation that would otherwise be seen to violate Article 15, by drawing artificial distinctions between sex and socially constructed gender differences, or in the words of other courts that have been critical of this approach, between ‘sex and what sex implies’. The formal understanding of equality, within which any classification on the basis of sex is seen to constitute discrimination, requires that economic dependency be seen as something other than a difference based on sex, if the provision is to be upheld.

By way of contrast, a substantive model of equality would similarly allow the

Court to uphold such legislation, without ‘severing sex from what it implies’. It would direct attention to whether the rule in question contributes to the disadvantage of women, and a compensatory approach to gender would allow a recognition that women may need to be treated differently to compensate for past disadvantage. Within such an approach, the maintenance provision could be upheld on the ground that it takes gender difference into account to compensate for past disadvantage. The reality of women’s economic dependence, resulting from the sexual division of labour within the family, could be seen to require provisions that recognise and compensate women for this dependence. In *Krishna Murthy v PS Umadevi*,³⁶ Section 24 of the Hindu Marriage Act 1955 was challenged as violating Article 14, on the basis that a spouse’s liability for alimony was vague, particularly as compared to the Indian Divorce Act 1869, where a husband’s liability for alimony was expressly limited to a maximum of one-fifth of his income. In a brief decision, the High Court rejected the challenge, and held that there was no invidious discrimination or undue disability to the wife or the husband.

The case is also illustrative of the often contradictory nature of familial ideology. The way in which the Court casually draws a distinction between sex and women’s financial needs rests, at least partially, on the naturalisation of women’s economic dependency within the family. Economic dependency is not seen as a socially constructed gender difference, but simply as a natural and inevitable consequence of family life for many women. It is, at least in part, the way in which this assumption operates at the level of common sense that allows the Court to hold that the maintenance provision is not a classification on the basis of sex only, and in turn, to uphold the section from constitutional challenge. This result, which both draws upon and reinforces familial ideology, is at the same time an important victory both for the individual woman in the Calcutta case, who was awarded maintenance, and for all women who may otherwise qualify for maintenance under the specific legal provision that was challenged. The case thus illustrates the extent to which familial ideology does not necessarily always work against women’s immediate interests. Rather, in effectively blocking the equality challenge to a provision intended to address women’s socioeconomic inequality, familial ideology can be seen to have protected these interests.

A rather different constitutional challenge was brought to the maintenance provision in the Kerala High Court.³⁷ The case involved a challenge to a provision that entitles a divorced woman to maintenance while a married woman is not entitled to maintenance if she refuses to live with her husband without

sufficient reason, lives in adultery, or lives separately by mutual consent. The marriage of the parties was dissolved and a maintenance order granted for the child. None of the parties contested the legality of the divorce. The magistrate, however, did not grant maintenance to the divorcee-wife as she was living separately by mutual consent, and compensation under the Travancore Ezhava Act was promised to her at the time of divorce. The Court adopted the reasonable classification test, and held that the classification was based on intelligible differentia. In the Court's view, divorced women and married women were differently situated. The conditions stipulated in the impugned law could only apply to married women; they were, by their very nature, inapplicable to divorced women. Similarly, the Court observed that divorced women were disentitled to maintenance in situations that do not apply to married women, such as when divorced women remarry. The Court adopted a formal approach to equality, according to which the difference between married and divorced women is seen to defeat the challenge. But there is no interrogation of whether the legal treatment disadvantages married women.

The approach to difference is essentialist: in the Court's view, the differences between married women and divorced women are seen as natural, as part of the nature of the institution of marriage. The deeper question of why married and divorced women are different remains unexamined. There is no consideration of the extent to which these differences are a product of the legal regulation of marriage—that is, married women and divorced women are different because the law treats them differently. Rather than considering the question of economic dependence and economic need, criteria according to which married and divorced women may be similarly situated, the Court justifies the differential entitlement of maintenance on the basis of what it considers to be accepted differences. The case illustrates how virtually any difference, including those differences created solely through law, can be found to be intelligible criteria, and thereby satisfy the reasonable classification test of the formal equality approach.

Nor is there any consideration as to why the law has seen fit to treat these women differently. In examining the assumptions that underlie the law, it is important to recognise that the law does not distinguish between divorced women and all married women, but rather, only those married women who refuse to live with their husbands without sufficient reason, who live in adultery, or who live separately through mutual consent. The categories of married women who are disentitled from maintenance are those who have chosen not to live with their husbands. The question that is nowhere addressed in the decision is why women who choose not to live with their husbands should be any less

entitled to maintenance than divorced women (many of whom no doubt also choose not to live with their husbands). The answer lies in the assumptions about women's roles and responsibilities in marriage. The institution of marriage is seen to involve, first and foremost, the obligation of the wife to live with her husband. The status of being married precludes the idea that a woman can choose to not live with her husband.

These assumptions about the nature of marriage and about women's roles within marriage remain uninterrogated. According to the formal model of equality, the Court is able to simply point to what it understands to be significant differences. The mere existence of these differences precludes any further analysis of the source of these differences. As with so many of the cases involving challenges to family laws, women's discursively constituted roles as wives and mothers are accepted as natural, without any further consideration of the inequalities that these roles have produced, nor of the unequal social relations that have produced these roles. Again and again, the formal model of equality and familial ideology that constructs women as naturally wives and mothers pre-empts any substantive interrogation of inequality and disadvantage. At the same time, within the context of maintenance laws, familial ideology has largely operated to uphold these laws from equality rights challenges by men who have sought to escape from their legal obligations to support their wives.

3. Sexual Expression and Sexual Harassment

Indian courts have taken a very conservative view of sexual expression and have constructed the woman as a helpless passive victim of the male aggressor, and in coming to this conclusion about the sexuality of women have failed to distinguish between a case of sexual harassment, rape, and positive sexual expression. While there have been a handful of cases that have acknowledged the sexual agency of women, most of the cases have understood the sexual lives of women as the centre of their dignity in society. In the case of *A & B v State Through NCT of Delhi*,³⁸ a criminal case was registered against a married couple for ‘sitting in an objectionable position near a Metro pillar and ... kissing each other’ under the obscenity provisions and resulting in a situation where ‘passersby were feeling bad’.³⁹ The Delhi High Court held that ‘it is inconceivable how, even if one were to take what is stated in the FIR to be true, the expression of love by a young married couple, in the manner indicated in the FIR, would attract the offence of obscenity and trigger the coercive process of the law’.⁴⁰ It is important to note that this judgment, though prima facie very progressive, is severely limited in scope by the explicit mention of the married couple who are engaging in the expression of love.

The recognition of sexual agency within a marital context stands in contrast to the way in which sexual subjectivity is treated in the context of sexual harassment in the workplace. In 1997 the Supreme Court in the case of *Vishaka v State of Rajasthan* (hereinafter *Vishaka*)⁴¹ recognised the problem of sexual harassment at the workplace and accepted that the failure to check this amounted to the violation of the equality rights of the woman. The petition was filed when a State government employee who worked as a part of the Women Development Programme was brutally raped by a group of landlords in a village in Rajasthan. The Rajasthan High Court acquitted the rapists, which led to protests and the subsequent filing of the petition by Vishaka, an organisation working for women’s rights. The Supreme Court formulated guidelines to address sexual harassment at the workplace and defined sexual harassment as an unwelcome sexual conduct that disadvantages a woman in recruitment/promotion or creates a hostile work environment. However, in the Indian courts the second requirement of hostile work environment has gradually been diluted and the focus has been on the first leg, which is sexual conduct.

In the first case decided after *Vishaka*, *Apparel Export Promotion Council v*

AK Chopra,⁴² the complainant sued the chairman of the company, who had tried to molest her several times. In this case, the definition of what constitutes sexual harassment was expanded in these words: 'Any action or gesture which, whether directly or by implication, aims at or has the tendency to outrage the modesty of a female employee, must fall under the general concept of the definition of sexual harassment.'⁴³

The court held that the woman had been subject to sexual harassment, even though it is never specified what exactly happened. And the conduct was regarded as unwelcome because in the Court's view she was unmarried and hence not familiar with or knowledgeable about matters of sex. Implicit in this holding is that the dress and past sexual conduct of the complainant may be used to assess whether the conduct was in fact unwelcome. Such an understanding renders only some kinds of women worthy of protection under the legal regime, possibly excluding the bar dancer, the waitress, and the sex worker.

Additionally, the Court read into the definition of sexual harassment conduct the term 'outraging the modesty' of a woman, a nineteenth-century expression that had been included in the Penal Code drafted by the Victorian colonial ruler and continues to be in operation today. In the process, the court emphasised the first leg of the definition of sexual harassment, which is sexual conduct, while simultaneously diluting the second leg of the test formulated by *Vishaka*, which requires that the alleged sexual harassment creates a hostile work environment or prejudices the woman either in recruitment or promotion. The recent enactment of the Sexual Harassment of Women at Workplace (Prevention, Prohibition, and Redressal) Act 2013, which has yet to be brought into force, contains some of these very same limitations.

Thus what is once again a progressive law can be used to reproduce governing sexual and gender norms, and continue to view the issue of equality through a protectionist approach. The impact, of course, is to, at one level, recognise that the problem of sexual harassment in the workplace does exist, but through reasoning that does not subvert or disrupt sexual or gender stereotypes.

VI. CONCLUSION

Indian sex discrimination case law has been informed by a formal approach to equality, within which almost any differences can justify the differential treatment of women in law. Sometimes this approach has the effect of upholding legislative provisions designed to benefit women. But, very often, this approach

has the effect of upholding legislative provisions that have disadvantaged women. The formal approach to equality, coupled with a protectionist approach to gender difference, pre-empts any consideration of disadvantage: women are just different. I have further examined the way in which familial ideology interacts with this dominant discourse of equality and undermines any consideration of substantive inequality. Familial ideology constitutes women as wives and mothers, reinforcing the construction of gender difference. The woman is different, and thus is precluded from any entitlement to be treated the same. Familial ideology thereby operates to immunise laws that treat women differently than men from constitutional challenge.

As I have argued, however, the impact of this familial ideology on women in the context of equality rights challenges is contradictory. In many cases, where men have sought to have legislation that is intended to promote women's interests struck down as discriminatory, familial ideology has operated to defeat the challenge. The understanding of women as wives and mothers, as naturally different from men, lead the courts to conclude that women need not be treated the same as men, and that legislation that treats women differently is not unconstitutional. Maintenance laws, for example, are thus upheld on the ground that women are different, and in need of protection. Paradoxically, within a formal approach to equality, this understanding of women as different has had the effect of upholding laws that promote women's substantive equality.

In contrast to formal equality, there is a second substantive model of equality, in which the central question is whether the impugned legislation contributes to the subordination of the disadvantaged group, or to overcoming that subordination. I suggest that substantive equality analysis might alter both the reasoning and results of the cases, by directing attention to the question of disadvantage. Such an approach to equality does not, in and of itself, answer the question of the relevance of gender difference. Rather, this substantive approach simply directs the interrogation to whether gender difference needs to be taken into account in furtherance of the substantive equality of women. This approach opens the space within which the difficult question of gender difference can be examined. By directing attention to this question of disadvantage, this approach creates space for an analysis of the relationship between difference and disadvantage. In this way, difference is not assumed to be natural, nor assumed to be relevant. Rather, difference must itself become part of the analysis, rather than a justification for not pursuing an equality analysis. Substantive equality redirects our attention to disadvantage, and to a critical interrogation of the dilemmas of difference—to the ways in which difference has been socially constructed, to the ways in which difference has very real material implications

in an individual's life, and to the ways in which judicial approaches cannot simply proclaim on the relevance or irrelevance of difference, but rather, must begin to deconstruct the assumptions that are deeply embedded in the way we see the world.

The relationship between the discourses of equality and familialism will not be automatically resolved by a shift to a substantive model of equality. Familial ideology can still operate to blind courts to the socially constructed nature of women's roles as wives and mothers in the family. The substantive approach to equality simply opens the space within which this familial ideology, and the way in which these discourses constitute women as naturally different, can be further scrutinised and deconstructed. By redirecting our attention to disadvantage instead of difference, this approach may facilitate an analysis of the ways in which women's position in the family has contributed to their social, economic, and political inequality. It does not in any way guarantee that the ideological grip of the family will be loosened. But it might take us a few steps further in the project of destabilising assumptions about gender difference. A substantive approach to equality may provide feminists engaged with law with a way in which to make more complex legal arguments.

¹ Ratna Kapur and Brenda Cossman, *Subversive Sites: Feminist Engagements with Law in India* (Sage Publications 1996); Flavia Agnes, *Law and Gender Equality: The Politics of Women's Rights in India* (Oxford University Press 2000); Indira Jaising, 'Gender Justice and the Supreme Court' in BN Kirpal et al (eds) *Supreme but not Infallible: Essays in Honour of the Supreme Court of India* (Oxford University Press 2000) 288.

² Susan Williams, 'Equality, Representation, and Challenge to Hierarchy: Justifying Electoral Quotas for Women,' in Susan Williams (ed) *Constituting Equality: Gender Equality and Comparative Constitutional Law* (Cambridge University Press 2011) 56–60.

³ Joseph Tussman and Jacobus tenBroek, 'The Equal Protection of the Laws' (1949) 37 California Law Review 341.

⁴ YR Haragopal Reddy, 'Equality Doctrine and the Indian Constitution' (1982) 45 Andhra Law Times 57, 58; Parmanand Singh, 'Equal Opportunity and Compensatory Discrimination: Constitutional Policy and Judicial Control' (1976) 18(2) Journal of the Indian Law Institute 300.

⁵ KC Dwivedi, *Right to Equality and the Supreme Court* (Deep & Deep Publications 1990) 11.

⁶ Gwen Brodsky and Shelag Day, 'Canadian Charter Equality Rights for Women: One Step Forward or Two Steps Back?' (1989) Canadian Advisory Council on the Status of Women 158. See also Diana Majury, 'The Charter, Equality Rights, and Women: Equivocation and Celebration' (2002) 40(3) Osgoode Hall Law Journal 297.

⁷ Martha Minow, 'Learning to Live with the Dilemma of Difference: Bilingual and Special Education' (1985) 48 Law and Contemporary Problems 157, 207.

⁸ Maureen Maloney, 'An Analysis of Direct Taxes in India: A Feminist Perspective' (1988) 30(4) Journal of the Indian Law Institute 397, 401.

⁹ Singh ([n 4](#)).

¹⁰ Raj Kumar Gupta, 'Justice: Unequal but Inseparable' (1969) 11 Journal of the Indian Law Institute 57.

¹¹ *Budhan Choudhry v State of Bihar* AIR 1955 SC 191.

¹⁵ See also *Ram Chandra Mahton v State of Bihar* AIR 1966 Pat 214.

²⁷ *Marri Chandra Shekhar Rao* ([n 26](#)) [8].

¹² *RK Dalmia v Justice SR Tendolkar* AIR 1958 SC 538.

The Supreme Court has also emphasised another dimension of Article 14 as a guarantee against arbitrariness: *EP Royappa v State of Tamil Nadu* (1974) 4 SCC 3 [85]; *Ajay Hasia v Khalid Mujib Sehravardi* (1981) 1 SCC 722 [16]; See also *Maneka Gandhi v Union of India* (1978) 1 SCC 248 [7]. While many commentators have argued that this doctrine constitutes a significant shift in judicial approach to Article 14, the underlying understanding of equality has not been significantly altered, insofar as this approach has incorporated the doctrine of classification.

¹³ GP Reddy, *Women and Law* (4th edn, Gogia Law Agency 2000) 2.

¹⁴ AIR 1953 Bom 311.

¹⁶ Kamala Sankaran, 'Special Provisions and Access to Socioeconomic Rights: Women and the Indian Constitution' (2007) 23(1) South African Journal of Human Rights 277.

¹⁷ (1976) 2 SCC 310.

¹⁸ Marc Galanter, 'Symbolic Activism: A Judicial Encounter with the Contours of India's Compensatory Discrimination Policy' in Marc Galanter (ed) *Law and Society in Modern India* (Oxford University Press 1989) 112.

¹⁹ *Thomas* ([n 17](#)) [55].

²⁰ *Thomas* ([n 17](#)) [57].

²¹ (1992) Supp (3) SCC 217.

²² *Indra Sawhney* ([n 21](#)) [429]. See also *Subhash Chandra v Delhi Subordinate Services Selection Board* (2009) 15 SCC 458 [79], where the Court has stated that 'The law relating to affirmative action and protective discrimination ... invoking clause (4) of Article 16 of the Constitution of India is reflected by constitutionalism.' Similarly, in *Union of India v Rakesh Kumar* (2010) 4 SCC 50 [87], the Court has reiterated that 'It is a well-accepted premise in our legal system that ideas such as "substantive equality" and "distributive justice" are at the heart of our understanding of the guarantee of "equal protection before the law". The State can treat unequals differently with the objective of creating a level-playing field in the social, economic and political spheres.'

²³ See *Jagdish Rai v State of Haryana* AIR 1977 P&H 56 [6], in which *Thomas* is interpreted as having 'introduced a new dynamic and a new dimension into the concept of ... equality of opportunity'. See also *Singh* ([n 4](#)) 304–19; Galanter ([n 18](#)) 112.

²⁴ (1989) Supp (1) SCC 116.

²⁵ *Roop Chand Adlakha* ([n 24](#)) [20].

²⁶ (1990) 3 SCC 130.

²⁸ Eileen Kaufman, 'Women and Law: A Comparative Analysis of the United States and Indian Supreme Courts' Equality Jurisprudence' (2006) 34 Georgetown Journal of International and Comparative Law 557.

²⁹ *Aruna Parmod Shah v Union of India* (2008) 102 DRJ 543.

³⁰ *Aruna Parmod Shah* ([n 29](#)) [4].

³¹ *Aruna Parmod Shah* ([n 29](#)) [4].

³² *Aruna Parmod Shah* ([n 29](#)) [5].

³³ AIR 1981 Cal 123.

³⁴ *Purnananda Banerjee v Swapna Banerjee* AIR 1981 Cal 123 [9].

³⁵ *Purnananda Banerjee* ([n 34](#)) [9].

³⁶ AIR 1987 AP 237.

³⁷ *K Shanmukhan v G Sarojini* (1981) Cri LJ 830.

³⁸ 2010 Cri LJ 669.

³⁹ *A & B* ([n 38](#)) [9]

⁴⁰ *A & B* ([n 38](#)) [12].

⁴¹ (1997) 6 SCC 241.

⁴² (1999) 1 SCC 759.

⁴³ *Apparel Export Promotion Council* ([n 42](#)) [23].

CHAPTER 42

LIFE AND PERSONAL LIBERTY

ANUP SURENDRANATH*

I. INTRODUCTION

THE cases that invoke the ‘right to life and personal liberty’ in Article 21 are far too many to confidently build a grand narrative around it. It has been expanded in such numerous directions in so many different ways that it becomes difficult to discern any level of normative coherence. The attempt in this chapter is to achieve a balance between coverage and developing an analytical critique of the manner in which the content of the ‘right to life and personal liberty’ has been developed. In circumstances of difficult political, social, and economic questions, the reasonableness standard has resulted in dilution of rights protection under Article 21. At the same time, however, we see repeated references to ‘dignity’ and ‘life beyond animal existence’ being used to radically redefine the scope of rights protection under Article 21. Given that the extent of the protection under Article 21 now extends from the prohibition against torture to the right to sleep, a discussion on the hierarchy of rights seems inevitable. Further, the chapter in various sections also examines the inconsistent use of dignity and the ‘life-is-more-than-animal-existence’ framework to read in penumbral rights.

The chapter adopts two broad approaches. The first is to distil the normative concerns about the content of rights, method of recognition of rights, and protection of rights from landmark cases. Secondly, in the parts that deal with specific rights, the attempt has been to buttress the arguments on the lack of normative coherence, while at the same time to provide an internal critique about the inadequacies relating to the content of those rights.

In Section II, the various aspects of Article 21 that were considered in *AK Gopalan* are discussed. The section also demonstrates that the solution arising out of *Maneka*, while addressing the issue of the test to be adopted under ‘procedure established by law’, leaves quite a few questions unanswered about the content of Article 21.

In Sections III and IV, the strategies adopted by the Supreme Court (SC) to expand the scope of the ‘right to life and personal liberty’ are analysed, with

particular emphasis on the Court's surprising and repeated emphasis on a particular extract from *Munn v Illinois*, along with its use of dignity. Sections V, VI, and VII contain an examination of the manner in which specific rights claims were recognised or not, while also engaging with the content of these rights. Section VIII brings together the various discussions and argues for the need to discuss hierarchy of rights and critically re-evaluate the significance of *Maneka* in contemporary constitutional jurisprudence on Article 21.

II. FROM GOPALAN TO MANEKA—UNRESOLVED ISSUES

Every discussion on the content of the right to life and personal liberty inevitably takes us back to *Gopalan*¹ because it was in that case that the SC, despite being primarily concerned with Article 22, made its first moves on the scope of Articles 19 and 21. The critical question in *Gopalan* was whether a particular freedom (in this instance the preventive detention law) could fall under both Articles 19 and 21, for this would determine the applicable standard of review.

Gopalan is often taken to have only held that any particular freedom cannot fall under both Articles 19 and 21. However, such a reading misses out nuances that appear on a close reading of the opinions in *Gopalan*. Of the six judges in *Gopalan*, only Fazl Ali J held that an overlap of Articles 19 and 21 was possible.² For him, a preventive detention law had to not only satisfy the requirements of Article 21 but additionally that of freedom of movement in Article 19(1)(d) and 19(5) because Articles 19–22 did not form independent codes in themselves.

However, the five other judges in *Gopalan* held that Articles 19 and 21 occupy exclusive domains, with no overlap whatsoever. Apart from the fact that Article 19 is available to all citizens and Article 21 to all persons, the text indicates more restrictions on the State under Article 19. Reading freedoms as overlapping between Articles 19 and 21 would result in the alleged infringement being tested against the provisions of Article 19 as well. However, the majority position in *Gopalan* would require a particular freedom to be located either in Article 19 or 21.

There was significant discussion in *Gopalan* on the substance of the protection in Article 21 under the term 'personal liberty' and its relation with Article 19 freedoms. Despite being subsequently overruled, the opinions on the fields occupied by Articles 19 and 21 in *Gopalan* raise important questions for subsequent constitutional discussions on the content and protection under Article

21.

Amongst the majority, Sastri and Mukherjea JJ view Article 21 as being limited to issues of bodily restraint and coerced detention, while Kania J takes a much broader view to include the rights to work, sleep, play, *etc.*³ However, Das J envisages a hierarchy of rights between the bodily freedom of a person and other auxiliary rights. Even within the auxiliary rights, Das J saw the Article 19 freedoms as occupying a higher position and therefore having received specific mention in the Constitution.

The above discussion is important because it highlights a conceptual difficulty that has been largely ignored since *Gopalan*, namely the difference in treatment that must be accorded to the different freedoms that form part of Articles 19 and 21. Article 19 gives a clear framework for the protection of freedoms mentioned therein for citizens, but the development of Article 21 jurisprudence so far leaves us with the rather problematic choice to protect the right against torture in the same manner and intensity with which we would protect the freedom of dietary preferences.

The SC in *RC Cooper*⁴ made an important contribution in finally achieving the reversal of the majority position in *Gopalan* that Articles 19 and 21 occupy different and exclusive fields. In *RC Cooper* it was held (in the context of right to property under Articles 19(1)(f) and 31) that the freedoms and rights in [Part III](#) could be addressed by more than one provision.⁵ Using this move made by an eleven-judge bench, the transformation in the Articles 19–21 debate was completed in *Maneka Gandhi*.⁶

The seven-judge bench in *Maneka*, though primarily concerned with the meaning of ‘procedure established by law’, had to necessarily address the relationship between the substantive protections of Articles 19 and 21. *Maneka* was explicit that there existed certain freedoms that fell within both Articles 19 and 21, and for such freedoms the State would have to satisfy the burdens envisaged in both provisions, along with satisfying the non-arbitrariness requirement of Article 14.

Therefore, the following scheme appears after *Maneka*:

1. Freedoms that fall under both Articles 19 and 21: the Article 19 reasonableness test and the requirements of Article 21 would have to be satisfied, along with the Article 14 non-arbitrariness test.
2. Freedoms that fall only within Article 21: the Article 14 non-arbitrariness test along with the requirements of Article 21 would have to be satisfied.

Maneka's attempts to resolve issues in one area has left many others unresolved. *Maneka* has no reply to the issue of whether the primary and foundational rights under Article 21 must be protected in the same manner as auxiliary rights. Further, even within Article 21, the spectrum of freedoms contained within the provision raises similar questions. For example, the protection against torture under Article 21 is only subject to the non-arbitrariness test under Article 14, which imposes a very low burden. Moreover, there is arguably no clear basis for the conflation of the rights within Articles 14, 19, and 21.⁷ As at least one author notes, this integrated reading of the Articles renders emergency provisions providing for suspension of Article 19 freedoms (among others) useless, and to that extent is inconsistent within the constitutional framework.⁸

Both *Gopalan* and *Maneka* get parts of the puzzle correct, while leaving other parts with no clear resolution. *Gopalan* is correct to the extent that it recognises that certain Articles 19 and 21 freedoms attract different levels of protection, but its weakness lies in holding that the 'right to life and personal liberty' is to be protected to a lesser degree than Article 19 freedoms. *Maneka*, on the other hand, raises the level of protection for the freedoms contained within 'right to life and personal liberty' but ends up homogenising the level of protection for all freedoms. In this levelling of freedoms, *Maneka* has ensured that it is quite convenient and easy for the State to discharge its burden in restricting even the most foundational of freedoms contained in Article 21. This near-homogeneous treatment of freedoms in Articles 19 and 21 leads to difficult constitutional dilemmas that will be explored in the following sections of this chapter.

III. THE BASIS FOR EXPANDING THE MEANING OF 'PERSONAL LIBERTY'

Apart from the relationship between Articles 19 and 21, the critical question raised during the Emergency was whether there existed a natural law right to life and personal liberty in natural law after [Part III](#) was suspended (Articles 352 and 359 as it stood then). Deciding the case in a pre-*Maneka* context, four judges in *ADM Jabalpur v Shivakant Shukla* took the position that there existed no right to life and personal liberty beyond Article 21 and that the State's suspension of [Part III](#) was constitutionally valid.⁹ This majority judgment of the five-judge bench was delivered in the context of widespread State excesses, including forced disappearances and illegal detention. Khanna J's muchcelebrated dissent took

the position that even though Article 21 might have been validly suspended, it did not mean that the petitioners could not challenge the exercise of that power.

The first couple of decades of the Court's adjudication on Article 21 involved issues of detention, arrest, and restrictions on movement wherein the SC began to seriously address the issue of rights beyond the literal meaning of Article 21, in both the contexts of 'personal liberty' and 'right to life'. The possibility of expanding the protection available under 'personal liberty' was explored in *Kharak Singh*,¹⁰ strengthened in *Gobind*,¹¹ and given the widest reading in *Maneka*. As far as the expansion of the 'right to life' under Article 21 is concerned, a significant part of the judicial discourse relies on the dignity-based conception of the right in *Francis Coralie Mullin*.¹²

The protection and expansion of 'personal liberty' received significant support in *Kharak Singh*. Adjudicating the validity of surveillance measures, the Court upheld the right to be in one's house without unjustified interference by the State. It invoked 'common law rights of man' to hold that 'every man's house is his castle'.¹³ Building on this property notion, the Court held that domiciliary visits by a police official were violative of Article 21. The majority opinion relied heavily on the aspect of 'dignity' used in the preamble to bring in the expanded reading of Article 21.¹⁴ Though the majority made no explicit reference to the right to privacy (unlike Subba Rao J's dissent) it nonetheless began the process of expanding Article 21 beyond the limited issues of arrest and detention as far as 'personal liberty' was concerned. The expansionist mode of the Court is evident in its characterisation of Article 21 as the residuary of *all* personal liberties not covered by Article 19(1).

With the recognition of the right to privacy as a fundamental right in *Gobind*, the idea of penumbral rights under Article 21 seems to have been established. It would be difficult to argue, from a textual reading of the provision, that the right to privacy is an obvious component of Article 21. However, this expansion of 'personal liberty' was based essentially on a broad and vague understanding of the 'right to life'. In *Kharak Singh*, Ayyangar J based his wider reading of 'personal liberty' on a wide definition given to life in *Munn v Illinois*¹⁵ as being something 'more than mere animal existence'.¹⁶ Curiously (and it goes on to become symptomatic of the SC's use of foreign sources), there is hardly any context provided to this excerpt. *Munn* has hardly anything to do with the right to life and the phrase was never meant to delineate the precise meaning of that right. It is surprising that in many ways it went on to represent a judicial standard that determined the content of 'right to life and personal liberty' under Article 21.

In *Kharak Singh*, the argument was that if ‘life’ could be construed widely, then the same approach was to be adopted for ‘personal liberty’ and include all safeguards necessary to protect the dignity of the individual.¹⁷ This might well be due to the fact that *Kharak Singh* and *Gobind* are based on the premise that Article 21 is a residuary provision for all personal liberties. A subtle shift on this issue can be seen from a comparison with *Gopalan*, where the Court viewed Article 21 as a provision that encompassed certain rights out of which Article 19 freedoms were carved out.

Maneka throws further light on unenumerated rights and attempts to provide a framework (albeit in the context of Article 19). The test developed in *Maneka* is whether the right claimed is an integral part or of the same nature as the named right. Further, these rights need to be ‘in reality and substance nothing but an instance of the exercise of the named fundamental right’.¹⁸ There was no further guidance available to determine whether a rights claim would fall under a fundamental rights provision.

IV. USING DIGNITY TO EXPAND THE ‘RIGHT TO LIFE’ AND ‘PERSONAL LIBERTY’

In *Francis Coralie Mullin*,¹⁹ the Court used the extract from *Munn* to establish a dignity-based conception of the ‘right to life’. Holding that the ‘right to life’ went beyond protection of limbs and faculties, the Court included in it the ‘right to live with human dignity’. Without providing any normative framework for the application of human dignity, the Court provided an inclusive list that comprised dignity—for example, adequate nutrition; clothing, shelter and facilities; expressing oneself; etc.²⁰ This dignity-based conception was subsequently used in cases such as the *Asiad* case,²¹ *Olga Tellis*,²² *Bandhua Mukti Morcha*,²³ and *Mohini Jain*.²⁴

The right to live with dignity as part of the ‘right to life’ becomes a constant refrain for the Court in cases that invoke the ‘right to life’ but the use of dignity in cases that involve issues of personal liberty is rather confused. The SC has invoked dignity to adjudicate the constitutionality of practices like solitary confinement and bar fetters,²⁵ handcuffing of prisoners,²⁶ and custodial death and torture.²⁷ The use of dignity in *Sunil Batra* and *DK Basu* is typical of the manner in which it is invoked in personal liberty cases. The Court declares the issue at hand to be an instance of violation of dignity without ever really

developing the principles indicating the instances that are likely to be considered violations of dignity.

In more recent times, the difficulty in the manner in which the SC has developed the dignity discourse has been exposed in the context of manual scavenging. With the 2013 Act replacing the 1993 Act,²⁸ the SC delivered a final judgment in a public interest litigation filed by the Safai Karamchari Andolan in 2003 seeking destruction of all dry latrines.²⁹ It was unfortunate to see the SC give its approval for the 2013 Act wherein the issue of cleaning of sewers and septic tanks continues to be legal when undertaken using protective gear and cleaning devices. The 2013 Act places this issue within the framework of health and safety of the workers rather than one of dignity.

V. CIVIL AND POLITICAL RIGHTS

In this section, various instances of the SC providing content to the ‘right to life and personal liberty’ are analysed. Within each of these instances, it will be examined whether the Court has considered the issue under the right to ‘life’ or ‘personal liberty’. Further, an attempt has been made to delineate the Court’s basis for either accepting or rejecting a particular rights claim.

1. Rights of Individuals in Detention and Protection Homes

Custodial torture and death, rights of prisoners, and sexual violence in custody are the main themes with which the Court has engaged on the rights of detainees. Although the jurisprudence of the Court has seen significant expansion in this area with reliance on dignity, no clear dignity framework has been developed.

In *Sunil Batra*,³⁰ the Court found the solitary confinement of a death row prisoner and use of bar fetters on an undertrial prisoner to be violative of the right to live with human dignity under Article 21.³¹ Similarly, handcuffing a certain class of prisoners while being escorted to court was held to be violative of dignity and an unreasonable restriction on the freedom of movement.³² Citing *Sunil Batra* and *Prem Shankar Shukla*, the Court has also declared that handcuffing and parading an accused through the streets to the police station amounted to undignified treatment.³³

In the context of custodial violence the radical aspect of the Court’s

jurisprudence is the remedy it has crafted for it. Through a series of decisions, the Court has now firmly crystallised the position that it can award monetary compensation as a public law remedy for such Article 21 violations.³⁴ However, the Court has not developed a principled basis for determining the categories of rights violations that are eligible for monetary compensation.

It is curious that the Court has largely been quiet on fixing accountability and the criminal prosecution of those involved in custodial torture and deaths.

In dealing with Article 21 rights of arrested persons, undertrials, prisoners, and those in protection homes, the Court has also adopted the strategy of issuing wide-ranging directions on procedure for arrest, treatment of inmates, living conditions, and access to legal aid, as typified in the *Agra Protection Home* case.³⁵

The Court uses this strategy in an attempt to secure the protection of Article 21 rights, but the Court has not attempted a constitutional justification of such a power. Doing so will not only ensure that the Court's powers in designing such remedies are well defined, but will also provide a basis for insisting that the Court exercise such a power when the conditions laid down are satisfied. The current manner of exercising this power to issue directions resembles political discretion more than anything else.

2. Access to Justice

Access to justice under Article 21 is largely based on reading in the content from Article 39A in the Directive Principles of State Policy (DPSPs). While there is hardly any discussion on whether access to justice is part of right to ‘life’ or ‘personal liberty’ under Article 21, the argument on offer is that not reading access to justice as part of Article 21 would violate the ‘fair, just and reasonable’ requirement of the ‘procedure established by law’. Through acting on newspaper reports about the large number of undertrials languishing in Bihar’s jails, the SC issued a series of directions in the *Hussainara Khatoon* line of cases.³⁶ In *Hussainara Khatoon (IV)*,³⁷ the SC for the first time held that the right to free legal aid services was part of the protection afforded by Article 21 and a non-negotiable part of the right to a fair trial.³⁸ In *Khatri (II)*,³⁹ the Court plugged a major loophole and made it mandatory for judges in lower courts to inform all accused persons that they had a right to free legal representation if they could not privately afford the services of a lawyer. In *Suk Das*,⁴⁰ the Court further clarified that it is not necessary for the accused to ask for free legal representation but it is instead the obligation of the judge to inform the accused of such a right.⁴¹

MH Hoskot affirmed the right to legal aid for convicts in order to help them in the appellate stages,⁴² ruling that the burden was not on the convicted prisoner to seek legal aid inside prison, but rather that it was the obligation of the prison authorities to inform all convicted prisoners of their right to legal aid and the authorities would be required to demonstrate that they had indeed discharged their duty.

One area within access to justice that the Court has surprisingly paid scant attention to is legal aid in police custody. In *Nandini Satpathy*,⁴³ where the rights of arrested individuals were examined in detail, the Court declined to rule that an indigent person detained at a police station has the right to free legal aid. This case, along with *Sheela Barse*,⁴⁴ are notable instances of the Court missing an opportunity to rule on informal arrests.⁴⁵ While in *DK Basu* the Court did rule that a person detained by the police had the right to consult a lawyer, the Court was quick to clarify that such a right did not extend to having a lawyer present throughout police interrogation. Even the Legal Services Authorities Act 1987 does not recognise such a statutory right, and only extends legal services to a person who has to ‘file or defend a case’.⁴⁶

3. Taking Life: The State and the Individual

In this subsection the SC's position on extinguishing life in two contexts is examined. The constitutional discourse on taking of life by the State through the death penalty and the attempt to commit suicide by an individual are analysed.

a. *Death Penalty*

The first constitutional challenge to the death penalty was in *Jagmohan*⁴⁷ (pre-*Maneka*) and was based on Articles 14, 19, and 21 on the grounds that: (a) the judges had arbitrary power to impose the death penalty; (b) the death penalty extinguished all freedoms under Article 19; (c) there was no procedure prescribed for sentencing to indicate when the death penalty must be chosen. The constitutional bench unanimously disagreed with these arguments, largely within the framework that the Constitution of India itself recognised the existence and validity of the death penalty.⁴⁸ Also, the judgment in *Jagmohan* came three months after the decision in *Furman v Georgia*,⁴⁹ but the bench was unwilling to give it any considerable weight, citing the lack of a provision similar to the Eighth Amendment ('cruel and unusual punishment') in the Constitution of India. The majority in *Bachan Singh*⁵⁰ (post-*Maneka*) operated within the same framework as *Jagmohan*, but made a crucial addition by developing the 'rarest of the rare' framework to address concerns around the arbitrary use of the death penalty. Now the Court was required to balance aggravating and mitigating circumstances relating to the criminal and the crime in the sentencing phase. However, inconsistency displayed by the SC itself on this ruling, as in *Ravji*,⁵¹ which was subsequently relied on to confirm the death sentences of numerous individuals (some of whom were even executed) before the error was judicially acknowledged in *Santosh Bariyar*⁵² and *Sangeet*,⁵³ has inexplicably kept some prisoners such as Mohan Anna Chavan and Umesh Reddy under death row despite two benches of the SC having acknowledged the error in their cases.⁵⁴

The constitutionality of death by hanging was challenged in *Deena* before a three-judge bench.⁵⁵ Upholding its constitutionality, the Court declared that hanging did not amount to cruel punishment. Citing medical opinion, the Court was of the view that death by hanging causes the least pain and was a dignified manner of carrying out death sentences.⁵⁶

The SC, however, has gone miles ahead of the rest of the world in terms of delay jurisprudence in the context of the death penalty. In *Shatrughan Chauhan*,⁵⁷ it ruled that undue and inordinate delay in deciding the mercy petition of death row prisoners would be a ground for commutation by itself. The concerned prisoner need not show any adverse effects s/he has suffered due to such delay and the very fact of the delay would be sufficient for commutation, as it has a dehumanising effect amounting to torture.⁵⁸ While commuting the death sentence of fifteen prisoners, the Court laid down detailed guidelines concerning steps that must be taken after the rejection of mercy petitions such as a last meeting with the family, the opportunity to challenge the rejection of the mercy petition, mental health evaluations, etc.⁵⁹ *Shatrughan Chauhan* also overruled the decision in *Devender Pal Singh Bhullar*,⁶⁰ which had held that those sentenced to death for terrorist offences could not claim the benefit of inordinate delay due to the nature of their crimes.

b. *Attempt to Suicide*

The constitutional discussion on the attempt to suicide is important for two reasons: (i) it throws light on the nature of Article 21 and its relationship with the other fundamental rights; (ii) it highlights the concerns with the use of dignity in the absence of a framework.

The constitutionality of Sections 306 and 309 of the Indian Penal Code 1860 that criminalise the attempt to suicide and abetment of suicide was the subject matter of *P Rathinam*⁶¹ and *Gian Kaur*,⁶² respectively. *Gian Kaur* overruled the decision in *Rathinam* based on a different understanding of Article 21. In *Rathinam*, the Court held that what was true of other fundamental rights must be true of Article 21, and so the right to life must also include the right not to live, just as the freedom of speech included the freedom not to speak.⁶³ However, in *Gian Kaur* the constitutional bench took the view that such a construction cannot be given to Article 21 because in all other instances it is the negative aspect of the right that is invoked; that is, no action is required from the individual and the right to kill oneself would require positive actions by the individual.⁶⁴ The Court does not offer an explanation for this differential treatment between positive action and inaction. In *Gian Kaur*, the Court was also of the view that since dignity was used to give meaning and content to the right to life, it could not then be used to extinguish life itself.

However, the Court distinguished the right to end one's life from the choice to die a dignified death at the end of one's natural life. The right to die with dignity is available only when 'the natural process of death has commenced', but there is no right to die an unnatural death. However, this part of *Gian Kaur* was recognised as obiter in *Aruna Ramachandra Shanbaug*.⁶⁵ Addressing the issue of passive euthanasia in *Aruna Ramachandra Shanbaug*, the Court was of the view that in situations where the natural process of death had begun or the person was in a permanent vegetative state, it would not be a crime to passively accelerate death in these instances by refusing medical assistance. The issue for the Court in this case was not whether there was a right to die, but instead whether there was an obligation to prolong life when the patient was terminally ill.

4. Anti-terror and Security Legislation

In many ways the constitutional challenges to anti-terror and security challenges have tested the normative foundations of the SC's seemingly progressive jurisprudence on the 'right to life and personal liberty'. The superstructure of Article 21 built in a host of cases discussed before seems to stand on unstable foundations as the Court struggles to even frame the constitutional debate in the context of anti-terror and security legislation. The Court's response to the constitutional challenges to these legislation also demonstrates the inherent weakness of the Article 21 jurisprudence that has been developed since *Maneka*.

In this section, the constitutional challenges to the Armed Forces Special Powers Act 1958 (AFSPA), the Terrorist and Disruptive Activities (Prevention) Act 1987 (TADA), and the Prevention of Terrorism Act 2002 (POTA) are considered. The AFSPA gives power to the executive to declare an area as 'disturbed' and within such areas, amongst other powers, allows the armed forces to arrest without warrant and shoot at sight in case of an unlawful assembly.⁶⁶ AFSPA is now applicable in parts of all seven States in the North East and also in Jammu and Kashmir. TADA, which lapsed in 1995, was applicable in declared 'disturbed' areas and permitted long periods in police custody without a charge sheet, made bail provisions onerous for the accused, permitted the use of confessions in police custody as evidence in a trial, and authorised the use of anonymous witnesses.⁶⁷ POTA was enacted in March 2002 with provisions largely similar to TADA, and was repealed in December 2004 by Parliament, despite its constitutionality having been upheld by the SC. In *Naga People's Movement of Human Rights* (hereinafter '*Naga People's*'),⁶⁸ *Kartar Singh*,⁶⁹ and *PUCL*,⁷⁰ the Court was concerned with setting the constitutional standards that the State had to meet before taking measures that subverted fair trial protections in the context of security concerns.

It is rather curious that in all three of these cases there is hardly any discussion on the nature of the right being restricted or deprived. A constitutionally relevant method would be to first lay out the content of the right that is sought to be restricted and then proceed to examine the justifications put forth by the State. The cases are remarkable for their lack of balancing of interests, and are focused solely on the reasonableness of the measures taken, rather than examining their impact on the rights in questions. The concern here is not that the Court has come out in favour of the State by upholding the legislation in question; the point is a prior one. Surely, the burden on the State should differ depending on

whether the legislative measures in question merely have an incidental impact on the right, or amount to substantial infringement. Further, there needs to be a constitutional examination of the stated aims of the State in introducing such legislation.

On the issue of the State's rationale for anti-terror laws in *Kartar Singh*, and *PUCL* in the context of TADA and POTA, the Court gave a resounding approval for the State's version. The Court preceded by accepting the background of extremist violence and terrorism provided by the State and then proceeded directly to address the reasonableness of the measures. It is almost as though invoking the national security argument entitles the State to very wide latitude in terms of constitutionally acceptable measures, without having to demonstrate a narrower fit to the aims sought to be achieved.⁷¹

It has been argued that greater deference to the State is appropriate in respect of anti-terror and security measures adopted under 'conditions of stress', as opposed to in ordinary times.⁷² This does not, however, ease the burden on the State to show that it is faced with such 'conditions of stress'. In *Naga People's*, the Court gave the State a free hand in extending the imposition of AFSPA without any outer limit, which led to the rather absurd situation where certain areas had been subject to this Act for decades. At the very least, the State must have an increasing burden, with time to justify the continued imposition of such a special law.

Given the extremely deferential attitude to the State's stated aims, the Court's solution is to design interpretational remedies for the application of the legislation. The Court's preferred method is to read the provisions in such a manner or issue guidelines that might prevent the abuse of power.⁷³ For example, in *Naga People's*, on the issue of shoot-at-sight powers of the armed forces, the Court takes the view that there were sufficient inbuilt conditions, such as the officer having to satisfy himself that the situation demanded firing and warning shots having to be fired.⁷⁴ Similarly, while addressing the serious concern of custodial violence in the context of police confessions that were made admissible under TADA, the Court in *Kartar Singh* is of the view that the legislation's meagre protections were sufficient.⁷⁵

The Court's approach to these legislation has paved the way to treat these statutes like every other piece of legislation. A contrast to the majority's approach is readily available in Ramaswamy J's dissenting opinion in *Kartar Singh*, which invokes the right against torture entrenched in Article 21 and views the admissibility of custodial confessions within that framework.⁷⁶ He concludes that the power of the State to regulate criminal procedure cannot extend to

deprivation of fundamental constitutional protections.

5. Sexual Minorities

The judgments in *Naz Foundation*⁷⁷ and *Suresh Kumar Koushal*⁷⁸ test the provision criminalising sodomy (Section 377, Indian Penal Code 1860) against Article 21. The judgment of the Delhi High Court in *Naz Foundation* and the SC's judgment in *Suresh Kumar Koushal* come to opposite conclusions. The Delhi High Court accepts that Section 377 violates Article 21 by infringing the right to privacy and depriving homosexuals of autonomy, thereby denying them the right to life with dignity. The privacy right constructed by the Court is not spatial privacy but rather privacy of the person where the person has a right to be left alone.⁷⁹ Expressing one's sexuality without the interference of community or the State is then viewed by the Court to be at the core of such a right to privacy of the person. Further, the Court argues that at the very core of dignity must lie the autonomy of the private will and the person's freedom of choice and action. Section 377, in the opinion of the Court, took away a fundamental aspect of such autonomy by criminalising sodomy.⁸⁰

The SC's judgment in *Suresh Kumar Koushal*, reversing the judgment of the Delhi High Court and upholding the constitutionality of Section 377, is shallow in its treatment of the Article 21 claim. Apart from citing decisions of the SC on privacy⁸¹ and the right to life with dignity,⁸² there is hardly any constitutional reasoning that the Court has to offer for finding Section 377 compatible with the 'right to life and personal liberty'.

In *National Legal Services Authority v Union of India*,⁸³ we see a completely different Court in action on the legal recognition of transgenders as a separate gender identity. The Court reiterates that Article 21 protects individual autonomy, privacy, and dignity.⁸⁴ Aided by comparative and international jurisprudence, the Court concludes that 'self-determination of gender is an integral part of personal autonomy' and therefore a facet of 'personal liberty',⁸⁵ and is also a part of the right to life with dignity.⁸⁶ The stark difference in the approach to autonomy and dignity under Article 21 between *Koushal* and *National Legal Services Authority* is impossible to explain in terms of constitutional reasoning and interpretation. All that was denied to homosexuals by one bench of the SC for, amongst other reasons, being a *minuscule minority*, was allowed for transgenders by another bench of the Court.

VI. SOCIO-ECONOMIC RIGHTS

There was a radical shift in the Court's jurisprudence from the early 1980s concerning the very nature of rights protected under Article 21 towards understanding Article 21 as also imposing positive obligations on the State. Therefore, for example, Article 21 does not just protect against the State proactively depriving persons of education, it also imposes an obligation on the State to provide for education. However, this has led the Court into territory that has proven tricky for many apex courts around the world. Unfortunately, the SC has rarely acknowledged the normative difficulties of this task. We do not see fundamental discussions on the nature of socioeconomic rights claims in terms of a minimum core or progressive realisation, precise content of the right, and their coverage in terms of beneficiaries. Developing a normative framework would ensure that the judiciary adjudicates all socioeconomic rights claims within that framework and does not adopt an unpredictable and uncertain approach for recognition of these rights.

1. Right to Education

Though Article 21A now contains a fundamental right to elementary education, the evolution of the right to education jurisprudence of the SC is interesting for a few reasons. First, it is amongst the early and rare instances of the Court clarifying its position on positive rights in the context of Article 21. Also, it is one of the few instances where the Court grapples with the content of the socioeconomic rights at a normative level, which then ultimately leads to an explicit constitutional and statutory obligation.

The judgment of a two-judge bench of the SC in *Mohini Jain*⁸⁷ triggered an interesting disagreement on the content of the right to education. Reading in a positive obligation of the State, the Court ruled that the State under Article 21 has to provide adequate educational institutions at all levels, but is, however, silent on free and compulsory education at any level.⁸⁸ However, the constitutional bench in *Unni Krishnan*⁸⁹ disagreed with *Mohini Jain* on the scope and content of the right to education and went on to hold that the right meant free and compulsory education until fourteen years of age.⁹⁰ Using Articles 41, 45, and 46 under the DPSP, the Court concluded that the constitutional scheme required an intense focus on primary education.⁹¹ While the Court is undoubtedly correct in deciphering the constitutional emphasis on primary education, it has no real explanation for excluding all other levels of education from the right to education.

Nine years after the judgment in *Unni Krishnan*, Parliament inserted Article 21A into the Constitution, making free and compulsory education until the age of fourteen a fundamental right. In pursuance of this mandate, the Right of Children to Free and Compulsory Education Act 2009 (RTE Act) was passed by Parliament, which required all schools, including private unaided schools, to set aside 25 per cent of their seats for children belonging to ‘disadvantaged groups’ and ‘weaker sections’.⁹² The constitutional validity of the RTE Act (except its application to unaided minority institutions) was first upheld by a three-judge bench in *Society for Unaided Private Schools of Rajasthan*.⁹³ Article 15(5) and the RTE Act (except its application to *all* minority institutions) were both upheld in *Pramati Educational and Cultural Trust*.⁹⁴

The importance given to education at all stages in *Mohini Jain* as part of Article 21 is first restricted to primary education in *Unni Krishnan*. The Court articulates this right as foundational for our polity, but then finds an exception

for unaided minority institutions in *Society for Unaided Private Schools of Rajasthan*. This is further diluted in *Pramati Educational and Cultural Trust*, when the exception is then extended to all minority institutions. Once again, the Court finds itself without any tools for balancing the interests under Article 21 with minority rights in Article 30. Instead, we are left with a bald assertion that enforcing the RTE Act on minority institutions would abrogate their Article 30 rights.

2. Right to Health

The content of the right to health under Article 21 has been largely understood in two ways—first, as access to medical facilities and secondly, as the right to a healthy life. In *Parmanand Katara*,⁹⁵ the SC ruled that Article 21 imposed an obligation on all medical professionals to treat emergency cases without any delay. The Court did not explore any constitutional basis for imposing such an obligation and neither did it clarify the extent to which these emergency services were to be made available. In *Paschim Banga Khet Mazdoor Samity*,⁹⁶ the SC held that the non-availability of medical facilities is a violation of Article 21, ruling that the State had an obligation to provide medical facilities and that financial constraints are constitutionally unacceptable reasons in such a situation. The Court also issued guidelines to be followed while enforcing this right, but the Court was once again not very forthcoming about the content of such a right. Of course, the institutional capability of the Court to design such a right and provide a workable framework taking into account financial and infrastructural provisions needs to be closely examined.

In a more specific context in terms of access to medicines and treatment, the SC in *Sahara House*⁹⁷ issued an order stating that universal access must be provided to second-line anti-retroviral therapy for treating AIDS. Here, the Court is absolutely clear that the access to medicines and treatment is immediate and without exception. In *Social Jurists*,⁹⁸ the Court ruled that obligations of private hospitals to provide access to medical facilities to the poor meant providing holistic access to health care facilities in these hospitals and not merely setting aside of beds.

3. Right to Shelter and Housing

The right to housing is an area where the SC adopts a conservative approach in comparison to other socioeconomic rights,⁹⁹ and the Court is clearly reluctant to use the fully fledged rhetoric around dignity to design immediately realisable remedies. Though there is constant reiteration of the impact homelessness has on dignity, the Court is satisfied to defer to the executive on providing the evictees with alternative accommodation, if at all. This is evident early on in *Olga Tellis*,¹⁰⁰ where the Court, while recognising the right to livelihood in Article 21 in very strong terms and providing for procedural safeguards in terms of a hearing, declined to uphold a right to resettlement before eviction. A similar ruling appears in *Ahmedabad Municipal Corporation v Nawab Khan Gulab Khan*.¹⁰¹ It is a curious judgment because on the one hand the Court cites the decisions in *Chameli Singh*,¹⁰² *Shantistar Builders*,¹⁰³ and *PG Gupta*¹⁰⁴ to reiterate the importance of livelihood and shelter in ensuring a life with dignity, but on the other couches the problem of unauthorised encroachments in the framework of ‘unhygienic ecology’, ‘traffic hazards’, and ‘risks to lives of pedestrians’.¹⁰⁵ The Court is unwilling to intervene in the schemes of the competent authority, citing concerns of budgetary allocation and also distances itself from evolving any general system of resettlement before eviction, citing the apprehension that doing so would encourage people to encroach upon public property and abuse the judicial process.¹⁰⁶ The housing and shelter cases present a strange internal dichotomy where the Court is eager to engage in rhetoric about the dignity harms caused by homelessness, but at the same time is unwilling to structure any meaningful remedy to ensure protection from the marginalising impact of homelessness.

4. The Right to Food (Security)

The right to food is another example of a judicially recognised and enforced right being converted into a statutory right. In *People’s Union for Civil Liberties*,¹⁰⁷ the petitioners argued that the Government of Rajasthan failed to take measures to address scarcity of food by providing grains at subsidised prices to eligible persons. The first set of detailed orders started from November 2001, where the SC essentially converted a series of government schemes into

constitutional guarantees under Article 21. In subsequent orders,¹⁰⁸ the Court went beyond effective access to foodgrains and issued orders on larger systemic issues affecting hunger and starvation by making modifications to such schemes. The Court unpacked the contents of the right in significant detail, something that it has failed to do in the context of other socioeconomic rights. It is clear from these orders that the Court was in the process of developing a robust food security regime that accounted for various structural factors, rather than just ensuring that people received foodgrains.

This approach towards food security has unfortunately been abandoned in the National Food Security Act 2013, where the emphasis is on just giving foodgrains to the poor at highly subsidised rates. The Act has been rightly criticised for concentrating only on food entitlements and ignoring integral aspects of food security such as the non-food elements of nutrition, security of small farmers, protection of livelihoods, control of resources by people, *etc.*

VII. ENVIRONMENTAL JURISPRUDENCE AND ARTICLE 21

In the matter of environment cases, the right to life has been read by the courts in two ways—first, a right to a clean environment has been read to be implicit in Article 21,¹⁰⁹ and secondly, the concept of ‘sustainable development’ has been firmly recognised through a combined reading of Article 21 along with provisions of the Constitution, statutory obligations, and international instruments.¹¹⁰ The usual practice of the courts has been to enforce environmental statutory obligations of the State, and also award compensation for rights infringement.

In *Indian Council for Enviro-Legal Action*, the Court held that the failure of authorities to carry out their statutory duty to regulate pollution of soil and underground water constituted violation of the right to life of affected persons.¹¹¹ In the *Oleum Gas Leak* case, the Court recognised the ‘polluter pays principle’ and established the principle of absolute liability of enterprises that engaged in hazardous or inherently dangerous activity.¹¹²

In *Vellore Citizens’ Welfare Forum*, the Court unpacked the concept of sustainable development, reading Article 21 together with the DPSPs in Articles 47, 48A, the fundamental duty enumerated in 51A(g), as well as various environmental legislation to hold that the ‘precautionary principle’ and the ‘polluter pays principle’ were two facets of sustainable development.¹¹³ In *MC*

Mehta v Kamal Nath, the Court expanded the principle of sustainable development to include the 'public trust doctrine', which enjoins the State to act as a trustee of the natural resources meant for public use.¹¹⁴

The Court has held sustainable development to be a balancing concept between ecology and development.¹¹⁵ Where an imbalance is alleged, the Court would have to assess rival claims on the basis of scientific and technical reports and with reference to the environment regulations. This necessarily involves taking executive decisions and legislative policymaking through the method of judicial review, and the SC has adopted this activist approach numerous times.¹¹⁶ For instance, in *Vedanta*,¹¹⁷ the Court revoked the permission of a controversial mining company to mine bauxite in the Niyamgiri Hills, citing the lack of a definite fillip to local jobs as well as the low credibility of the mining company as prominent reasons for refusal of permission. It is to be noted that the company had otherwise obtained all requisite clearances.

However, a completely different approach has been on display by the Court in cases relating to development projects. Here, the SC's approach has been of non-interference on the ground that the issues raised in such cases require technical expertise and involve legislative policymaking and as such, are out of the purview of the Court.¹¹⁸ In cases concerning the Tehri Hydroelectric Project, Konkan Railways, or the Sardar Sarovar Dam, judicial restraint was advocated by an appeal to the ideal of separation of powers.¹¹⁹ In *Narmada Bachao Andolan*,¹²⁰ the SC declined to examine the environmental impact of the dam and restricted the petition to the matter of rehabilitation.¹²¹

These cases illustrate that the Court does not regard 'separation of powers' as an ideal to uphold consistently. One explanation is that it is easier to make a prima facie case for the environment based on facts and reports than it is to decide between competing claims of national interest and ecological sustenance.¹²² But that can hardly account for the courts' active promotion of infrastructure and development projects where the ecological stakes enter the courtroom already diminished by a development rhetoric that pervades globalising India.

It is suggested that much confusion arises from a lack of coherence on sustainable development and the constitutional contour given to it. Which interests could be fed into its matrix and what weights shall be attached to these interests? A framework that sets no normative limits on the extent of ecology preservation or that of development compounds the risks on the former.¹²³ Moreover, an incomplete articulation of the principles within sustainable

development makes other rights susceptible to perceived development interests. A judicial engagement with these questions could possibly transform ‘sustainable development’ into a tool of immense objective application.

VIII. EVALUATING THE JUDICIAL DISCOURSE

Before reflecting on the jurisprudence around Article 21, there are larger structural issues with the development of ‘right to life and personal liberty’ jurisprudence that need to be addressed.

1. Restriction and Deprivation: The Burden on the State

As is evident from the discussion of specific rights, the ‘right to life and personal liberty’ now captures within it a very wide gamut of rights. How are we to conceptually understand these rights in terms of the claims made by persons and the burden the State must discharge to justify infringement or a violation in this context? Do all these rights identified and developed under the Article 21 occupy the same constitutional significance and position? Essential to this discussion is a point that has received scant attention in the interpretation of Article 21, and it concerns the interpretation of the word ‘deprived’. This issue finds place in the opinions rendered in *Gopalan*, but is largely lost thereafter. This strand of the discussion holds significant potential to provide structural and substantive coherence to the meaning of ‘right to life and personal liberty’. While Article 19 permits reasonable ‘restrictions’, the question that arises is whether there is a difference between a right being ‘deprived’ and a right being ‘restricted’. Are we to treat all kinds of impact on Article 21 arising from State action in the same way and subject them to the same level of scrutiny?

The burden on the State should vary with the extent of the infringement, depending on whether it is a ‘restriction’ or a ‘deprivation’. However, the judicial development of Article 21 so far has very little to offer on this. The problem that arises with not undertaking that exercise is that we end up with treating all infringements, irrespective of their extent, alike and subjecting the State to the same burden across the board.

2. Hierarchy of Rights?

Given the sheer breadth of rights being read into Article 21, it is evident that the same level of justification for infringement by the State for all rights recognised by the Court end up being problematic. Das J's opinion in *Gopalan* engages with the idea of a hierarchy of rights. For Das J, at the very top of this hierarchy falls the right to life, which means the right to not have one's life taken except in accordance with law. Then comes the right to the freedom of the person, the right against restraint or coercion of the physical body except according to law. These are the primary rights attached to a person, after which come the auxiliary rights that are attributes of the freedom of the person and are also attached to the person, including, but not limited to, Article 19 rights. Even within the auxiliary rights, Das J seems to accept the existence of a hierarchy where Article 19 rights would fall above the other auxiliary rights since they are more fundamental.

One may not entirely agree with Das J's conceptualisation, particularly on the point that it has no place for socioeconomic rights. But the point to be discussed is whether all rights being recognised and enforced under Article 21 must be protected to the same extent in terms of the burden to be discharged by the State.¹²⁴ At the risk of simplifying the issues, the question is whether the 'right to sleep' deserves the same level of protection as the right against torture. This discussion is important because one gets the sense that the expansion of the scope of Article 21 has resulted in a diluted standard of review for what we might consider core Article 21 rights (whatever they might be). Judicial deference in anti-terror law cases is one such worrying trend. In cases examining the validity of TADA and POTA, the mere invocation of the national security justification seems to be sufficient to meet the burden of the State. Even though the level of protection afforded to Article 21 rights post-*Maneka* is certainly higher than the *Gopalan* phase, one questions the appropriateness of the 'reasonableness' standard for the wide range of rights that Article 21 currently covers.

3. Developing Content of 'Right to Life and Personal Liberty'

The use of dignity and the 'right-to-life-is-more-than-mere-animal-existence' framework have not been used in a manner to lend any sense of coherence to the content of rights in Article 21. When these frameworks have been used to recognise rights, it has largely been a bald assertion on a case-by-case basis,

rather than any attempt to justify the recognition of a right by placing it in any normative framework. The problem with the current approach of the Court is that it leaves the Court with absolute discretion on which rights claims it will recognise, or rather more importantly, which ones it will not. And this issue manifests itself across the different segments discussed above. We see a total absence of the dignity discussion in anti-terror cases, despite foundational infringement of criminal justice protections. The Court's arguments, while upholding the validity of criminalising the attempt to suicide and overruling the Delhi High Court's judgment reading down Section 377, are also strong examples of the problems facing the dignity discourse under Article 21. In essence, it breaks down into whatever any judge says it is. Further, the selective application of the dignity framework in the socioeconomic rights discourse is also apparent. In cases concerning the right to housing and shelter of slum and pavement dwellers, the Court's use of dignity does not translate into any meaningful recognition of their rights, much less any protection. It also finds a curious manifestation in the Article 21 cases relating to the environment. In the context of big dams and infrastructure projects, the Court has been unable to achieve consistency on the weight it will assign to the impact on the project-affected groups. The very use of dignity in terms of when it is invoked, and also the manner in which it is used, does not present a picture of principled adjudication.

This use of dignity by the courts is not peculiar to India. Internationally, 'dignity' has been fraught with a conceptual open-endedness that has reduced it to a 'rhetorical flourish', contributing to judicial confusion.¹²⁵ A comparative analysis of the use of dignity with respect to South Africa and Canada suggests competing understandings of 'dignity'. On the one hand, it is articulated as respecting individual autonomy, while on the other, it has been understood as mandating protection of people's needs.¹²⁶ However, one must ask whether its nebulous conception must necessarily hinder a fundamental commitment to respecting human dignity. As McCrudden argues, 'dignity' offers a universally agreeable principle to recognise the worth of all persons and can thus be seen as a 'place holder' for furthering human rights.¹²⁷ To that extent the normative commitment of courts in India towards dignity has at the very least enabled the expansion of the 'right to life and personal liberty'. However, the problem persists in the absence of a coherent understanding of 'dignity' to give content to Article 21 rights.

IX. CONCLUSION

I do believe that it is an important project to revisit the impact of *Maneka* on Article 21. For far too long now we have been viewing the importance of *Maneka* for Article 21 in the light of the ruling in *Gopalan*. Though the argument is obviously not to return to the *Gopalan* position, the call is for us to interrogate whether *Maneka* goes far enough to provide effective protection to the content of right to life and personal liberty. In its very conception, the ‘reasonableness’ review is not ideal to protect the core of Article 21 rights. The task of identifying the core, in terms of civil-political, socioeconomic, and environmental rights, is an important one that requires clear normative foundations. The SC has regrettably not developed the normative foundations of Article 21, be it the use of dignity or the repeated invoking of the *Munn v Illinois* extract about life being more than animal existence, towards recognising penumbral rights. The process of deciding whether an action or inaction of the State amounts to a violation of the right to life and personal liberty increasingly seems to resemble Potter Stewart J’s ‘I-know-it-when-I-see-it’ test for obscenity.

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¹ *AK Gopalan v State of Madras* AIR 1950 SC 27.

² *AK Gopalan* ([n 1](#)) [58].

³ *AK Gopalan* ([n 1](#)) [14].

⁴ *Rustom Cavasjee Cooper v Union of India* (1970) 1 SCC 248.

⁵ *Rustom Cavasjee Cooper* ([n 4](#)) [52].

⁶ *Maneka Gandhi v Union of India* (1978) 1 SCC 248.

⁷ PK Tripathi, ‘The Fiasco of Overruling AK Gopalan’ AIR 1990 (Jour) 1, 6.

⁸ B Errabbi, ‘The Right to Personal Liberty in India: Gopalan Revisited with a Difference’ in MP Singh (ed) *Comparative Constitutional Law* (Eastern Book Company 2011).

⁹ (1976) 2 SCC 521.

¹⁰ *Kharak Singh v State of Uttar Pradesh* AIR 1963 SC 1295.

¹¹ *Gobind v State of Madhya Pradesh* (1975) 2 SCC 148.

¹² *Francis Coralie Mullin v Administrator, Union Territory of Delhi* (1981) 1 SCC 608.

¹³ *Kharak Singh* ([n 10](#)) [15].

¹⁴ *Kharak Singh* ([n 10](#)) [13].

¹⁵ 94 US 113 (1877).

¹⁶ *Kharak Singh* ([n 10](#)) [13].

¹⁷ *Kharak Singh* ([n 10](#)) [13].

¹⁸ *Maneka Gandhi* ([n 6](#)) [29].

- ¹⁹ Francis Coralie Mullin ([n 12](#)).
- ²⁰ Francis Coralie Mullin ([n 12](#)) [8].
- ²¹ *People's Union for Democratic Rights v Union of India* (1982) 3 SCC 235.
- ²² *Olga Tellis v Bombay Municipal Corporation* (1985) 3 SCC 545.
- ²³ *Bandhua Mukti Morcha v Union of India* (1984) 3 SCC 161.
- ²⁴ *Mohini Jain v State of Karnataka* (1992) 3 SCC 666.
- ²⁵ *Sunil Batra v Delhi Administration* (1978) 4 SCC 494.
- ²⁶ *Prem Shankar Shukla v Delhi Administration* (1980) 3 SCC 526.
- ²⁷ *DK Basu v State of West Bengal* (1997) 1 SCC 416.
- ²⁸ Prohibition of Employment as Manual Scavengers and Their Rehabilitation Act 2013.
- ²⁹ *Safai Karamchari Andolan v Union of India* 2014 SCC OnLine SC 262.
- ³⁰ *Sunil Batra (II) v Delhi Administration* (1980) 3 SCC 488.
- ³¹ *Sunil Batra* ([n 25](#)) [197-A].
- ³² *Prem Shankar Shukla* ([n 26](#)) [25].
- ³³ *State of Maharashtra v Ravikant S Patil* (1991) 2 SCC 373 [3].
- ³⁴ See *Khatrri (IV) v State of Bihar* (1981) 2 SCC 493; *Khatrri (II) v State of Bihar* (1981) 1 SCC 627; *People's Union for Democratic Rights v Police Commissioner, Delhi Police Headquarters* (1989) 4 SCC 730; *Nilabati Behera v State of Orissa* (1993) 2 SCC 746.
- ³⁵ *Dr Upendra Baxi v State of Uttar Pradesh* (1986) 4 SCC 106.
- ³⁶ *Hussainara Khatoon (I) v Home Secretary, State of Bihar* (1980) 1 SCC 81; *Hussainara Khatoon (II) v State of Bihar* (1980) 1 SCC 91; *Hussainara Khatoon (III) v State of Bihar* (1980) 1 SCC 93; *Hussainara Khatoon (IV) v State of Bihar* (1980) 1 SCC 98.
- ³⁷ *Hussainara Khatoon (IV)* ([n 36](#)).
- ³⁸ *Hussainara Khatoon (IV)* ([n 36](#)) [7].
- ³⁹ *Khatrri (II)* ([n 34](#)).
- ⁴⁰ *Suk Das v Union Territory of Arunachal Pradesh* (1986) 2 SCC 401.
- ⁴¹ *Suk Das* ([n 40](#)) [6].
- ⁴² *Madhav Hayawadanrao Hoskot v State of Maharashtra* (1978) 3 SCC 544.
- ⁴³ *Nandini Satpathy v PL Dani* (1978) 2 SCC 424.
- ⁴⁴ *Sheela Barse v State of Maharashtra* (1983) 2 SCC 96.
- ⁴⁵ Mohammad Ghouse, 'State Lawlessness and the Constitution: A Study of Lock-up Deaths' in MP Singh (ed) *Comparative Constitutional Law* (Eastern Book Company 2011) 488.
- ⁴⁶ Legal Services Authorities Act 1987, s 12.
- ⁴⁷ *Jagmohan Singh v State of Uttar Pradesh* (1973) 1 SCC 20.
- ⁴⁸ The majority cited Constitution of India 1950, arts 72(1)(c), 72(3), and 134, as well as art 21 itself. *Jagmohan Singh* ([n 47](#)) [12].
- ⁴⁹ 408 US 238 (1972).
- ⁵⁰ *Bachan Singh v State of Punjab* (1980) 2 SCC 684.
- ⁵¹ *Ravji v State of Rajasthan* (1996) 2 SCC 175.
- ⁵² *Santosh Kumar Satishbhushan Bariyar v State of Maharashtra* (2009) 6 SCC 498.
- ⁵³ *Sangeet v State of Haryana* (2013) 2 SCC 452.

⁵⁴ Prabha Sridevan, 'Take these men off death row' *The Hindu* (New Delhi, 6 July 2012) <<http://www.thehindu.com/opinion/lead/take-these-men-off-death-row/article3606856.ece>>, accessed November 2015.

⁵⁵ *Deena v Union of India* (1983) 4 SCC 645.

⁵⁶ *Deena* ([n 55](#)) [80].

⁵⁷ *Shatrughan Chauhan v Union of India* (2014) 3 SCC 1.

⁵⁸ *Shatrughan Chauhan* ([n 57](#)) [61].

⁵⁹ *Shatrughan Chauhan* ([n 57](#)) [241].

⁶⁰ *Devendar Pal Singh Bhullar v State (NCT of Delhi)* (2013) 6 SCC 195.

⁶¹ *P Rathinam v Union of India* (1994) 3 SCC 394.

⁶² *Gian Kaur v State of Punjab* (1996) 2 SCC 648.

⁶³ *P Rathinam* ([n 61](#)) [31].

⁶⁴ *Gian Kaur* ([n 62](#)) [22].

⁶⁵ *Aruna Ramachandra Shanbaug v Union of India* (2011) 4 SCC 454.

⁶⁶ Armed Forces Special Powers Act 1958, ss 3, 4(c), 4(a).

⁶⁷ Terrorist and Disruptive Activities Act 1987, ss 20(4)(b), 20(8), 15(1), 16(2).

⁶⁸ *Naga People's Movement of Human Rights v Union of India* (1998) 2 SCC 109.

⁶⁹ *Kartar Singh v State of Punjab* (1994) 3 SCC 569.

⁷⁰ *People's Union for Civil Liberties v Union of India* (2004) 9 SCC 580.

⁷¹ For an opposing perspective, refer to Richard Posner, *Not a Suicide Pact: The Constitution in a Time of National Emergency* (Oxford University Press 2006).

⁷² Michel Rosenfeld, 'Judicial Balancing in Times of Stress: A Comparative Constitutional Perspective' in Andrea Bianchi and Alexis Keller (eds) *Counterterrorism: Democracy's Challenge* (Hart Publishing 2008) 357–94.

⁷³ For a comparative perspective on the levels of responses to counterterrorism measures offered by national courts through judicial review, refer to Eyal Benvenisti, 'United We Stand: National Courts Reviewing Counterterrorism Measures' in Andrea Bianchi and Alexis Keller (eds) *Counterterrorism: Democracy's Challenge* (Hart Publishing 2008) 251–76.

⁷⁴ *Naga People's Movement of Human Rights* ([n 68](#)) [46].

⁷⁵ *Kartar Singh* ([n 69](#)) [258], [259].

⁷⁶ *Kartar Singh* ([n 69](#)) [397].

⁷⁷ (2009) 160 DLT 277.

⁷⁸ (2014) 1 SCC 1.

⁷⁹ Vikram Raghavan, 'Navigating the Noteworthy and Nebulous in Naz Foundation' (2009) 2 NUJS Law Review 397, 398, 403

⁸⁰ See *Naz Foundation* ([n 77](#)) [26], [48].

⁸¹ *Kharak Singh* ([n 10](#)); *Gobind* ([n 11](#)); *Mr X v Hospital Z* (1998) 8 SCC 296; *Suchita Srivastava v Chandigarh Administration* (2009) 9 SCC 1.

⁸² *Francis Coralie Mullin* ([n 12](#)).

⁸³ (2014) 5 SCC 438.

⁸⁴ *National Legal Services Authority* ([n 83](#)) [73].

⁸⁵ *National Legal Services Authority* ([n 83](#)) [75].

⁸⁶ *National Legal Services Authority* ([n 83](#)) [74].

- ⁸⁷ Mohini Jain ([n 24](#)).
- ⁸⁸ Mohini Jain ([n 24](#)) [14].
- ⁸⁹ *Unni Krishnan v State of Andhra Pradesh* (1993) 1 SCC 645.
- ⁹⁰ *Unni Krishnan* ([n 89](#)) [54].
- ⁹¹ *Unni Krishnan* ([n 89](#)) [171].
- ⁹² Right of Children to Free and Compulsory Education Act 2009, s 12.
- ⁹³ *Society for Unaided Private Schools of Rajasthan v Union of India* (2012) 6 SCC 1.
- ⁹⁴ *Pramati Educational and Cultural Trust v Union of India* (2014) 8 SCC 1.
- ⁹⁵ *Parmanand Katara v Union of India* (1989) 4 SCC 286.
- ⁹⁶ *Paschim Banga Khet Mazdoor Samity v State of West Bengal* (1996) 4 SCC 37.
- ⁹⁷ *Sahara House v Union of India*, Writ Petition (C) 535 of 1998, order dated 16 December 2010.
- ⁹⁸ *Social Jurists v Govt of NCT of Delhi* (2007) 140 DLT 698.
- ⁹⁹ For international and comparative law perspectives on the right to housing, see Jessie Hohmann, *The Right to Housing: Law, Concepts, Possibilities* (Hart Publishing 2013).
- ¹⁰⁰ *Olga Tellis* ([n 22](#)).
- ¹⁰¹ (1997) 11 SCC 121.
- ¹⁰² *Chameli Singh v State of Uttar Pradesh* (1996) 2 SCC 549.
- ¹⁰³ *Shantistar Builders v Narayan Khimalal Totame* (1990) 1 SCC 520.
- ¹⁰⁴ *PG Gupta v State of Gujarat* (1995) Supp (2) SCC 182.
- ¹⁰⁵ See Usha Ramanathan, 'Demolition Drive' (2005) 40(23) *Economic and Political Weekly* 2908.
- ¹⁰⁶ *Ahmedabad Municipal Corporation v Nawab Khan Gulab Khan* (1997) 11 SCC 121 [32].
- ¹⁰⁷ *People's Union for Civil Liberties v Union of India*, Writ Petition (C) 196 of 2001, order dated 28 November 2001.
- ¹⁰⁸ *Right to Food Campaign* <<http://www.righttofoodindia.org/orders/interimorders.html>>, accessed November 2015.
- ¹⁰⁹ *Virender Gaur v State of Haryana* (1995) 2 SCC 577; *Re Noise Pollution (V)* (2005) 5 SCC 733.
- ¹¹⁰ *Indian Council for Enviro-Legal Action v Union of India* (1996) 3 SCC 212; *Vellore Citizens' Welfare Forum v Union of India* (1996) 5 SCC 647; *MC Mehta v Kamal Nath* (1997) 1 SCC 388.
- ¹¹¹ *Indian Council for Enviro-Legal Action* ([n 110](#)) [54].
- ¹¹² *MC Mehta v Union of India* (1987) 1 SCC 395.
- ¹¹³ *Vellore Citizens' Welfare Forum* ([n 110](#)) [13]–[14].
- ¹¹⁴ *MC Mehta* ([n 110](#)) [34].
- ¹¹⁵ 'The traditional concept that development and ecology are opposed to each other is no longer acceptable. Sustainable Development is the answer.' *Vellore Citizens' Welfare Forum* ([n 110](#)) [10].
- ¹¹⁶ *State of Himachal Pradesh v Ganesh Wood Products* (1995) 6 SCC 363; *S Jagannath v Union of India* (1997) 2 SCC 87; *MC Mehta v Union of India* (1997) 2 SCC 353; *MC Mehta v Union of India* (1998) 6 SCC 63; *Intellectuals Forum v State of Andhra Pradesh* (2006) 3 SCC 549; *TN Godavarman Thirumulpad v Union of India* (2008) 2 SCC 222; Videh Upadhyay, 'Changing Judicial Power: Courts on Infrastructure Projects and Environment' (2000) 35(43/44) *Economic and Political Weekly* 3789.
- ¹¹⁷ *TN Godavarman Thirumulpad* ([n 116](#)).
- ¹¹⁸ Nivedita Menon, 'Environment and the Will to Rule' in Mayur Suresh and Siddharth Narrain (eds) *The Shifting Scales of Justice* (Orient Blackswan 2014).

¹¹⁹ Upadhyay ([n 116](#)).

¹²⁰ *Narmada Bachao Andolan v Union of India* (2000) 10 SCC 664.

¹²¹ ‘In respect of public projects and policies which are initiated by the Government the Courts should not become an approval authority. Normally such decisions are taken by the Government after due care and consideration.’ *Narmada Bachao Andolan* ([n 120](#)) [234].

¹²² Upadhyay ([n 116](#)).

¹²³ As Nivedita Menon argues, this is akin to taking a very instrumental view of the environment, where environment is just fodder for development. Menon ([n 118](#)).

¹²⁴ The idea of a pyramidal structure within Article 21 has found recent traction with the SC in *Mohd Arif v The Registrar, Supreme Court of India* Writ Petition (Crl) No 77/2014 [36] (Nariman J).

¹²⁵ Conor O’Mahony, ‘There is No Such Thing as a Right to Dignity’ (2012) 10 International Journal of Constitutional Law 551–52.

¹²⁶ Rory O’Connell, ‘The Role of Dignity in Equality Law: Lessons from Canada and South Africa’ (2008) 6 International Journal of Constitutional Law 267, 285.

¹²⁷ Christopher McCrudden, ‘Human Dignity and Judicial Interpretation of Human Rights’ (2008) 19 European Journal of International Law 655.

CHAPTER 43

DUE PROCESS

ABHINAV CHANDRACHUD

I. INTRODUCTION

IN 1947, Justice Felix Frankfurter of the US Supreme Court advised one of the chief architects of India's Constitution, Sir Benegal Narsing Rau,¹ to delete the phrase 'due process of law' from the draft constitution.² The Fifth and Fourteenth Amendments to the US Constitution provide that the government cannot deprive a person of 'life, liberty, or property, without due process of law ...' After the American Civil War, the Due Process Clause of the newly enacted Fourteenth Amendment went on to acquire a complex meaning, and in the early twentieth century leading up to the Great Depression, American courts had used the clause to invalidate social welfare legislation.³ Following Rau's meeting with Frankfurter, the term 'due process of law' was deleted from the text of India's draft constitution, and replaced with the words 'procedure established by law'. Article 21 of India's Constitution, which came into force in 1950,⁴ reads, to this day: 'No person shall be deprived of his life or personal liberty except according to procedure established by law.'

Fast-forward sixty-two years. In a case decided in 2012, a bench of two judges of the Supreme Court of India opined that the term 'due process of law' was 'contained in Article 21 of the Constitution'.⁵ Despite the conscious deletion of the phrase 'due process of law' from India's Constitution, the Supreme Court of India has, over the years, disregarded the original intent of the framers of the Constitution, and adopted some versions of the US doctrines of 'procedural due process' and 'substantive due process' into Indian constitutional law. Yet, the precise contours of these doctrines in India are unclear, and the phrase 'due process of law' in India is itself quite confusing.⁶

This chapter has two descriptive objectives: first, to briefly outline the history of how the term 'due process of law' was gradually read into India's Constitution, and secondly, to define the contours of doctrines like procedural due process and substantive due process under Indian constitutional law today. In the light of these descriptive findings, this chapter will then conclude by

discussing what the Supreme Court's treatment of Article 21 of the Constitution says about the doctrine of original intent in Indian constitutional law.

It is one of the central arguments of this chapter that there are three kinds of due process presently seen in Indian constitutional law. The first kind, referred to here as 'pure form' due process, was what the framers of India's Constitution intended, namely, that a person's life and personal liberty *can* be deprived so long as the deprivation proceeds under a validly enacted law—a restraint on the executive, but not the legislative, branch of government. The second type, or 'procedural due process', was adopted in India in 1978, by arguably one of the best-known decisions of the Supreme Court, *Maneka Gandhi v Union of India*.⁷ Procedural due process requires that a person's life and personal liberty *can* be deprived so long as the procedure by which the deprivation takes place is 'fair, just and reasonable'. The third type, or 'substantive due process', came into being in the 1980s, and under it, Indian constitutional courts can examine whether substantive provisions of law are themselves 'fair, just and reasonable'.⁸

Consider the following hypothetical. Assume that India's Parliament enacts a law called the Criminal Laws Amendment Act 2014 (the 'Act'). The Act has two sections. Section 1 of the Act amends the Indian Penal Code, inserting a provision into it that makes it a crime to drink tea in the afternoon, punishable by a sentence of imprisonment.⁹ Section 2 of the Act amends the Criminal Procedure Code and provides that anyone tried for the offence of drinking tea in the afternoon will be denied the right to be represented in court by legal counsel. In short, section 1 is a substantive law, while section 2 is a procedural law.¹⁰ The question is: does this law violate the due process clause of India's Constitution?

This question has three different answers, which can be arrived at by asking three different questions. First, was the Act validly enacted? That is, were all the procedures prescribed by the Constitution for the enactment of a law followed? If so, the law is valid according to a pure textual reading of Article 21 of the Indian Constitution, which only requires that a procedure be 'established by law' in order for a person's life or personal liberty to be deprived. This will be referred to in this chapter as 'pure form' due process. Secondly, is the law procedurally fair? In other words, is section 2 of the Act, which deprives anyone who is being tried under section 1 of the Act of the right to be represented by legal counsel in court, fair? If not, the law is invalid. This is a 'procedural due process' question. Thirdly, is the substantive law—that is, section 1 of the Act, which makes it an offence to drink tea in the afternoon—itself fair? Even if the Act is validly enacted, and even if section 2 is fair, a court that asks itself whether section 1 of the Act is fair engages in a 'substantive due process'

question.

Section II of this chapter briefly outlines the history of the enactment of Article 21 of the Constitution. Section III discusses how the doctrine of procedural due process became a part of Indian constitutional law, by discussing two seminal constitutional cases: the *Gopalan* case¹¹ and the *Maneka Gandhi* case.¹² Section IV discusses the doctrine of substantive due process under Indian constitutional law.

II. THE FRAMING OF INDIA'S CONSTITUTION

The office of the Constituent Assembly of India was set up on 1 July 1946, over a year before India became independent, with Sir Benegal Rau in charge as constitutional advisor.¹³ In notes written in September 1946 and April 1947, Rau expressed doubts about whether the American due process clause should be introduced into India's proposed constitution. His fear was that the clause had given American courts far too much discretion over legislation, and that it likewise might empower Indian courts to stand in the way of 'beneficient social legislation'.¹⁴

In March 1947, a draft constitution prepared by the chairman of the Drafting Committee of the Constituent Assembly of India, Dr BR Ambedkar, contained a due process clause that was identical to the Fourteenth Amendment of the US Constitution. It read: 'nor shall any State deprive any person of life, liberty and property without due process of law ...'¹⁵ In the US, the 'life, liberty and property' formulation owed its origins to the seventeenth-century British political philosopher John Locke, by whose teachings the framers of the US Constitution were deeply influenced.¹⁶ However, at the time India's Constitution was being drafted, the dreaded '*Lochner* era', where the US Supreme Court used the due process clause of the Constitution to invalidate social welfare legislation on a theory of the liberty of contract, had only recently come to an end. Over the coming months, three substantial changes were made to Ambedkar's clause, largely because the framers of India's Constitution were worried that the due process clause would give too much power to courts, especially to invalidate social welfare legislation.

First, in April 1947, the right to property was deleted from the due process clause of India's draft constitution.¹⁷ This was done because the framers of the Constitution were planning a large-scale overhaul of the property regime in

India, by redistributing land owned by colonial-era landlords to tenants. It was feared that the right to property in the due process clause would enable courts to interfere with this reform, in particular.¹⁸

Secondly, Sir Benegal Rau qualified the term 'liberty' in the due process clause of the draft constitution with the word 'personal'. He did this because he feared that courts would interpret the term 'liberty' too broadly. For example, he suggested that even price control legislation could be interpreted by a court as interfering with the liberty of contract between buyer and seller.¹⁹ Once again, this fear sprung from the recently concluded '*Lochner* era' on the US Supreme Court. In the Court's most famous case during that time, *Lochner v New York*,²⁰ the Court invalidated a New York statute which prohibited bakers from making their employees work for more than sixty hours per week or more than ten hours in any one day, because the Court believed that the statute interfered with a person's liberty of contract.

Thirdly, the phrase 'due process of law' itself was deleted from the text of the draft constitution. Sometime between October and December 1947, BN Rau met Justice Felix Frankfurter in the US, among other judges. Frankfurter told Rau to delete the phrase 'due process of law' from India's draft constitution because it was 'undemocratic' ('because it gives a few judges the power of vetoing legislation enacted by the representatives of the nation'), and because it imposed an 'unfair burden' on the judiciary.²¹ Frankfurter's advice probably merely served to reinforce Rau's pre-existing fears about the due process clause. Based on Rau's report upon his return, the Drafting Committee deleted the phrase 'due process of law' and replaced it with 'procedure established by law' borrowed from Article 31 of the Japanese Constitution.²² In an article written in the Harvard Law Review a few years later, Frankfurter credited BN Rau with deleting the due process clause from India's Constitution.²³

The deletion of the phrase 'due process of law' caused an uproar in the Constituent Assembly. Numerous amendments were moved by members to reintroduce it. Only Alladi Krishnaswami Ayyar spoke strongly in favour of its deletion.²⁴ Ayyar argued that the words 'due process of law' would 'serve as a great handicap for all social legislation' and give too much discretion to courts, creating 'judicial vagaries in the moulding of law'.²⁵ Even Ambedkar was ambivalent about the deletion of the phrase 'due process of law'. Those who spoke in favour of reintroducing 'due process of law' into India's Constitution argued that the phrase 'procedure established by law' would only give courts the power to engage in what has been described above as 'pure form' due process, but not procedural or substantive due process. Kazi Syed Karimuddin, for

example, said that the clause, as it presently stood, did not permit courts to look into ‘the injustice of a law or into a capricious provision in a law’.²⁶ ‘As soon as the procedure is complied with’, he said, ‘there will be an end to everything and the judges will be only spectators.’²⁷ However, on 13 December 1948, all the proposed amendments to the clause failed, and the phrase ‘due process of law’ was permanently deleted from the text of India’s Constitution.²⁸

As a consequence, Article 21 of the Constitution had three differences from the due process clause of the US Constitution: first, it did not contain the right to property; secondly, it protected ‘personal liberty’, not ‘liberty’ like the US Constitution; and thirdly, the phrase ‘due process of law’ was replaced with the phrase ‘procedure established by law’.

However, as a concession to those who had argued in favour of due process, a new provision was inserted into the Constitution, which protected against arbitrary arrest and detention.²⁹ According to the framers, the new clause, which was to become Article 22 of the Constitution of India, instituted numerous safeguards which were akin to due process rights: for example, those arrested and detained had a right to be informed of the grounds of their arrest, to consult and be defended by a lawyer of their choice, and to be produced before a magistrate within twenty-four hours of the arrest.

III. PROCEDURAL DUE PROCESS

1. The *Gopalan* Era

In the first ‘fundamental rights’³⁰ case which came to the Supreme Court of India, *AK Gopalan v State of Madras*,³¹ the petitioner argued that the Preventive Detention Act 1950 did not provide some of the most important procedural safeguards against arbitrary detention.³² A majority of the judges of the Court rejected the petitioner’s argument that ‘procedure established by law’ meant procedural due process.³³ Five of the Court’s six judges discussed the due process clause in the US Constitution.³⁴ Kania CJ pointed out that Article 21 of the Indian Constitution had modified the American due process clause in the three ways discussed in the previous section.³⁵ Reading ‘procedure established by law’ to mean procedural due process or natural justice was therefore

impermissible. Sastri J wrote that doing so would have the effect of making ‘procedure established by law’ resemble ‘due process of law’, and ‘those “subtle and elusive criteria” implied in that phrase which it was the deliberate purpose of the framers of our Constitution to avoid’.³⁶ ‘[I]t is common knowledge’, wrote Das J, ‘that our Constitution-makers deliberately declined to adopt the uncertain and shifting American doctrine of due process of law ...’³⁷ ‘To try to bring in the American doctrine, in spite of this fact ...’, he continued, ‘will be to stultify the intention of the Constitution as expressed in Article 21.’³⁸

The majority therefore seemed willing to accept the contention that Article 21 did not impose a serious limitation on the legislative branch of the government.³⁹ Once a ‘procedure’ was ‘established by law’—that is, once a law was validly enacted by the legislative branch—Article 21 could not be said to have been infringed. In short, the *Gopalan* Court found that Article 21 only imposed ‘pure form’ due process limitations on the other branches of government.⁴⁰

Only one judge, Fazl Ali J, dissented on the question of whether ‘procedure established by law’ meant procedural due process.⁴¹ Fazl Ali pointed out that the phrase ‘procedure established by law’ was borrowed from the Japanese Constitution, which had been drafted ‘wholly under American influence’. Since the prevalent view in the US at the time, according to Fazl Ali was that the due process clause should be restricted to procedural due process, the words ‘procedure established by law’ in the Japanese Constitution might be said to have reflected that view.⁴² He noticed that the word ‘law’ was common to both the phrases ‘due process of law’ and ‘procedure established by law’, and since, according to Fazl Ali, American courts had interpreted the term ‘law’ to mean procedural due process, the phrase ‘procedure established by law’ meant procedural due process.⁴³ In conclusion, Fazl Ali found in his dissent that Article 21 of the Indian Constitution gave everyone a right to be heard before being condemned, and that deprivations of life and personal liberty under Article 21 of the Constitution could only proceed if the aggrieved person was given four procedural safeguards:⁴⁴ (i) a notice; (ii) an opportunity to be heard; (iii) an impartial tribunal; and (iv) an orderly course of procedure.⁴⁵

The majority of the judges in the *Gopalan* case held that Article 21 was both substantive and procedural in its content.⁴⁶ However, by this the judges were not referring to the American doctrines of substantive or procedural due process. The holding was that in order for a person’s life and personal liberty to be deprived by the State, there had to be a validly enacted substantive and procedural law; in other words, that Article 21 did not merely require a validly

enacted procedural law. In short, even the substantive law (not merely the procedural law) that deprives a person of his life or personal liberty must be validly enacted according to Article 21 of the Constitution.

2. The *Maneka Gandhi* Case

The *Gopalan* Court's interpretation of Article 21 of the Constitution was undone in one of the best-known cases of India's constitutional history, *Maneka Gandhi v Union of India*,⁴⁷ decided in 1978. The case was decided by a bench of seven judges, over *Gopalan*'s six.

Like many of the Court's decisions at this time, the *Maneka Gandhi* case was decided by a Court that was desperately trying to regain some of the legitimacy it had lost during the political Emergency of the mid-1970s, when the Court had failed to prevent arbitrary arrests and detentions in the *Habeas Corpus* case.⁴⁸ The lesson the Court learned from that case was that the Constitution did not always have to be interpreted with strict fidelity to its text, or in a manner faithful to the intent of its framers. It was the Constitution itself, after all, drafted by India's founding fathers, which permitted Article 21 to be suspended during an Emergency. By refusing to ignore the text of India's Constitution, and by failing to permit arbitrarily detained prisoners to petition courts for the writ of *habeas corpus* during the Emergency, the Court had failed the country in a significant moment of crisis. In short, the influence of the original intent of the framers of India's Constitution began to erode in the 1970s, as a result of the lessons learned from the Emergency.

The passport of the petitioner in this case had been impounded in the 'public interest', without giving her any reasons. Among other grounds raised before the Court, the petitioner contended that the procedure prescribed by the act was arbitrary and unreasonable, and that the provision therefore fell foul of Article 21 of the Constitution. In the leading majority judgment, Bhagwati J asked a question which had been considered in the *Gopalan* case before:

Does Article 21 merely require that there must be some semblance of procedure, howsoever arbitrary or fanciful, prescribed by law before a person can be deprived of his personal liberty or that the procedure must satisfy certain requisites in the sense that it must be fair and reasonable?⁴⁹

A majority of the judges of the Court found that a procedural law which deprived 'personal liberty' had to be 'fair, just and reasonable, not fanciful, oppressive or arbitrary'⁵⁰—words remarkably reminiscent of the US Supreme

Court's decision in the *Lochner* case.⁵¹ The majority found that before (or after⁵²) taking away a person's right to go abroad (which, according to the Court, was a part of the right to 'personal liberty'), a passport officer had to give the person a hearing.⁵³ The right to be heard before having one's passport impounded was read into the Passports Act, by implication.⁵⁴ In short, where the *Gopalan* Court had held that procedural due process was not included in Article 21, the Court in the *Maneka Gandhi* case held that it was. Since then, any law which deprives a person of her right to life or personal liberty has to comply with the requirements of 'natural justice',⁵⁵ the foremost of which is the requirement of a hearing. Importantly, even if a law meets the requirements of procedural due process, it is still open for a person to challenge it for violating other provisions of the Constitution—for example, Articles 14 or 19.⁵⁶

The *Maneka Gandhi* case is therefore an authority for the proposition that procedural due process is a part of Article 21 of the Constitution.⁵⁷ We have seen in Section III.1 that a majority of the judges in the *Gopalan* case held that Article 21 applied to both procedural and substantive laws. However, the Court's holding in the *Maneka Gandhi* case seemed only to apply to procedural laws. In short, in the hypothetical set out in the introduction to this paper, the framework of the *Maneka Gandhi* case applies only to section 2 of the hypothetical Act, but not to section 1. In other words, it is only the procedural law that deprives the right to life or personal liberty, not the substantive law, which has to satisfy the requirement of being 'fair, just and reasonable'.

IV. SUBSTANTIVE DUE PROCESS

1. Beyond Procedural Fairness

In numerous instances after *Maneka Gandhi*'s case, the Supreme Court of India dealt with cases that could be considered procedural due process cases, involving either an issue of natural justice, or procedural fairness.⁵⁸ For example, in one case, the Court held that a person who was imprisoned, after being convicted of an offence, was entitled to get a copy of the judgment, so that he could file an appeal.⁵⁹ In another case, the Court held that those undergoing criminal trials had the right to a speedy trial;⁶⁰ in other words, that the 'procedure established by law' for the deprivation of life and personal liberty had to be speedy in order to be considered 'fair, just and reasonable'.

One of the most significant procedural due process cases was decided by the Court only a few months after the *Maneka Gandhi* case.⁶¹ The case, *Sunil Batra v Delhi Administration*,⁶² involved a challenge to section 30(2) of the Prisons Act 1894, which provided that a prisoner 'under sentence of death' was to be kept in 'in a cell apart from all other prisoners'. The question was whether this permitted jail authorities to keep death row prisoners in solitary confinement. This case is important because it brings out the distinction between the doctrines of procedural and substantive due process. In criminal law, statutes that define offences and prescribe punishments are considered 'substantive', while others are typically considered 'procedural'.⁶³ Since section 30(2) of the Prisons Act did not impose a punishment, but only dealt with how a person sentenced to death was to be procedurally treated, it was a procedural law, not a substantive law.⁶⁴ As the Court in the *Sunil Batra* case repeatedly pointed out, sections 73 and 74 of the Indian Penal Code contain the substantive punishment of solitary confinement, and the Court in the *Sunil Batra* case was not examining the constitutional validity of these provisions.⁶⁵ Section 30(2) of the Prisons Act was challenged by a convict on death row. Using Article 21 of the Constitution, the Court 'read down' the provision. It was held that a prisoner was only 'under sentence of death' once the entire appellate process had been concluded and the clemency petition was denied.⁶⁶ It was also held that the words of the section—confinement 'in a cell apart from all other prisoners'—did not mean solitary confinement in the first place.⁶⁷ Since the *Sunil Batra* case dealt with a procedural law, not a substantive one, it was a procedural due process case, not a substantive due process case.

In a case decided a few years later, however, the Supreme Court applied a test

of constitutional analysis that could be equated with the doctrine of substantive due process. This was in the case of *Bachan Singh v State of Punjab*,⁶⁸ where section 302 of the Indian Penal Code, a substantive provision of criminal law that permits a court to impose the sentence of death for the offence of murder, was challenged as being unconstitutional. Since section 302 of the Indian Penal Code was a substantive law, the Court could have held that since Article 21 only applied to procedural laws, the Court was precluded from scrutinising the constitutionality of the provision under Article 21 of the Constitution. That is not what happened. Instead, the majority of the judges of the Court tested section 302 of the Indian Penal Code on the touchstone of Article 21 of the Constitution,⁶⁹ and found that it was neither substantively nor procedurally unconstitutional—that is, that it was neither unconstitutional *per se* (substantively) nor because of the manner of its execution (procedurally):

In view of the aforesaid constitutional postulates, by no stretch of imagination can it be said that death penalty under Section 302, Penal Code, *either per se or because of its execution* by hanging, constitutes an unreasonable, cruel or unusual punishment.⁷⁰

Bhagwati J dissented from the majority in this case, and issued a separate opinion two years after the majority judgment had been delivered.⁷¹ Bhagwati's dissent in the *Bachan Singh* case is particularly revealing because it was Bhagwati who also wrote the Court's majority opinion in the *Maneka Gandhi* case. It will be remembered that the Court, in the *Gopalan* case, had held that Article 21 applied to both procedural and substantive laws. Bhagwati J's dissenting judgment in the *Bachan Singh* case clarified that the framework of the *Maneka Gandhi* case (ie, that the 'procedure established by law' under Article 21 had to be 'fair, just and reasonable') likewise applied both to procedural and substantive laws. 'The word "procedure" in Article 21', wrote Bhagwati J, 'is wide enough to cover the entire process by which deprivation is effected and that would include not only the adjectival but also the substantive part of the law'.⁷² Thus, the majority judges in the case and the dissenting judge all seemed to agree that substantive laws could be tested on the touchstone of Article 21.

To be sure, not every scrutiny of a substantive law under Article 21 of the Constitution can be termed 'substantive due process'. For example, in the case of *Mithu v State of Punjab*,⁷³ the Supreme Court was considering the constitutional validity of section 303 of the Indian Penal Code, a substantive law that imposed a mandatory death penalty on any person who committed murder while undergoing a sentence of life imprisonment. The Court held that the section was unconstitutional. However, the mere fact that the Court struck down a

substantive provision of law does not mean that this was necessarily a 'substantive due process' case. The reason the Court struck section 303 down in that case was because the section deprived a convict of his procedural rights under sections 235(2) and 354(3) of the Criminal Procedure Code. Under these provisions, a judge is required to hear the accused on the question of sentence, and to write 'special reasons' for passing the death sentence. Though section 303 of the Indian Penal Code was a substantive law, it excluded these 'fair, just and reasonable' procedural safeguards, and thereby violated the doctrine of procedural due process articulated in the *Maneka Gandhi* case.⁷⁴ The *Mithu* case is therefore an authority for procedural due process, not substantive due process, even though a substantive law was invalidated in that case.

However, in the *Mithu* case, the Court also made certain observations which point out that Indian constitutional law recognises the doctrine of substantive due process. The Court in that case observed that the legislature cannot impose a 'savage sentence' under the criminal law.⁷⁵ '[I]f a law were to provide', wrote the Chief Justice, 'that the offence of theft will be punishable with the penalty of the cutting of hands, the law will be bad as violating Article 21.'⁷⁶ In other words, a 'savage' sentence imposed by a substantive criminal law could substantively be invalidated on the touchstone of Article 21 of the Constitution, not because the accused is not given procedural due process safeguards like a hearing, but because a savage sentence like the cutting of hands is substantively unfair. Wrote the Chief Justice, 'A savage sentence is anathema to the civilized jurisprudence of Article 21.'⁷⁷ In short, though the *Mithu* case was a procedural due process case where a substantive law was struck down, the Court's observations in that case point out that the substantive due process doctrine is also a part of Indian constitutional law.⁷⁸

Another substantive due process case was that of *Saroj Rani v Sudarshan Kumar*,⁷⁹ decided by the Court in 1984. There, the Court examined the question of whether section 9 of the Hindu Marriage Act 1955⁸⁰ was unconstitutional. The section permits one spouse to sue the other for restitution of conjugal rights when the latter withdraws from the society of the former without reasonable excuse. The Court found that the provision was consistent with Article 21 of the Constitution, not merely because it contained 'sufficient safeguards' which prevented it from being used tyrannically,⁸¹ but also because the provision had to be 'understood in its proper perspective' as serving the 'social purpose' of preventing 'the breakup of marriage'.⁸² In short, the Court substantively scrutinised section 9 of the Hindu Marriage Act, a substantive law, and found it

consistent with Article 21 of the Constitution.

The suicide cases of the Supreme Court had clear substantive due process implications. In the first case, decided in 1994, *P Rathinam v Union of India*,⁸³ the Court held that section 309 of the Indian Penal Code, which made it a criminal offence to attempt to commit suicide, violated Article 21 of the Constitution, because it was a ‘cruel and irrational provision’, which punished a person who was in agony.⁸⁴ The case was subsequently overruled by a constitutional bench of the Court, two years later, in *Gian Kaur v State of Punjab*.⁸⁵ There, the Court held that a legislative provision could only be invalidated if it fell foul of some provision of the Constitution, but not if it was merely considered undesirable by a court⁸⁶—a holding which perhaps ignores the fact that even substantive laws have to be ‘fair, just and reasonable’ under Article 21 of the Constitution, and in essence, what is ‘fair, just and reasonable’ is rarely an objective standard, but a subjective one, which depends on the personal value choices of the judges deciding the case. In the *Gian Kaur* case, it was held that the *Rathinam* case was incorrectly decided because its central holding, namely, that the right to life did not include the right to die, was incorrect.⁸⁷ However, the Court in that case also observed that it could be possible to interpret euthanasia for ‘a dying man who is terminally ill or in a persistent vegetative state’ consistently with the right to live with dignity under Article 21 of the Constitution.⁸⁸ This observation suggests that the Court even in the *Gian Kaur* case acknowledged that it had the power to use substantive due process doctrine, because it could interpretively limit the contours of section 309 of the Indian Penal Code to potentially exclude mercy killings under certain circumstances. That was exactly what eventually happened in a case decided in 2011, where the Court held that ‘passive’ euthanasia would be permitted under certain circumstances, notwithstanding the bar against abetting suicide under section 306 of the Indian Penal Code. In that case the Court also opined that the time had come for Parliament to delete section 309 of the Indian Penal Code as it had become ‘anachronistic’.

In 2009, the Delhi High Court’s holding in the case of *Naz Foundation v Government of National Capital Territory of Delhi*⁸⁹ was a clear substantive due process case. There, the petitioners challenged section 377 of the Indian Penal Code, a substantive law, which made it an offence to perform ‘carnal intercourse against the order of nature’, as it applied against the LGBT community. The Court held that the provision ‘insofar as it criminalises consensual sexual acts of adults in private’ violated Article 21 of the Constitution.⁹⁰ This was not a procedural law that was invalidated, but a substantive law, on substantive

grounds. Though this decision was eventually reversed on appeal by the Supreme Court, the Supreme Court held that the 'requirement of substantive due process' had been 'read into the Indian Constitution through a combined reading of Articles 14, 21 and 19 ...', that substantive due process was a constitutional law 'test' under which a law has to be 'just, fair and reasonable', which involves questions of 'legitimate State interest and the principle of proportionality'.⁹¹

2. Beyond Physical Restraint: Unenumerated Rights

It has been seen in Section II that the constitutional advisor to the Constituent Assembly of India, BN Rau, deliberately inserted the word ‘personal’ before the word ‘liberty’ in what was to become Article 21 of the Constitution, in order to limit the definition of the term, and to prevent courts from interpreting it extensively.⁹² However, in a series of decisions dating back to the 1960s,⁹³ the Supreme Court of India expanded the ambit of the terms ‘life’ and ‘personal liberty’ under Article 21, thereby diluting the intent of the framers of the Constitution to limit the ambit of the clause. In these decisions, the Court interpreted the terms ‘life’ and ‘personal liberty’ to include something more than mere freedom from physical restraint—that is, arrest and detention. For example, the Court held that the right to go abroad, to privacy, livelihood, shelter, education, health, even reputation, and to dignity generally, were all included within the meaning of the terms ‘life’ or ‘personal liberty’ under Article 21 of the Constitution.⁹⁴ In short, unenumerated rights—that is, rights not specifically written down in the text of India’s Constitution—have been recognised and given the status of fundamental rights by the Supreme Court. This phenomenon resembles ‘modern’ substantive due process under US constitutional law, though unenumerated rights in India are not always subject to heightened scrutiny.⁹⁵ The doctrine of substantive due process seems to have been understood and used in this sense by the Supreme Court of India in at least one case, decided in 2010.⁹⁶

The expansion of the terms ‘life’ and ‘personal liberty’ under Article 21 of the Constitution serves two purposes.

First, it brings within the purview of Article 21 government actions that do not have anything to do with arrest or detention. For example, this was what happened in the *Maneka Gandhi* case itself, seen in Section III of this chapter. There, though the petitioner’s passport had been impounded, the petitioner was not physically restrained by the State in the conventional sense (ie, arrested or detained)⁹⁷—in short, the petitioner in the *Maneka Gandhi* case had not been deprived of her right to ‘life’ or ‘personal liberty’ according to the plain, common-sense, and original meaning of those terms. However, in order to bring the passport officer’s actions within the ambit of Article 21 of the Constitution, the Court held that the right to go abroad was a part of the right of ‘personal liberty’. Similarly, in another case dating back to 1967,⁹⁸ the petitioner

challenged an order of the passport officers of Delhi and Bombay, asking him to surrender his passport. Quite contrary to the intent of the framers of the Constitution, the Court held that the term ‘liberty’ under the Indian Constitution had to be interpreted as broadly as it was under the US Constitution, and that it included the right to go abroad.⁹⁹

Another good example of this phenomenon was the case of *Olga Tellis v Bombay Municipal Corporation*.¹⁰⁰ There, the petitioners contended that the forcible eviction of pavement and slum dwellers, under section 314 of the Bombay Municipal Corporation Act 1888, without giving them alternative accommodation, violated their rights to life, because it deprived them of their livelihood. An eviction of a pavement dweller did not amount to arrest or detention, and so the case was not a traditional right-to-life case under Article 21. Even so, to bring the government action within the ambit of Article 21, the Court held that the right to livelihood was a part of the right to life under Article 21, and that section 314 of the statute was therefore subject to the requirements set under Article 21.

Secondly, the expanded definition of the terms ‘life’ and ‘personal liberty’ has been used by the Court to help it figure out whether a substantive law is substantively fair. For example, the *Naz Foundation* case,¹⁰¹ decided by the Delhi High Court, was a physical restraint case—section 377 of the Indian Penal Code carried a punishment of imprisonment. As a consequence, the case already fell within the conventional boundaries of Article 21 of the Constitution, and did not need an expanded definition of the right to life to make it so. Yet, the Delhi High Court expanded the definition of the term ‘life’ under Article 21 of the Constitution to include sexual privacy and identity, in order to justify its decision to read down the provision. Similarly, the *Rathinam* case,¹⁰² decided by the Supreme Court, was a physical restraint case—section 309 of the Indian Penal Code imposed a punishment of imprisonment. Yet, the Court expanded the definition of the right to life, making it include the right to die, in order to justify the substantive invalidation of the provision under Article 21 of the Constitution. Thus, the expansion of the right to ‘life’ and ‘personal liberty’ under the Constitution has not merely been used to bring cases not involving physical restraint under the purview of Article 21 of the Constitution, but also to justify the substantive invalidation of laws under a doctrine resembling substantive due process.

3. Arbitrariness/Reasonableness

Though substantive due process became a part of Indian constitutional law in the 1980s, courts have been scrutinising substantive laws under Articles 14 (right to equality) and 19 (right to certain enumerated liberties) of the Constitution since the very beginning. Though doctrines for scrutinising substantive laws under Articles 14 and 19 of the Constitution are not ‘substantive due process’, they still resemble substantive due process in that they may involve scrutiny of substantive legislation.

Article 14 of the Constitution contains the right to equality. State action can be substantively challenged under Article 14 on the ground of ‘arbitrariness’. Prior to the 1970s, the Supreme Court utilised a test known as the ‘classification test’ to determine whether a law was discriminatory and fell foul of Article 14.¹⁰³ However, in a case decided in 1973, *EP Royappa v State of Tamil Nadu*,¹⁰⁴ the Court created a new doctrine under Article 14, the arbitrariness test. Stated simply, this new doctrine was that a law would be considered to have violated Article 14 of the Constitution if it was ‘arbitrary’. The noted constitutional law scholar HM Seervai pointed out that this meant that a law that did not necessarily even discriminate between two people could also be found ‘arbitrary’ by a court.¹⁰⁵ For this reason, the arbitrariness doctrine is a very vague standard of constitutional analysis, and over the years, various attempts have been made to limit¹⁰⁶ or exclude¹⁰⁷ it from Indian constitutional law altogether. Both the old classification test and the new arbitrariness test are substantive in nature, as they permit courts to look into the fairness of a substantive provision of law.

Article 19(1) of the Constitution contains six enumerated liberties: speech, assembly, association, locomotion, residence, and occupation. Articles 19(2)–(6) of the Constitution permit the State to impose ‘reasonable restrictions’ on these liberties. It is for a court to decide whether the restrictions imposed by the State are ‘reasonable’—a form of scrutiny which, like the arbitrariness test under Article 14, is substantive in nature.

Neither the arbitrariness test under Article 14 nor the reasonableness test under Article 19 can strictly be considered ‘substantive due process’ under Article 21 of the Constitution. However, when Articles 14 and 19 are read together with Article 21, the effect is much the same. ‘True, our Constitution has no “due process” clause’, wrote Krishna Iyer J in his concurring opinion in the *Sunil Batra* case, ‘but, in this branch of law, after *Cooper* and *Maneka Gandhi*, the consequence is the same.’¹⁰⁸ Krishna Iyer’s holding in that case was that procedural law would be scrutinised under Article 21, while substantive law

would be scrutinised under Articles 14 and 19: ‘For what is punitively outrageous, scandalizingly unusual or cruel and rehabilitatively counterproductive, is unarguably unreasonable and arbitrary and is shot down by Articles 14 and 19 and if inflicted with procedural unfairness, falls foul of Article 21.’¹⁰⁹ In short, Articles 14, 19, and 21 of the Constitution work as a unit, and it is beyond dispute that courts can scrutinise the arbitrariness or reasonableness of substantive statutes under Articles 14 and 19 of the Constitution, respectively.

V. DEFINING ‘DUE PROCESS’

The upshot of this chapter is that the Supreme Court of India has not defined the doctrines of substantive due process or procedural due process. The cases themselves do not tell us what these doctrines mean. Indeed, doctrines like substantive and procedural due process are considered, even in the US, to be elusive and hard to define. This chapter defines doctrines like substantive and procedural process by looking at whether the thing involved is substance or procedure. If a governmental action (be it a statute, government-enacted rule, or executive order) is invalidated by a court because it conflicts with the court’s substantive value judgments (eg, if it interferes with the right to sexual privacy), then the exercise of judicial power can be called ‘substantive due process’, but if it is invalidated by a court because it conflicts with a rule of procedure (eg, that a person must be given a hearing before any action is taken against him/her), then the exercise of judicial power can be termed ‘procedural due process’.¹¹⁰

However, there is an alternative definition of these doctrines out there (hereinafter the ‘alternative definition’), according to which the difference between substantive and procedural due process is based on whether the thing being challenged is a legislative or non-legislative governmental action. According to the alternative definition, substantive due process involves any Article 21 investigation of legislation, while procedural due process involves any Article 21 investigation of anything apart from legislation. Thus, if the government decides to terminate the services of one of its employees because he/she is a homosexual, and a court invalidates the decision under Article 21, then the alternative definition contemplates that this is still ‘procedural due process’ because the thing being challenged is not legislation. Similarly, if a court invalidates a statute which provides that a person accused of a criminal offence will not have the right to confront and cross-examine witnesses, the

alternative definition contemplates that this is ‘substantive due process’. This chapter does not subscribe to the alternative definition. However, again, there appears to be no Supreme Court decision to tell us which definition is correct.

How, then, does one identify what ‘substantive due process’ is and what its limits are? First, like all constitutional law cases, there must be a conflict between the State (or one of its Article 12 instrumentalities) and an individual. There can be no substantive due process in cases between private parties. Secondly, the person aggrieved by a governmental action must complain that his right to ‘life’ or ‘personal liberty’ under Article 21 has been violated. Thus, a court cannot apply the doctrine of substantive due process while examining the right to practise a religion under Article 25. Thirdly, the court must hold that the action of the government (whether contained in a statute, order or otherwise) is substantively wrong—that is, that it is wrong for reasons that have nothing to do with procedure. However, there appear to be no judicially defined limits as to which substantive values a court will apply in an exercise of substantive due process. Thus, substantive due process is a dangerous doctrine, because it involves a court imposing its own values on the other branches of government.

Pure form due process is the most deferential of the three doctrines, while substantive due process is the least deferential. For example, while applying the procedural process doctrine, when a court chooses to insist that governmental authorities adopt suitable procedures in arriving at a decision, the court tries to ensure that the substantive outcome arrived at by the governmental authority will be a fair one, without imposing the court’s own values on the governmental authority. However, when a court chooses to apply the doctrine of substantive due process, it aggressively challenges the very value choices of the popular branches of India’s government, which is a remarkably counter-majoritarian and democratically illegitimate exercise. Bearing this in mind, perhaps the doctrine of substantive due process ought only to be applied by courts to protect ‘discrete and insular minorities’^{[111](#)}—who are theoretically incapable of protecting their rights through the majoritarian process.

VI. CONCLUSION

Can it be said that in adopting substantive and procedural due process, the Supreme Court has betrayed the framers of the Constitution? The answer to this question might be in the negative for several reasons.

First, we have seen that the framers of the Constitution were themselves very

ambivalent about the deletion of the term ‘due process of law’ from India’s Constitution, which caused an uproar in the Constituent Assembly. The architect of India’s Constitution, BR Ambedkar, was himself unsure about whether the clause ought to have been deleted or retained. The ambivalence of the framers towards this clause suggests that the Court was not utterly disregarding their core original intent when it read the ‘due process of law’ into India’s Constitution.

Secondly, we have seen that BN Rau and Alladi Krishnaswami Ayyar were worried that the due process clause would be used by Indian courts to invalidate social welfare legislation, like price control laws. However, the Court has not used ‘due process’ to invalidate social welfare legislation. In fact, often, the Court has used due process doctrines to protect the interests of vulnerable sections of society such as pavement dwellers and prisoners. In short, a ‘*Lochner* era’ has not been seen on the Supreme Court of India under the due process clause.

Thirdly, the original intent of the framers of India’s Constitution is not as sacrosanct as it is elsewhere. In an article written for *The Hindu* in 1948, BN Rau questioned the legitimacy of the Constitution of India, among other reasons, because it was being enacted by a body that had not been elected on the basis of universal adult suffrage.¹¹² In other words, one of the chief architects of India’s Constitution—the very man responsible for deleting the due process clause from the Constitution—expressed doubts about the legitimacy of the framers of the Constitution. Further, the Emergency taught the Supreme Court of India that the Constitution did not always have to be interpreted faithfully to its text or to the intent of the framers.

¹ A graduate of Madras and Cambridge universities, Rau was a member of the Indian Civil Service, and a former judge of the Calcutta High Court. He was being considered for the post of judge on the Federal Court of India. He subsequently served as a judge on the International Court of Justice. Sir Benegal Rau, *India’s Constitution in the Making* (Allied Publishers Private Limited 1963) v, xix. His brother, B Shiva Rao, was a noted scholar of early Indian constitutional law. See ‘Late Mr. B.N. Rau’ *Times of India* (New Delhi, 2 December 1953) 7.

² See Granville Austin, *The Indian Constitution: Cornerstone of a Nation* (Oxford University Press 1996) 84–115; TR Andhyarujina, ‘The Evolution of Due Process of Law by the Supreme Court’ in BN Kirpal and others (eds) *Supreme but Not Infallible: Essays in Honour of the Supreme Court of India* (Oxford University Press 2000) 193–213; Manoj Mate, ‘The Origins of Due Process in India: The Role of Borrowing in Personal Liberty and Preventive Detention Cases’ (2010) 28 *Berkeley Journal of International Law* 216, 221; Abhinav Chandrachud, *Due Process of Law* (Eastern Book Company 2011).

³ For a history of substantive due process in US constitutional law, see Richard H Fallon, Jr, ‘Some Confusions About Due Process, Judicial Review, and Constitutional Remedies’ (1993) 93 *Columbia Law Review* 309; John Harrison, ‘Substantive Due Process and the Constitutional Text’ (1997) 83 *Virginia Law Review* 493; Erwin Chemerinsky, ‘Substantive Due Process’ (1999) 15 *Touro Law Review* 1501; David E

Bernstein, 'Lochner Era Revisionism, Revised: *Lochner* and the Origins of Fundamental Rights Constitutionalism' (2003) 92 Georgetown Law Journal 1; Ryan C Williams, 'The One and Only Substantive Due Process Clause' (2010) 120 Yale Law Journal 408; Nathan S Chapman and Michael W McConnell, 'Due Process as Separation of Powers' (2012) 121 Yale Law Journal 1672.

⁴ Constitution of India 1950, art 394. Some provisions of the Constitution, however, came into force on 26 November 1949.

⁵ *Re Ramlila Maidan Incident* (2012) 5 SCC 1.

⁶ See *Selvi v State of Karnataka* (2010) 7 SCC 263.

⁷ (1978) 1 SCC 248.

⁸ For a concise distinction between 'procedural due process' and 'substantive due process' under the US Constitution, see Williams (n 3) 419.

⁹ This might sound frivolous at first, but consider that in September 2013 a man was arrested by the police in Maharashtra for drinking tea in a suspicious manner. See Swati Deshpande, 'Drinking tea can't be a crime: Bombay HC' *Times of India* (New Delhi, 16 September 2013) <http://articles.timesofindia.indiatimes.com/2013-09-16/mumbai/42113279_1_drinking-tea-bombay-high-court-justice-patel>, accessed November 2015.

¹⁰ The boundaries between substantive and procedural laws, however, are seldom so simple. See Williams (n 3) 417–18.

¹¹ *AK Gopalan v State of Madras* AIR 1950 SC 27.

¹² *Maneka Gandhi* (n 7).

¹³ See Rau (n 1) 1. Its first session was held on 9 December 1946.

¹⁴ B Shiva Rao (ed), *The Framing of India's Constitution: Select Documents*, vol 2 (Indian Institute of Public Administration 1967) 20–36, 147–53. See also BN Rau, *Constitutional Precedents, Third Series* (Constituent Assembly of India 1947) 17–20.

¹⁵ Rao (n 14) 86.

¹⁶ See Jeffrey C Sindelar, Jr, 'Of Form and Function: Lockean Political Philosophy and Mass Tort' (2012) 90 Nebraska Law Review 887, 904.

¹⁷ This was done by the advisory committee during its meeting on 21–22 April 1947. KM Panikkar made the suggestion, and it was supported by Munshi, Ambedkar, and Rajagopalachari. B Shiva Rao (ed) *The Framing of India's Constitution: A Study* (Indian Institute of Public Administration 1968) 235.

¹⁸ Interestingly, Thomas Jefferson replaced the word 'property' with 'pursuit of happiness' in the Declaration of Independence, possibly because of his own interest in reforming property law (eg, by abolishing primogeniture) in his home State. See Linda M Keller, 'The American Rejection of Economic Rights as Human Rights and the Declaration of Independence: Does the Pursuit of Happiness Require Basic Economic Rights?' (2003) 19 New York Law School Journal of Human Rights 557.

¹⁹ Rao (n 17) 235. The Drafting Committee of the Constitution accepted this change, over Munshi's objection.

²⁰ 198 US 45 (1905).

²¹ Rau (n 1). Rau considered this information important enough to convey to the President of the Constituent Assembly, Rajendra Prasad, by an airmail letter dated 11 November 1947. Austin (n 2) 103.

²² Rao (n 17) 236. See also Austin (n 2) 104.

²³ Felix Frankfurter, 'John Marshall and the Judicial Function' (1955) 69 Harvard Law Review 217, 232. Frankfurter was a student of Harvard Law School professor James Bradley Thayer, whose negative views on due process were known to Rau. Austin (n 2) 103. See also Mate (n 2) 221; Partition-related communal riots in India might also have contributed to the deletion of the due process clause. Austin (n 2) 104; Mate (n 2) 223.

²⁴ In the Drafting Committee, Ayyar had provided the 'crucial swing vote' on the question of deleting the due process clause. Austin (n 2) 104–06; Mate (n 2) 222.

²⁵ *Constituent Assembly Debates*, vol 7 (Lok Sabha Secretariat 1986) 854, 6 December 1948.

²⁶ *Constituent Assembly Debates*, vol 7 (Lok Sabha Secretariat 1986) 843, 6 December 1948.

²⁷ *Constituent Assembly Debates*, vol 7 (Lok Sabha Secretariat 1986) 843, 6 December 1948.

²⁸ Rao ([n 17](#)) 238.

²⁹ Constitution of India 1950, art 22. See also HM Seervai, *Constitutional Law of India*, vol 2 (4th edn, Universal Book Traders 2002) 971.

³⁰ The term ‘fundamental rights’ is used differently in India and the US. In India, [Part III](#) of the Constitution itself contains ‘fundamental rights’. In the US, ‘fundamental rights’ are typically unenumerated rights created by the US Supreme Court.

³¹ AIR 1950 SC 27.

³² *AK Gopalan* ([n 11](#)) [115] (Sastri J).

³³ The judges were Kania CJ (AIR 1950 SC 27 [1]), Sastri J (AIR 1950 SC 27 [110]), Mukherjea J (AIR 1950 SC 27 [176]), and Das J (AIR 1950 SC 27 [236]). Fazl Ali dissented (AIR 1950 SC 27 [45]). Mahajan expressed no opinion on this point (AIR 1950 SC 27 [154]).

³⁴ Mahajan was the only judge to not have considered the question.

³⁵ See nn 17–23, and accompanying text.

³⁶ *AK Gopalan* ([n 11](#)) [125].

³⁷ *AK Gopalan* ([n 11](#)) [281].

³⁸ *AK Gopalan* ([n 11](#)) [281].

³⁹ *AK Gopalan* ([n 11](#)) [227] (Mukherjea J). See also *Francis Coralie Mullin v Administrator, Union Territory of Delhi* (1981) 1 SCC 608.

⁴⁰ See also Beg J’s opinion in *Additional District Magistrate, Jabalpur v Shivakant Shukla* (1976) 2 SCC 521.

⁴¹ In terms of the outcome of the case, however, both Fazl Ali and Mahajan JJ dissented, finding that sections 12 and 14 of the impugned statute were unconstitutional. The remaining judges found only section 14 unconstitutional, and dismissed the petition.

⁴² *AK Gopalan* ([n 11](#)) [74]. However, he did not find this line of reasoning conclusive because it was based on conjecture.

⁴³ *AK Gopalan* ([n 11](#)) [77]–[78].

⁴⁴ These were taken from a treatise on constitutional law written by an American scholar: Hugh E Willis, *Constitutional Law* (Principia Press 1936).

⁴⁵ *AK Gopalan* ([n 11](#)) [78].

⁴⁶ The judges who rejected this argument were Sastri (AIR 1950 SC 27 [119]), Mahajan (AIR 1950 SC 27 [155]), Mukherjea (AIR 1950 SC 27 [194]), and Das (AIR 1950 SC 27 [253], [265] [284]).

⁴⁹ *Maneka Gandhi* ([n 7](#)) [4].

⁴⁷ *Maneka Gandhi* ([n 7](#)). Manoj Mate argues that the *Maneka Gandhi* case did not represent a significant break from the past. Mate explains that the shift in the Supreme Court’s attitude towards foreign precedent and American due process doctrine between the *Gopalan* and *Maneka Gandhi* cases can be explained by a variety of factors, including the increasing ‘Americanization’ of India’s legal system. Mate ([n 2](#)) 221.

⁴⁸ *Additional District Magistrate, Jabalpur* ([n 40](#)). Three judges on the *Maneka Gandhi* bench (Beg, Chandrachud, and Bhagwati), including the judge who wrote the majority opinion (Bhagwati), were majority judges in the *Habeas Corpus* case. In his separate opinion in *Maneka Gandhi*’s case, Beg J repeatedly made references to his decision in the *Habeas Corpus* case. It was Khanna J’s dissent in the *Habeas Corpus* case that created an atmosphere in which judicial activism became legitimate and deference to the original intent of the framers of India’s Constitution no longer sacrosanct. See Abhinav Chandrachud,

‘Dialogic judicial activism in India’ *The Hindu* (Chennai, 18 July 2009) <<http://www.hindu.com/2009/07/18/stories/2009071852820800.htm>>, accessed November 2015.

⁵⁰ *Maneka Gandhi* ([n 7](#)) [48] (per Chandrachud J). Nearly identical words were used by Bhagwati J ((1978) 1 SCC 248 [5]) and Krishna Iyer J ((1978) 1 SCC 248 [4]). See also *Francis Coralie Mullin* ([n 39](#)).

⁵¹ See Abhinav Chandrachud, *Due Process of Law* (Eastern Book Company 2011) 27.

⁵² *Maneka Gandhi* ([n 7](#)) [48].

⁵³ *Maneka Gandhi* ([n 7](#)) [48].

⁵⁴ *Maneka Gandhi* ([n 7](#)) [48].

⁵⁵ *Maneka Gandhi* ([n 7](#)) [13].

⁵⁶ *Maneka Gandhi* ([n 7](#)) [6].

⁵⁷ See also GCV Subbarao and P Kalpakam, ‘Revolution in Indian “Due Process” ’ AIR 1980 Journal 44.

⁷⁰ *Bachan Singh* ([n 68](#)) [136] (emphasis added).

⁵⁸ See eg, *Francis Coralie Mullin* ([n 39](#)); *TV Vatheeswaran v State of Tamil Nadu* (1983) 2 SCC 68; *Sher Singh v State of Punjab* (1983) 2 SCC 344; *Parmanand Katara v Union of India* (1989) 4 SCC 286; *State of Bihar v Lal Krishna Advani* (2003) 8 SCC 361.

⁵⁹ *MH Hoskot v State of Maharashtra* (1978) 3 SCC 544.

⁶⁰ *Hussainara Khatoon (3) v Home Secretary, State of Bihar* (1980) 1 SCC 93.

⁶¹ The *Maneka Gandhi* case was decided in January 1978, while the *Sunil Batra* case was decided in August 1978.

⁶² (1978) 4 SCC 494.

⁶³ Other such cases, all procedural due process cases, were *Prem Shankar Shukla v Delhi Administration* (1980) 3 SCC 526 and *Attorney General of India v Lachma Devi* (1989) Supp (1) SCC 264.

⁶⁴ The Court also held that a prisoner could only be confined in irons under certain very limited conditions, and only after the prisoner had been given a hearing and reasons had been provided as to why he was being so confined.

⁶⁵ *Sunil Batra* ([n 62](#)) [88], [91], [219].

⁶⁶ *Sunil Batra* ([n 62](#)) [118]–[119].

⁶⁷ *Sunil Batra* ([n 62](#)) [220].

⁶⁸ (1980) 2 SCC 684.

⁶⁹ According to the majority, Article 21 of the Constitution had been rewritten in the *Maneka Gandhi* case as follows: ‘No person shall be deprived of his life or personal liberty except according to fair, just and reasonable procedure established by valid law.’ *Bachan Singh* ([n 68](#)) [136].

⁷¹ The majority judgment was delivered in May 1980, while Bhagwati’s dissenting judgment was delivered in August 1982.

⁷² *Bachan Singh v State of Punjab* (1982) 3 SCC 24 [17].

⁷³ (1983) 2 SCC 277.

⁷⁴ *Mithu* ([n 73](#)) [6], [18], [23].

⁷⁵ *Mithu* ([n 73](#)) [6].

⁷⁶ *Mithu* ([n 73](#)) [6].

⁷⁷ *Mithu* ([n 73](#)) [6].

⁷⁸ See also MP Singh (ed) *VN Shukla’s Constitution of India* (11th edn, Eastern Book Company 2008) 202.

⁷⁹ (1984) 4 SCC 90.

⁸⁰ Read with the Code of Civil Procedure 1908, Order 21, Rule 32, which provides for the enforcement

of a decree of restitution of conjugal rights by the attachment of the property of the party that wilfully disobeys the decree.

⁸¹ *Saroj Rani* ([n 79](#)) [14].

⁸² *Saroj Rani* ([n 79](#)) [16].

⁸³ (1994) 3 SCC 394.

⁸⁴ *P Rathinam* ([n 83](#)) [109].

⁸⁵ (1996) 2 SCC 648.

⁸⁶ *Gian Kaur* ([n 85](#)) [17].

⁸⁷ *Gian Kaur* ([n 85](#)) [18]–[26].

⁸⁸ *Gian Kaur* ([n 85](#)) [24]–[25].

⁸⁹ (2009) 160 DLT 277.

⁹⁰ *Naz Foundation* ([n 89](#)) [132].

⁹¹ *Suresh Kumar Koushal v Naz Foundation* (2014) 1 SCC 1 [69].

⁹² See [n 19](#) and accompanying text.

⁹³ One of the earliest such cases was *Satwant Singh Sawhney v D Ramarathnam* AIR 1967 SC 1836.

⁹⁴ See Nick Robinson, ‘Expanding Judiciaries: India and the Rise of the Good Governance Court’ (2009) 8 Washington University Global Studies Law Review 1; Abhinav Chandrachud, *Due Process of Law* (Eastern Book Company 2011) 206–38.

⁹⁵ For the use of the strict scrutiny test in fundamental rights cases in the US, see Fallon, Jr ([n 3](#)); Richard H Fallon, Jr, ‘Strict Judicial Scrutiny’ (2007) 54 UCLA Law Review 1267, 1283.

⁹⁶ *Selvi v State of Karnataka* (2010) 7 SCC 263 [7]. In that case, the Court looked into whether police interrogation techniques involving narco-analysis, the polygraph test, or the brain electrical activation profile test violated Articles 20 or 21 of the Constitution. Regarding Article 21, the Court looked into whether the said techniques violated the unenumerated rights ‘against cruel, inhuman or degrading treatment’ and to privacy, and called this investigation ‘substantive due process’.

⁹⁷ True, technically, Maneka Gandhi was physically restrained from leaving the country. However, the passport officer’s actions in that case did not involve arrest or detention, the most conventional forms of physical restraint.

⁹⁸ *Satwant Singh Sawhney* ([n 93](#)).

⁹⁹ *Satwant Singh Sawhney* ([n 93](#)) [27].

¹⁰⁰ (1985) 3 SCC 545.

¹⁰¹ *Naz Foundation* ([n 89](#)).

¹⁰² *P Rathinam* ([n 83](#)).

¹⁰³ Under the traditional classification test, a law would be held in violation of the right to equality under India’s Constitution if (i) it did not employ an ‘intelligible differentia’ which distinguished persons or things that were grouped together from others left out of the group; or (ii) if the differentia did not bear a rational (or reasonable) relation with the object sought to be achieved by the law. See *Kedar Nath Bajoria v State of West Bengal* AIR 1953 SC 404; *Budhan Choudhry v State of Bihar* AIR 1955 SC 191; *Ram Krishna Dalmia v Justice SR Tendolkar* AIR 1958 SC 538.

¹⁰⁴ (1974) 4 SCC 3.

¹⁰⁵ Seervai, vol 1 ([n 29](#)) 439.

¹⁰⁶ *Om Kumar v Union of India* (2001) 2 SCC 386.

¹⁰⁷ *State of Andhra Pradesh v McDowell & Co* (1996) 3 SCC 709; *Re Special Reference No 1 of 2012* (2012) 10 SCC 1.

¹⁰⁸ *Sunil Batra* ([n 62](#)) [52].

¹⁰⁹ *Sunil Batra* ([n 62](#)) [52].

¹¹⁰ At some level, this distinction between substantive and procedural due process is superficial, as the task of deciding which rules of procedure must be considered so fundamental as to form a part of procedural due process is itself a somewhat substantive exercise.

¹¹¹ *United States v Carolene Products* 304 US 144 (1938), 152 ([n 4](#)); John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press 1980).

¹¹² Rau ([n 1](#)) 389–94. See also Abhinav Chandrachud, *The Informal Constitution: Unwritten Criteria in Selecting Judges for the Supreme Court of India* (Oxford University Press 2014).

CHAPTER 44

CRIMINAL LAW AND THE CONSTITUTION

APARNA CHANDRA AND MRINAL SATISH

I. INTRODUCTION

THE interface between criminal law and the Constitution highlights a classic debate in political liberalism: where and how to draw the line between individual liberty and social control. Criminal law deals with the State's use of its coercive powers to limit individual liberty in the interest of some conception of the public good such as State security or public order, and criminal procedure describes the processes employed by the State to investigate and prosecute a crime, thus achieving the public good. Simultaneously, in order to protect individual liberty from excessive or arbitrary intrusion by the State, a liberal constitutional order seeks to restrict State power by placing constitutional limitations on the scope and processes of criminal law.

Constitutional choices in the domain of criminal procedure reflect, and often amplify, the tension between these competing goals of protecting individual liberty and promoting the public good.¹ At the very least, two options are available to constitution drafters and crafters: emphasising individual liberty by restricting State power (the 'liberty perspective') or emphasising public order by limiting individual liberty and expanding State power (the 'public order perspective').²

What we call here the 'liberty perspective' conceives of criminal process primarily as a *limitation* on State power,³ to ensure that the State does not arbitrarily or excessively trample over an individual's liberty interests, including her autonomy, dignity, and privacy. Therefore, constitutional rights against the State prescribe constraints on State power such as those of search and seizure, and arrest and detention, or through providing rights against self-incrimination, *etc.*⁴ To ensure that the State functions within constitutionally prescribed limits, the State has to justify every deprivation of liberty before an impartial tribunal, where individuals are guaranteed a fair trial, including equality in proceedings, especially through an assured right to legal representation. If the limitations

imposed on the State curtail its ability to make accurate determinations of factual wrongdoing, then that is just the price for protecting liberty.

Conversely, what we call the ‘public order perspective’ prioritises social control and security over individual liberty when the two interests clash. Constitutional rights are restricted in scope and interpretation so as to leave the State with as much power as possible to identify and punish the accused. Here, criminal process is primarily tasked with making accurate determinations of factual guilt and innocence, and adequately punishing the guilty.⁵ Thus, procedural norms restricting the government’s power to make determinations of factual guilt are seen as ‘technicalities’ interfering in the securing of public order, and are therefore read restrictively.

The two perspectives are not mutually exclusive, watertight compartments or oppositional models, or even the only perspectives on understanding the criminal process. They refer to priorities—tendencies, instead of binaries. Each perspective is a standpoint, an orientation, from which a decision maker canvasses the domain of constitutional criminal procedure, and determines where the emphasis should lie in balancing individual liberty and social control. Approaching constitutional criminal procedure from one perspective does not imply that the values of the other are negated, but does influence their *inter se* prioritisation. For example, the liberty perspective *does* recognise the epistemological function of criminal trials and *is* therefore interested in accurate adjudication. However, the emphasis is on not depriving an innocent person’s liberty. Conversely, the public order perspective prioritises identifying the guilty, but does not negate the importance of individual liberty.⁶

We present these perspectives not as ideal-type categories, but as descriptive accounts of approaches that have influenced Indian constitutional criminal procedure.⁷ They help us understand the types of values at play, and the trade-offs between these values in the adjudication process. We argue that the development of constitutional criminal procedure in India has demonstrated a shift from a liberty perspective to a public order perspective. On our account, the Supreme Court’s perspective has resulted in distinct forms of interpretative practices and doctrinal construction, which helps explain the particular trajectories of criminal due process rights in India.

Section II of the chapter illustrates the liberty perspective by providing an account of discussions in the Constituent Assembly on criminal due process rights. In Section III, we describe how the Supreme Court’s understanding of these rights significantly differs from the Constituent Assembly’s. The intention behind drawing this distinction is not to suggest a methodology of originalism

that privileges the intention of the ‘founders’ in constitutional interpretation. Instead, the distinction serves to provide a counterpoint to better understand, and ‘de-normalise’ the Court’s perspective. In conclusion, we reflect upon the impact of the Court’s approach on the rights of the impoverished in the criminal process.

The operation of the criminal law implicates many rights guaranteed by the Constitution. This chapter does not cover every aspect of the interface between criminal law and constitutional rights. Its focus is limited to the Court’s interpretation and application of criminal process rights contained in Articles 20 and 22, as well as the fair trial guarantee rights read into Article 21 by the Court.

II. THE LIBERTY PERSPECTIVE

The Constituent Assembly debates illustrate the liberty perspective on criminal process rights. Members of the assembly recognised that drafting criminal process safeguards involved balancing the goals of individual liberty and social control.⁸ Debates over what were to become Articles 21 and 22 exemplified the struggle to fine-tune this balance.⁹ As we show below, in deciding where the balance should lie, the primary concern of the Constituent Assembly was on limiting State power, so as to prevent arbitrary intrusions into the realm of individual liberty.

The Constituent Assembly’s Advisory Committee on Minorities, Fundamental Rights, *etc.* had recommended the inclusion of a provision guaranteeing that ‘no person shall be deprived of his life, or liberty, without due process of law’.¹⁰ The Drafting Committee later substituted the phrase ‘procedure established by law’ in place of ‘due process of law’ to address concerns that a ‘due process’ clause may result in *Lochner*-style¹¹ economic due process interpretations, which would be detrimental to social welfare measures enacted by the State.¹²

This decision to shift to ‘procedure established by law’ evoked sharp protests inside and outside the assembly on the ground that the new phrasing would provide the legislature carte blanche to authorise use of the State’s coercive powers in an arbitrary manner.¹³ For this reason, one member of the Constituent Assembly described Article 21 as the ‘crown of our failures’.¹⁴ Others pointed out that the Drafting Committee, while borrowing the phrase ‘procedure established by law’ from Article 31 of the Japanese Constitution, had left out succeeding Articles, which provided guarantees to protect individual liberty

against the State.¹⁵ They argued that not including a due process clause or specific criminal process safeguards would render the Constitution ‘lifeless’ because it would lead to the destruction of individual liberty in the name of social control.¹⁶

Ambedkar agreed with the concern that the removal of the ‘due process’ clause may be inimical to individual liberty. As ‘compensation’, he introduced draft Article 15A, which went on to become Article 22 of the Constitution.¹⁷ This Article contained criminal process rights, which could not be abrogated by Parliament. Long debates took place in the Constituent Assembly about the scope of these ‘compensatory’ due process guarantees. Although members disagreed vigorously on whether these safeguards were adequate to protect individual liberty against State tyranny, they agreed that the Constitution *had* to provide explicit limitations on the criminal process in order to protect individual liberty.¹⁸

Some members referenced the excesses of the State under British rule, especially their own experiences of incarceration during the freedom movement, to highlight the dangers of a legal order that permitted deprivations of liberty without any modicum of fair process.¹⁹ In this spirit Thakur Das Bhargava asked the Assembly, ‘Do we not know the Rowlatt Act which said, no *vakil*, no *daleel* no appeal?’²⁰

Others expressed concerns about laws already being promulgated by the Central and Provincial Governments that were seen as unwarranted intrusions upon life and liberty.²¹ Members used these examples to emphasise the need for requiring the State to justify every deprivation of liberty by entrenching the right to a fair criminal process as a precondition for such deprivation.²²

In sum therefore, in keeping with a liberty perspective, the Constituent Assembly conceived of criminal process rights as necessary limitations upon State power in order to protect individual liberty against arbitrary intrusions, even if as a result the security interest of the State or the efficient administration of the criminal process were thereby constrained.²³

Contrast this with the approach towards preventive detention. Article 22 creates an exception to the ordinary rules of criminal due process, and permits preventive detention for up to three months, for cases where public order and State security are the predominant concerns.²⁴ Ordinarily, therefore, the emphasis was on protecting the liberty of the individual by limiting the powers of the State. In exceptional circumstances, the balance would be reversed.

However, as we discuss below, the Supreme Court has largely eschewed this

liberty perspective of limited State power and instead emphasised a public order rationale in interpreting the scope of the procedural guarantees contained in Articles 20–22.

III. READING AGAINST THE RIGHT: PUBLIC ORDER PERSPECTIVE

The Supreme Court’s rhetoric and doctrine in interpreting criminal due process rights reflects a different approach from that of the Constituent Assembly. The Court’s dominant narrative emphasises the public order virtues of the criminal process.²⁵ It sees the criminal process as primarily serving the cause of societal security by identifying and punishing the guilty and liberating the innocent.²⁶ Thus, the Court views the trial as a process ‘to find out the truth, and not to shield the accused from the consequences of his wrongdoing’.²⁷ This assists in the accurate identification of the ‘factually’ guilty.²⁸ According to the Court, this truth-seeking function reflects the ‘ideals as enshrined under the Constitution and our laws’, and has ‘led to several decisions, whereby innovating methods and progressive tools have been forged to find out the real truth and to ensure that the guilty does not go unpunished’.²⁹

As we seek to demonstrate below, the Court’s rhetoric on the ‘truth-seeking’ and public-order-enhancing functions of the criminal process is evident from its distinct dynamic of engagement with criminal process guarantees. First, the Court predominantly reads criminal process rights to privilege accurate and efficient determinations of factual guilt and innocence in order to satisfy public order interests. This approach is contrary to one that emphasises limiting State power for preventing abuse. Since criminal process rights limit the power of the State to pursue public order goals, the Court’s general interpretative approach is that of reading against the right—that is, reading criminal process rights restrictively. The Court expresses disenchantment with procedural technicalities and niceties that obstruct ‘truth seeking’.³⁰ It reads down procedural safeguards that impact the State’s ability in finding the truth and punishing wrongdoers. The Court therefore reads rights in a manner that narrows the field of limitation, and expands the power of the State, in the interests of public order.

Secondly, even when the Court upholds a particular safeguard, it privileges the role of the safeguard in promoting accurate determinations of ‘factual’ guilt rather than its importance in protecting individual liberty.³¹

Thirdly, in order to facilitate public order goals, the Court rejects categorical prohibitions against State actions that violate criminal process safeguards. Instead, it focuses on a case-by-case analysis, on whether the violation of a procedural safeguard led to any material prejudice to the accused. Instead of placing *ex-ante* limitations on State actors, the Court favours *ex-post* oversight or review of State action by the judiciary as a safeguard against abuse. Where, in the Court's estimation, no 'harm' has been caused to the accused by the violation of a right, it is reluctant to allow the accused to 'benefit' from such a violation.

In Section III.1, we survey the Court's doctrine on criminal process rights, and highlight how the public order perspective shapes the Court's interpretations of these rights.

1. *Ex-Post Facto* Laws

Article 20(1) prohibits convictions and penalties under *ex-post facto* laws. An *ex-post facto* law is seen as 'highly inequitable and unjust' because it does not give fair warning to an individual that her conduct is proscribed, and punishes her for an act that she was otherwise free to do.³² Further, *ex-post facto* laws can be misused by a State bent on persecuting an individual, since the State could criminalise an action that was lawful when it took place, or remove protective procedural rules in order to overcome a deficiency in legal proof.³³

In India, the guarantee against *ex-post facto* laws comprises two distinct parts.³⁴ The first prohibits conviction for an act that was not an offence at the time of its commission. The second proscribes retrospective enhancement of penalty.

Soni Devrajibhai Babubhai v State of Gujarat exemplifies the impact of the first safeguard under Article 20(1).³⁵ The appellants here argued that Section 304B of the Indian Penal Code 1860, which had been inserted in November 1986, should apply to an alleged incident that had occurred in August 1986. The Court rejected this contention and held that Article 20(1) meant that Section 304B could not be given any retrospective effect.

On the question of retrospective enhancement of punishment, *Kedar Nath Bajoria v State of West Bengal* is a paradigmatic example.³⁶ Here, for an offence committed in 1947, the State sought to apply a law enacted in 1949 which provided that upon conviction for certain types of offences the Court would impose a special fine on the convict. The Court held that the special fine could

not be imposed because of Article 20(1)'s prohibition against retrospective enhancement of punishment.

Paradigmatic cases aside, and viewed in its entirety, the Court's jurisprudence has sought to interpret the Article 20(1) guarantee restrictively, and has done so by making problematic distinctions between procedural rules and substantive provisions; and between criminal and civil liability.³⁷ For example, the Court has held that the retrospective application of provisions that raise new evidentiary presumptions against the accused and reverse the burden of proof, or otherwise disadvantage the accused, will not be barred by Article 20(1).³⁸ This interpretation is not sensitive to the history of abuse of *ex-post facto* laws, which provides ample examples of changes to substantive and procedural provisions to disadvantage accused persons.³⁹ It may be argued that the wording of Article 20(1), specifically the phrase 'violation of the law in force at the time of the commission' does not permit an interpretation that allows for bringing disadvantageous procedural changes within the ambit of Article 20(1)'s protection. However, after the expanded 'due process' interpretation of Article 21, the Court can read such prohibition into Article 21, which it has not done. The Court continues to abide by the formal distinction between procedural and substantive rules, rather than looking at material disadvantage to the accused by the changed procedure.⁴⁰

Another formal distinction, which defeats the substantive concern behind enacting a prohibition on *ex-post facto* laws, is between criminal and civil liabilities. The second part of Article 20(1) prohibits subjecting a person to 'a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence'. The Court has refused to read the words 'penalty' and 'offence' expansively to include retrospective application of non-criminal liabilities within the scope of this part. It has held that *ex-post* imposition of civil liability, even when the failure to discharge such liability could lead to imprisonment, is not barred by Article 20(1).⁴¹ Similarly, upholding a law which authorised the *ex-post* levy of penalties for the failure to discharge tax liability, the Court held that Article 20(1) provides protection only to 'persons who are charged with a crime before a criminal court', and therefore does not bar the retrospective levy of penalties for failure to comply with tax laws.⁴² So also the Court has held that *ex-post* levy of charges for unauthorised use of canal water,⁴³ retrospective application of a law authorising forfeiture of properties,⁴⁴ *ex-post* application of a law that permits restraining a person from associating with any corporate body in accessing the securities market, and prohibiting such person from buying, selling, or dealing in securities, all impose

non-criminal liabilities, and are hence not protected by Article 20(1).⁴⁵ The Court reasoned that the second part of Article 20(1) only prohibits retrospective imposition or enhancement of imprisonment or fine levied as a result of conviction in a criminal case.

The distinction between criminal and civil liabilities does not account for the underlying concern about State abuse and denial of individual liberty that results from *ex-post* application of burdens on individuals. A fine or an imprisonment in a criminal proceeding, a penalty in a tax statute, or imprisonment as a consequence of failure to discharge an *ex-post* civil liability are not qualitatively different when the focus is on limiting the State's power to retrospectively impose burdens on individuals for the exercise of their liberty.

A similar concern with drawing specious distinctions between civil and criminal liabilities arises in cases of retrospectively imposed collateral civil liability on the basis of a prior criminal penalty. That is, if law A imposes a criminal penalty and law B retrospectively attaches an additional civil liability to the criminal penalty, the Court does not consider law B as violating the second part of Article 20(1).⁴⁶ According to the Court, the prior criminal penalty was only the basis on which the legislature identified the class of people who would be subject to liability under the civil law. Although the Court's interpretation allows the State to place significant burdens upon individuals under the guise of using the previous conviction as the 'factual basis' for legislative classification, the Court has not discussed this implication of its decision. Instead, demonstrating its public-order-oriented approach, the Court has held that '[t]he nature of the activity and the harm it does to the community provide[s] a sufficiently rational basis' to justify such retrospective application.⁴⁷

2. Double Jeopardy

Article 20(2) provides that ‘No person shall be prosecuted and punished for the same offence more than once.’ The Court exhibits the same public order perspective of reading the right restrictively while interpreting this guarantee against double jeopardy. As explained by the US Supreme Court in *Green v United States*,⁴⁸ the basis of the guarantee against double jeopardy is that:

[t]he State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offence, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.⁴⁹

UK and US courts have interpreted the guarantee against double jeopardy to protect against a second trial regardless of whether the first ended in conviction or acquittal.⁵⁰ The Indian Supreme Court, however, has refused to read the phrase ‘prosecuted and punished’ disjunctively, that is, as ‘prosecuted or punished’.⁵¹ Instead, it has interpreted Article 20(2) as only barring a second trial for an offence for which a person has already been punished once. An acquittal in the first prosecution does not bar another prosecution.⁵²

The Court has also held that Article 20(2) only bars more than one criminal prosecution and punishment for the same offence.⁵³ It does not bar a civil trial, administrative proceedings, or any other non-criminal proceeding arising out of the same transaction for which a person has been prosecuted and punished in a criminal proceeding.⁵⁴ Proceedings before quasi-judicial bodies are also not barred by, and do not further bar, a prosecution before a criminal court.⁵⁵

Similarly, the Court has interpreted the phrase ‘for the same offence’ to refer only to cases where the prosecution and punishment in the first and subsequent instances are for offences whose ingredients are the same.⁵⁶ Where the ingredients of two offences are non-identical, then, although the prosecution for both is based upon the same allegations, a person can be prosecuted and punished for both offences.⁵⁷

3. Right Against Self-incrimination

The right against self-incrimination brings into confrontation, perhaps most directly, the liberty interest in preventing coercion by State authorities, and the public order interest in determining the ‘truth’. The right against self-incrimination protects a person accused of an offence from being compelled to be a witness against herself.⁵⁸ The Court has understood this right as ‘ensuring reliability of the statements made by an accused’ along with ‘ensuring that such statements are made voluntarily’.⁵⁹ According to the Court, the concern with voluntariness of the statements itself arises from the fact that a compelled testimony has a high likelihood of being false.⁶⁰

The scope of the right against self-incrimination has been heavily litigated in the Supreme Court, which has been called upon to determine what the terms ‘accused of an offence’, ‘being compelled’, and ‘to be a witness’ mean. The Court has held that a person is considered to be ‘accused of an offence’ if she ‘stood in the character of an accused’ when making the statement, and includes the investigation and trial stages.⁶¹ However, by its interpretation of what it means ‘to be a witness’, the Court has limited the scope of the right against self-incrimination.

In *MP Sharma v Satish Chandra* (hereinafter *Sharma*),⁶² an eight-judge bench of the Court ruled that a person is a witness not only when she gives oral evidence, but also when she produces documents,⁶³ even during the investigative phase.⁶⁴ Subsequently, however, an eleven-judge bench in *Kathi Kalu Oghad v State of Bombay* (hereinafter *Oghad*) confined the term ‘to be a witness’ in Article 20(3) to cover only oral and written statements, which it termed ‘personal testimony’.⁶⁵ Personal testimony involves conveying facts that are within the personal knowledge of the accused. Conversely, the Court held that a person is not a ‘witness’ when she produces physical objects or provides thumb impressions, handwriting samples, or other bodily substances using which she may be identified.⁶⁶ These amount to ‘furnishing evidence’, but not to ‘being a witness’,⁶⁷ the distinguishing feature being personal knowledge of the relevant facts.⁶⁸ The Court reasoned that the Constitution makers ‘may have intended to protect an accused person from the hazards of self-incrimination ... they could not have intended to put obstacles in the way of efficient and effective investigation into crime and of bringing criminals to justice’.⁶⁹ ‘Arming’ the police and courts with powers to ‘bring offenders to justice’ was as important as

ensuring that accused persons are not compelled to make self-incriminatory statements.⁷⁰

The distinction between personal testimony and physical objects derives from the concern that compelling personal testimonies may lead to non-voluntary statements, which will impair the truth-seeking function of the criminal process. Conversely, the production of physical objects does not raise this concern, and actually furthers the ability of State actors to find the truth.

In contrast to *Sharma* and *Oghad*, the facts of which involved ‘furnishing evidence’, *Selvi v State of Karnataka* (hereinafter *Selvi*) dealt with compelling a person to make statements.⁷¹ The Court in *Selvi* emphasised the ‘reliability rationale’ of the right against self-incrimination, observing that coerced, threatened, or induced statements have a higher tendency to be false. Since unreliable and false evidence leads to inaccurate verdicts, and thus a miscarriage of justice, statements obtained through coercion, threat, or inducement are not admissible.⁷² Holding that statements made by an accused in a narco-analysis test, under the influence of ‘truth serum’, are involuntary, and hence compelled, the Court reasoned that the involuntary nature of such statements heavily impacted their *reliability* and could therefore compromise the entire trial.⁷³

The truth-seeking perspective of the Court has in the recent past extended to compelling accused persons to incriminate themselves during trial. This is starkly exhibited in the Court’s interpretation of Section 313 of the Criminal Procedure Code 1973, which requires the judge to pose questions to the accused about the circumstances appearing against her in the prosecution evidence.⁷⁴ Section 313 expressly states that the accused shall not be administered oath and shall not render herself liable to punishment by either refusing to answer the Court’s questions or by answering falsely.⁷⁵ Departing from pre-constitutional law, the 1973 Code removed the permissibility of drawing adverse inferences if the accused refused to answer or gave false answers, to bring the provision in tune with Article 20(3).⁷⁶ However, in a series of recent cases, the Court has held that although the accused is entitled to remain silent or completely deny the allegation against her, an adverse inference can be drawn from such silence or false denial.⁷⁷ This interpretation compels the accused to provide the court an explanation for the evidence against her.

The Court’s engagement with the question of compulsion highlights its public order perspective. A liberty approach on the right against self-incrimination focuses on the importance of the right for curbing police brutality. The dominant narrative in the Indian context, exceptions apart,⁷⁸ however, has been on the

reliability of the evidence generated through compulsion. The scope of the protection against compulsion is circumscribed by the usefulness of the evidence so generated in making a determination of guilt or innocence.

4. Illegally Obtained Evidence

The Court's focus on reliability of evidence in determining the scope of Article 20(3) permeates to its doctrine on whether evidence obtained in violation of a fundamental right should be admissible or not. 'Compulsion' is the sole ground for exclusion of evidence. Therefore, evidence gathered in violation of Article 20(3) is inadmissible, but evidence obtained by other illegal means, including through the violation of Article 21, is admissible.

Recall that Section 25 of the Indian Evidence Act 1872 makes confessions to a police officer inadmissible. However, Section 27 makes admissible a 'discovery' made on the basis of a confession to a police officer, and the relevant part of the confession. In the context of the right against self-incrimination, the Court has had to rule on whether a 'discovery' made as a consequence of a statement obtained in violation of Article 20(3) is admissible under Section 27. In *Oghad*, the Court held that if compulsion is used to obtain a confession, a discovery made on the basis of such a compelled statement would be barred by Article 20(3).⁷⁹ More recently, in *Selvi*, the Court, following *Oghad*, held that if a person is compelled to make a statement while in custody, neither direct nor derivative use of that statement is permitted.⁸⁰

However, in *Yusufalli Esmail Nagree v State of Maharashtra*⁸¹ and *RM Malkani v State of Maharashtra* (hereinafter *Malkani*),⁸² the Court held as admissible a secretly tape-recorded conversation in which the accused incriminated himself, on the ground that since the conversation was entirely voluntary, and the accused had not been compelled, tortured, or threatened to make an incriminatory statement, the conversation was not hit by Article 20(3).

The Court's dicta is therefore unambiguous on the point that evidence obtained through compelled confessions violates Article 20(3) and is inadmissible. But what about evidence obtained through the violation of other rights? Article 21 prohibits deprivation of life and liberty except by procedure established by law. Should it therefore bar the admissibility of illegally obtained evidence, which by its very nature is not obtained by 'procedure established by law'? The Court has repeatedly rejected this contention.⁸³ In *Malkani*, the Court rejected the claim that Article 21 rights of the accused are violated when telephonic conversations of the accused are secretly recorded, without following the 'procedure established by law'. It ruled that Article 21 is meant to safeguard privacy rights of innocent citizens, not to protect the guilty, and that it would not

interpret Article 21 to prevent the police from acting against people seeking to violate the law by bribing public servants.⁸⁴ For this reason, evidence procured illegally would be admissible. More recently, in *State of Madhya Pradesh v Paltan Mallah*, the Court ruled that weapons obtained during an illegal search are admissible unless serious prejudice is caused to the accused.⁸⁵ Similarly, in *Umesh Kumar v State of Andhra Pradesh*, the Court expressly recognised that an illegally obtained document can be used as evidence as long as its relevance and genuineness is proved.⁸⁶

5. Fair Trial Guarantees

The Supreme Court has read a guarantee of ‘fair trial’ into the *Maneka*-expanded⁸⁷ ‘procedure established by law’ clause of Article 21.⁸⁸ While the Court has found it difficult to articulate an ‘analytical, all-comprehensive or exhaustive definition of the concept of a fair trial’,⁸⁹ the trend of cases indicates that fair trial under Article 21 has come to signify that the State should justify every deprivation of life or liberty before an impartial tribunal.⁹⁰ Consequently, the accused should be presumed innocent⁹¹ until the State can prove her guilt beyond reasonable doubt.⁹² Fair trial also encompasses the right of the accused to receive fair opportunity to defend herself against such charges and prove her innocence.⁹³ Apart from principles of natural justice,⁹⁴ the fair opportunity of defence includes the concomitant right to put forward a defence,⁹⁵ to receive legal assistance,⁹⁶ to adduce evidence in support of one’s case,⁹⁷ to receive fair disclosure of exculpatory evidence,⁹⁸ and to appeal the decision to at least one other tribunal.⁹⁹ Additionally, the right to speedy trial ensures that the accused is not put through extended pre-conviction detention, through ‘worry, anxiety, expense and disturbance’, and face impediments in defending herself because of an unduly prolonged trial.¹⁰⁰

In line with its larger rhetoric in cases of constitutional criminal procedure, the Court has understood the purpose of the right to fair trial as enabling accurate determinations of factual guilt and innocence.¹⁰¹ Therefore, the Court has held that a fair trial ‘should be a search for the truth and not a bout over technicalities’.¹⁰² Furthermore, courts should not be overly solicitous of the accused, but should also give weight to rights of victims and ‘interests of society’.¹⁰³ This narrative exemplifies the public order perspective.¹⁰⁴ A liberty perspective would examine criminal process rights as a matter of coordinating between the State’s power and the individual’s liberty so as to prevent arbitrary intrusion into individual liberty. The Court, however, throws the rights of victims into the mix, and suggests that ‘the concept of fair trial entails familiar triangulation of interests of the accused, the victim and the society ... [and that] [i]nterests of society are not to be treated completely with disdain and as *persona non grata*’ in a criminal process.¹⁰⁵ Thus, along with the rights of the accused, the criminal process should give ‘equal protection to the victim and to society at large to ensure that the guilty does not get away from the clutches of the law’.¹⁰⁶

Through constructing this tension between the rights of the accused on the one hand, and the rights of victims and society at large on the other, the Court emphasises the importance of the interests of (actual and potential) victims in crime reduction and maintenance of public order, in shaping the rights of an accused.¹⁰⁷ In practice, the Court's invocation of 'rights of the victims' and 'society at large' is always accompanied by reading down of the rights of the accused.

At the doctrinal level, the focus on factual guilt and innocence translates into an emerging narrative that the denial of fair trial rights does not amount to per se illegality of the trial or of any procedure. Instead, the accused has to establish 'factual prejudice' due to the violation, for the trial to be set aside or for the Court to award any other remedy. Therefore, guarantees flowing from the right to fair trial have been read, not as placing categorical restrictions upon the State, but as requiring preventing, on a case-by-case basis, 'factual prejudice' to the accused.

Take, for example, *Zahira Sheikh v State of Gujarat*, where the Court explained that the right to fair trial has as its 'ultimate object ... whether something that was done or said either before or at the trial deprived the quality of fairness to a degree where a miscarriage of justice has resulted'.¹⁰⁸ Similarly in *Rattiram v State of Madhya Pradesh* (hereinafter *Rattiram*),¹⁰⁹ the Court understood the 'sacrosanct purpose' and 'demonstrable object' of a fair trial to be that 'the accused should not be prejudiced'.¹¹⁰ The Court emphasised that '[t]he concept of fair trial and the conception of miscarriage of justice are not ... to be deduced from procedural lapse or [violation of] an interdict ...'.¹¹¹ Rather, '[t]he seminal issue is whether the protection given to the accused under the law has been jeopardised as a consequence of which there has been failure of justice or causation of any prejudice'.¹¹²

The right to receive disclosure of exculpatory material and the right to speedy trial also exemplify the 'factual prejudice' approach. In *Manu Sharma v State (NCT of Delhi)* (hereinafter *Manu Sharma*),¹¹³ the Court stated a broad principle that the prosecutor has a duty to make fair disclosure of all material that she relies upon, even if such material has not been placed in evidence before the court. However, the Court then curtailed the breadth of this principle, by requiring the prosecutor to disclose evidence relied upon only when the document was 'bona fide obtained by the investigating agency and *in the opinion of the Prosecutor* is relevant and would help in arriving at the truth'.¹¹⁴ Further, on facts, the Court held that since the non-disclosure of a ballistic report did not lead to any 'irreversible prejudice' to the accused, the trial would not be vitiated

for reasons of non-disclosure.¹¹⁵

Following *Manu Sharma* in *VK Sasikala v State*,¹¹⁶ the Court held that if, in an ongoing trial, the accused seeks disclosure of documents that have been forwarded to the Court by the prosecution, but have not been marked or exhibited, the Court will permit inspection of such documents if it is satisfied that the accused has a *reasonable* perception of prejudice if the documents are withheld.¹¹⁷ Here too, the accused has no indefeasible right to inspect all documents forwarded by the prosecution. Instead, the accused is required to establish, without having inspected the contents of the evidence, that denying its disclosure causes a reasonable perception of prejudice to her.¹¹⁸

Similarly, although the Court has read a right to speedy trial as part of the fair trial guarantee under Article 21, delay by itself is not considered a violation of the right. The accused has to establish that ‘prejudice’ was caused to her because of the delay.¹¹⁹

The Court has also read other fair trial rights restrictively. It has upheld the constitutionality of reverse onus clauses that shift the burden of proof onto the accused once the prosecution has proved certain foundational facts. Upon a challenge that reverse onus clauses in the Narcotic Drugs and Psychotropic Substances Act 1985 (NDPS Act) violate the presumption of innocence, the Court held that such clauses were justified due to the public interest in controlling drug-related offences.¹²⁰ Similarly, the Court referenced the public interest in controlling ‘the menace of adulteration of liquor’ to uphold the constitutionality of reverse onus clauses in the Kerala Abkari Act 1977.¹²¹ Though it recognised that these ‘special provisions are to some extent harsh and are a departure from normal criminal jurisprudence’, the Court held them to be ‘a special mode to tackle new situations created by human proclivity to amass wealth at the altar of human lives’.¹²² Consequently, despite arguments and citations to decisions around the world that have struck down reverse onus clauses for violating the presumption of innocence, the Court refused to strike or read down the law. Recently, in *Hardeep Singh v State of Punjab*, the Court explicitly recognised the truth-seeking virtues of such clauses, and held that their purpose lies in preventing ‘the real perpetrator of an offence to get away unpunished’.¹²³

In one line of cases, the Court has also expressed discomfort with the ‘beyond reasonable doubt’ standard, calling for the doctrine to be understood in a manner that does not ‘destroy social defence’.¹²⁴ According to the Court, ‘[j]ustice cannot be made sterile on the plea that it is better to let a hundred guilty escape

than punish an innocent. Letting the guilty escape is not doing justice according to law.’^{[125](#)} The Court has also wondered ‘whether in the meticulous hypersensitivity to eliminate a rare innocent from being punished, many guilty persons must be allowed to escape’.^{[126](#)} Rejecting this contention, the Court has held that ‘proof beyond reasonable doubt is a guideline, not a fetish’.^{[127](#)} Based on this reasoning the Court awarded the death sentence to the accused since his retracted, uncorroborated confession to a police officer was found to satisfy the standard of proof.^{[128](#)}

6. Right to Counsel

The right to counsel as part of a fair trial guarantee under Article 21 and a right under Article 22 (1) has also been diluted by the Court to a prejudice standard.

Article 22(1) of the Constitution mandates that no person who has been arrested shall be ‘denied the right to consult, and to be defended by, a legal practitioner of his choice’. Post-*Maneka*,¹²⁹ the right to legal assistance in a criminal proceeding has been unambiguously understood to be a core concomitant of the Article 21 fair trial guarantee.¹³⁰ The right to free legal aid extends to any accused financially incapable of engaging a counsel.¹³¹ Noting that the curtailment of liberty begins with arrest, the Court extended the State’s constitutional mandate to provide free legal aid to the time the arrestee is first produced before a magistrate.¹³² Importantly, the Court has also ruled that a person is not required to make a formal application for free legal assistance; it is the Court’s responsibility to ensure that a counsel is provided.¹³³

While the right to legal aid is a well-established fair trial guarantee, the scope of the right is less certain. Two issues in particular have come up before the Court regarding the right to counsel: first, whether it implies that the counsel can be present during interrogation; secondly, whether it means right to ‘effective counsel’.

Recognising that the right against self-incrimination would be meaningless unless the accused has access to legal advice, the Court in *Nandini Satpathy v PL Dani* (hereinafter *Satpathy*) and *Selvi* ruled that the right to counsel entitles the accused to have her lawyer present during interrogation.¹³⁴ In *Selvi*, the accused’s inability to access counsel when semi-conscious was a major reason behind the ‘truth serum’ tests being held unconstitutional.¹³⁵

Other judicial decisions have, however, whittled down the ruling in *Satpathy*. In *Poolpandi v Superintendent, Central Excise*,¹³⁶ the Court disagreed with *Satpathy*, stating that *Satpathy* was *per incuriam* two constitutional bench decisions of the Court on the right to counsel during interrogation.¹³⁷ More recently, in *Senior Intelligence Officer, Directorate of Revenue Intelligence v Jugal Kishore Samra*,¹³⁸ the Court ruled that an accused is not entitled to have counsel present during interrogation, although the counsel can ‘watch proceedings from a distance or from beyond a glass partition but ... not within the hearing distance’.¹³⁹

A slightly different approach was adopted in *State (NCT of Delhi) v Navjot*

Sandhu (hereinafter *Navjot Sandhu*),¹⁴⁰ where the Court, citing *Satpathy*, ruled that if the accused ‘wishes to have the presence of his lawyer, he shall not be denied that opportunity’ to meet and consult with her lawyer ‘at the stage’ of interrogation.¹⁴¹ However, this was in the context of Section 52(4) of the Prevention of Terrorism Act 2002, which provided the accused the right to meet her counsel during interrogation.

Mohd Ajmal Amir Kasab v State of Maharashtra (hereinafter *Kasab*)¹⁴² provides the latest word on the issue.¹⁴³ Following its truth-seeking approach, the Court drastically restricted the right to counsel. It ruled that in the Indian system, the role of the lawyer is predominantly in court proceedings, and is confined to arguing on issues of remand, bail, framing of charges and trial, in addition to providing legal advice at various stages of the process. The role of the defence lawyer was understood to ensure that rights guaranteed under the Constitution and various statutes are adhered to in practice.¹⁴⁴ The Court reiterated that failure to provide a lawyer during trial vitiates the trial. However, such failure during the pre-trial stage would not vitiate the trial, unless shown to cause *material prejudice* to the accused. It would only result in disciplinary action against the magistrate or give rise to a compensation claim from the State.¹⁴⁵

Another important issue is whether failure to provide counsel renders confessions made by the accused inadmissible. The Court in *Navjot Sandhu* rejected this argument, holding instead that the right to counsel is only an important ‘supplemental safeguard’ necessary to ensure that self-incrimination rights are not violated. The Court ruled that the denial of these safeguards would be relevant in deciding whether the confessions should be acted upon or discarded.¹⁴⁶ Therefore, the question of admissibility of such confessions would be decided on a case-to-case basis. However, the Court did not lay down any standard, such as prejudice to the accused, to adjudicate the issue.

The same issue arose in *Kasab*, where the Court rejected Kasab’s argument that not having counsel at the time of confession led to the denial of his right against self-incrimination.¹⁴⁷ It held that the purpose of the criminal process ‘is to find out the truth, and not to shield the accused from the consequences of his wrongdoing’.¹⁴⁸ The sole factor relevant in evaluating the evidentiary value of a confession is whether it was voluntarily made. The role of a lawyer is to conduct the trial ‘on the basis of material lawfully collected’ during investigation. To judge whether a confession is constitutional, the Court would not examine ‘whether the accused would have made the statement had he been sufficiently

scared by the lawyer regarding the consequences of the confession. The true test is whether or not the confession is voluntary.’¹⁴⁹

Finally, the question of whether or not the accused has a right to some minimum quality of legal assistance arose in *Navjot Sandhu*. The Court held that the right to legal aid in India ‘cannot be taken thus far’¹⁵⁰ and therefore rejected the applicability of ‘ineffective assistance of counsel’ as a ground to vitiate trials. Similarly, in *Ashok Debbarma v State of Tripura*,¹⁵¹ where the question was whether ineffective assistance by counsel can be considered a mitigating circumstance in death sentencing, the Court held that a determination has to be made whether prejudice was caused because of the counsel’s ineffectiveness. For this, a court has to consider the ‘totality of the evidence’ and conclude that absent the errors committed by the counsel, it was reasonably possible that the court would not have awarded the death sentence.¹⁵²

Hence, the Court has refused to consider ineffective assistance of counsel as violating Article 21, although in passing it observed in *Noor Aga v State of Punjab* that ineffective assistance of counsel is a ‘systemic violation of [an] accused’s core constitutional right’.¹⁵³

7. Rights upon Arrest and Bail

Article 22 of the Constitution guarantees an arrested person the right to be informed of the grounds for arrest; to not be denied the right to consult and be represented by a counsel of her choice; and to be produced before the nearest magistrate within twenty-four hours of being arrested. The Court has expanded these rights in numerous judgments, and laid down extensive guidelines relating to the arrest procedure.¹⁵⁴ Recently, it frowned upon unnecessary arrests, and gave directions to curb unnecessary arrest.¹⁵⁵ However, unlike the United States, where an illegal arrest serves to exclude evidence gathered as a result of such arrest,¹⁵⁶ in India, no case has considered the impact of illegal arrests on trial. *Satpathy and DK Basu v State of West Bengal*¹⁵⁷ only provided for compensation and disciplinary action against delinquent police officers. In light of the discussion on illegally obtained evidence, it appears unlikely that the Court would declare a mistrial or exclude evidence because of an illegal deprivation of liberty.

As a general matter, the Court has understood the law of arrest as requiring a balance between the human rights of an arrestee and protecting societal interest in reducing crime rates.¹⁵⁸ This approach is particularly evident in the law relating to bail.

In the immediate aftermath of *Maneka Gandhi*, the Court held that any law authorising deprivation of liberty should be ‘reasonable, even handed and geared to the goals of community good and State necessity’.¹⁵⁹ Reasonableness entailed not using pre-trial detention through the denial of bail as a punitive measure.¹⁶⁰ The Court held that ‘[t]he only material consideration[s]... are whether the accused would be readily available for his trial and whether he is likely to abuse the discretion granted in his favour by tampering with evidence’.¹⁶¹ ‘Bail not jail’ should be the courts’ mantra,¹⁶² and bail should not be denied on grounds that the community’s sentiments were against the accused.¹⁶³

However, the Court’s liberty-focused approach above has been significantly diluted in other decisions. Although continuing to pay lip service to the idea that bail is not punitive, its case law suggests a move towards such a model. Instead of focusing on factors such as the likelihood of the person absconding or tampering with evidence or witnesses, the Court has in recent cases focused on using bail law to balance between individual liberty and societal, security interests.¹⁶⁴

In a series of cases, the Court has denied bail, stating that ‘societal interest’ is not served by letting the person at liberty. This approach understands the purpose of pre-conviction detention as incapacitating the accused, which is a goal of punishment, not detention. The punitive approach is particularly evident in the Court’s increasing focus on the nature of the crime, and its understanding that ‘societal interests’ would *ipso facto* be affected if persons accused of committing certain types of crimes are released on bail. Instead of individualised determinations of likelihood of absconding or tampering with witnesses, the Court’s focus shifts to the nature of the crime, and the need to serve ‘societal interests’ seeking protection from such crime.

One such category is economic offences, where, on bail, the Court has advised against ‘misplaced sympathy ... on such white-collared accused persons whose acts of commission and omission has ruined a vast majority of poor citizens of this country’.¹⁶⁵ Similarly, finding that economic offences involve ‘deep-rooted conspiracies’, lead to a ‘huge loss of public funds’, and adversely affect the economy, the Court in *YS Jagan Mohan Reddy v CBI*,¹⁶⁶ denied bail to the accused, who had been in custody for more than a year, citing the magnitude of the fraud involved.

The Court has also developed distinct principles of bail law for terror-and drug-related offences, aided by the statutory trend of curtailing courts’ discretion to grant bail in such cases, by placing stringent preconditions therefor. Take, for example, Section 20(8) of the Terrorist and Disruptive Activities (Prevention) Act 1987 (TADA), which permitted bail only when the Court was satisfied that reasonable grounds exist for believing that the accused is not guilty of the offence; and that the accused is not likely to commit any offence while on bail. The constitutionality of this section was challenged in *Kartar Singh v State of Punjab*,¹⁶⁷ on the ground that these conditions were too onerous, effectively making bail impossible. The Court upheld the provision’s constitutionality, noting that though liberty has to be zealously safeguarded, in cases under legislation like the TADA, the rights of the victim are important too. The ‘collective interest of the community’ and national safety were deemed relevant in bail adjudication under such laws.¹⁶⁸ Similarly, in *Supreme Court Legal Aid Committee Representing Undertrial Prisoners v Union of India*¹⁶⁹ and *Shaheen Welfare Association v Union of India*,¹⁷⁰ where the Court was faced with prisoners in extended undertrial detention for drug-and terror-related offences, respectively, the Court framed the issue before itself as one of reconciling individual liberty versus the safety of the community. It adopted one-time ‘pragmatic’ measures to categorise prisoners based on the allegations against

them, and determined bail for each category accordingly.

Thus a creeping ‘public interest’ logic seems evident in bail jurisprudence, where decisions are not determined any more by an evaluation of the likelihood of the accused absconding or tampering with evidence. Instead, the determining factor is a broad punitive logic that suggests that ‘public interest’ is best served by incarcerating certain specific persons, or persons accused of certain types of crimes. This logic of incapacitation is more suited to the regime of post-conviction incarceration than to pre-trial detention.

IV. CONCLUSION: CONSTITUTIONAL CRIMINAL PROCEDURE AND RIGHTS OF THE IMPOVERISHED

In its interpretation of constitutional criminal process rights, the Court is more concerned with State security and truth seeking than individual liberty. Although the Court recognises the principle of presumption of innocence in individual cases, it creates a systemic presumption of criminality against accused persons as a class. Rights are read against the accused so as to not let the guilty get away. This is exemplified by the Court’s more recent bail jurisprudence, and its treatment of the right to counsel. Although the Court has consistently held that bail should not be punitive in nature, its doctrine has defeated the principle. The systemic presumption of guilt against the accused is also evident in the Court’s doctrine on reverse onus clauses.

Such systemic presumption of guilt; the dilution of the right to counsel during interrogations and confessions; the non-recognition of the right to effective counsel; the focus on *ex-post* review of State action for ‘factual prejudice’ rather than categorical *ex-ante* prohibitions on rights-defeating conduct; and the emergent public interest rationale for denial of bail, all serve to especially disadvantage impoverished accused persons. By reducing categorical principles to factual prejudice, the Court provides little *ex-ante* guidance to State actors on how to modulate their behaviour. Further, the Court puts the burden on the accused to prove factual prejudice. Not only is this a tough standard to meet—the rights of the accused are not automatically guaranteed—but it also requires the accused to agitate them. This assumes a high level of knowledge of rights, and quality legal representation, both of which are generally not available to impoverished defendants. Therefore, the Court’s approach does not augur well for those who face the brunt of police power: who cannot afford lawyers, and therefore depend upon the State, but do not get legal assistance until they are

remanded to custody, and even then, have to be satisfied with whatever quality of legal assistance is provided.

When BR Ambedkar rose to introduce draft Article 15A in the Constituent Assembly, he drew a distinction between provisions relating to arrest in a criminal case, and provisions relating to preventive detention contained in the Article.¹⁷¹ The rights upon arrest were ‘safeguards against inroads’ into the personal liberty of citizens. However, in emergency situations, especially those involving ‘tampering either with public order ... or with the Defence Services’, he did not believe that ‘the exigency of the liberty of the individual should be placed above the interests of the State’.¹⁷² In such cases, the need of public order could trump an individual’s liberty interest. However, through its public order readings of constitutional criminal procedure, the Supreme Court has conceived the quotidian reality of the State as one of routinised emergency.

¹ *Constituent Assembly Debates*, vol 7 (Lok Sabha Secretariat 1986) 853, 6 December 1948 (Alladi Krishnaswami Ayyar).

² See generally, Herbert Packer, ‘Two Models of the Criminal Process’ (1964) 113 *University of Pennsylvania Law Review* 1. Packer uses the terms ‘due process’ model and ‘crime control’ model to describe approaches that value individual liberty and public order, respectively. However, Packer’s models are not, and are not meant to be, descriptions of reality. Rather, they are abstractions from reality, set up as polar opposites on the scale of choices available in the construction of the criminal process, in order to discover and discuss the ‘normative antinomy’ between the value systems underlying the two models. While sharing Packer’s assessment of these values, we do not adopt his models or his terminology. See [n 7](#) and accompanying text for our reasons for departing from Packer’s framework.

³ See eg, *Miranda v Arizona* 384 US 436, 439 (1966), defining criminal procedure as ‘the restraints society must observe consistent with the Federal Constitution in prosecuting individuals for crime’.

⁴ Packer ([n 2](#)); Erik Luna, ‘The Models of Criminal Procedure’ (1999) 2 *Buffalo Criminal Law Review* 389, 402.

⁵ Luna ([n 4](#)) 401.

⁶ See generally, Mirjan Damaska, ‘Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study’ (1972) 121 *University of Pennsylvania Law Review* 506, 575–77.

⁷ In direct contrast with Packer, the liberty and public order perspectives are not conceived as polar opposites. They are presented as actual descriptions of approaches that have shaped the trajectory of Indian criminal procedure, rather than as hypothetical ‘models’. Therefore, the two perspectives should not be understood as limited to Packer’s two models of the criminal process. Consequently, despite significant overlap, we have adopted different terminology in order to avoid confusion with Packer’s models. See also [n 2](#).

⁸ See eg, *Constituent Assembly Debates*, vol 9 (Lok Sabha Secretariat 1986) 1514–19, 15 September 1949 (HV Kamath); *Constituent Assembly Debates*, vol 7 (Lok Sabha Secretariat 1986) 851–52, 6 December 1948 (KM Munshi).

⁹ Not much discussion took place in the Constituent Assembly over the Article 20 guarantees against *ex post facto* law and penalty, double jeopardy, and self-incrimination.

¹⁰ *Constituent Assembly Debates*, vol 3 (Lok Sabha Secretariat 1986) 441, 29 April 1947 (Interim Report

on Fundamental Rights).

¹¹ *Lochner v New York* 198 US 45 (1905).

¹² *Constituent Assembly Debates*, vol 7 (Lok Sabha Secretariat 1986) 853, 6 December 1948 (Alladi Krishnaswami Ayyar).

¹³ See eg, *Constituent Assembly Debates*, vol 7 (Lok Sabha Secretariat 1986) 844–48, 6 December 1948 (Mahboob Ali Baig, Thakur Das Bhargava).

¹⁴ *Constituent Assembly Debates*, vol 7 (Lok Sabha Secretariat 1986) 846–48, 6 December 1948 (Thakur Das Bhargava).

¹⁵ *Constituent Assembly Debates*, vol 9 (Lok Sabha Secretariat 1986) 1532, 15 September 1949 (Bakhshi Tek Chand); *Constituent Assembly Debates*, vol 7 (Lok Sabha Secretariat 1986) 844, 6 December 1948 (Mahboob Ali Baig).

¹⁶ *Constituent Assembly Debates*, vol 7 (Lok Sabha Secretariat 1986) 855–57, 6 December 1948 (ZH Lari).

¹⁷ *Constituent Assembly Debates*, vol 9 (Lok Sabha Secretariat 1986) 1497, 15 September 1949 (BR Ambedkar).

¹⁸ See eg, *Constituent Assembly Debates*, vol 9 (Lok Sabha Secretariat 1986) 1498–519, 15 September 1949 (Thakur Das Bhargava, N Ahmad, HV Kamath); *Constituent Assembly Debates*, vol 7 (Lok Sabha Secretariat 1986) 851–57, 6 December 1948 (KM Munshi, ZH Lari); *Constituent Assembly Debates*, vol 9 (Lok Sabha Secretariat 1986) 1556, 16 September 1949 (BR Ambedkar).

¹⁹ *Constituent Assembly Debates*, vol 9 (Lok Sabha Secretariat 1986) 1514–19, 15 September 1949 (HV Kamath).

²⁰ *Constituent Assembly Debates*, vol 9 (Lok Sabha Secretariat 1986) 1505, 15 September 1949.

²¹ *Constituent Assembly Debates*, vol 9 (Lok Sabha Secretariat 1986) 1505, 15 September 1949.

²² *Constituent Assembly Debates*, vol 7 (Lok Sabha Secretariat 1986) 844, 851–52, 855–57, 6 December 1948 (Mahboob Ali Baig, KM Munshi, ZH Lari).

²³ *Constituent Assembly Debates*, vol 7 (Lok Sabha Secretariat 1986) 846–57, 6 December 1948 (Thakur Das Bhargava, Chimanlal Chakkubhai Shah, ZH Lari).

²⁴ *Constituent Assembly Debates*, vol 9 (Lok Sabha Secretariat 1986) 1498, 15 September 1949 (BR Ambedkar).

²⁵ See eg, *Kartar Singh v State of Punjab* (1994) 3 SCC 569; *PN Krishna Lal v State of Kerala* (1995) Supp (2) SCC 187.

²⁶ Eg, *State of Uttar Pradesh v Anil Singh* (1988) Supp SCC 686, citing *Stirland v DPP* [1944] AC 315 (HL).

²⁷ *Ajmal Kasab v State of Maharashtra* (2012) 9 SCC 1. See also *Hardeep Singh v State of Punjab* (2014) 3 SCC 92.

²⁸ See eg, *Kartar Singh* ([n 25](#)) [399].

²⁹ *Hardeep Singh* ([n 27](#)).

³⁰ See *State of Himachal Pradesh v Pawan Kumar* (2005) 4 SCC 350; *J Jayalalithaa v State of Karnataka* (2014) 2 SCC 401.

³¹ See especially, *Selvi v State of Karnataka* (2010) 7 SCC 263.

³² *Rao Shiv Bahadur Singh v Vindhya Pradesh* AIR 1953 SC 394.

³³ See *Calder v Bull* 3 US 386 (1798), cited with approval in *Rao Shiv Bahadur Singh* ([n 32](#)).

³⁴ Constitution of India 1950, art 20(1).

³⁵ (1991) 4 SCC 298.

³⁶ AIR 1953 SC 404.

³⁷ Note also *Lily Thomas v Union of India* (2000) 6 SCC 224, where the Court held that the *ex-post* application of a substantive criminal provision to a new category of persons as a result of a court interpretation does not violate art 20(1).

³⁸ *Sajjan Singh v State of Punjab* AIR 1964 SC 464.

³⁹ See *Calder v Bull* 3 US 386 (1798), cited with approval in *Rao Shiv Bahadur Singh* ([n 32](#)).

⁴⁰ See eg, *GP Nayyar v State (Delhi Admn)* (1979) 2 SCC 593.

⁴¹ *Hathising Manufacturing Co Ltd v Union of India* AIR 1960 SC 923.

⁴² *Shiv Dutt Rai Fateh Chand v Union of India* (1983) 3 SCC 529.

⁴³ *Jawala Ram v State of Pepsu* AIR 1962 SC 1246.

⁴⁴ *State of West Bengal v SK Ghosh* AIR 1963 SC 255.

⁴⁵ *SEBI v Ajay Agarwal* (2010) 3 SCC 765.

⁴⁶ *Biswanath Bhattacharya v Union of India* (2014) 4 SCC 392.

⁴⁷ *Biswanath Bhattacharya* ([n 46](#)) [38].

⁴⁹ *Green* ([n 48](#)) 187.

⁴⁸ 355 US 184 (1957).

⁵⁰ MP Singh, VN Shukla's *Constitution of India* (12th edn, Eastern Book Company 2013) 195–96.

⁵¹ *SA Venkataraman v Union of India* AIR 1954 SC 375 [5].

⁵² *SA Venkataraman* ([n 51](#)) [5].

⁵³ *Raja Narayanlal Bansilal v Maneck Phiroz Mistry* AIR 1961 SC 29.

⁵⁴ *Maqbool Hussain v State of Bombay* AIR 1953 SC 325; *Union of India v Sunil Kumar* (2001) 3 SCC 414.

⁵⁵ *Thomas Dana v State of Punjab* AIR 1959 SC 375.

⁵⁶ *Thomas Dana* ([n 55](#)) [36].

⁵⁷ *Sangeetaben Patel v State of Gujarat* (2012) 7 SCC 621; *State (NCT of Delhi) v Navjot Sandhu* (2005) 11 SCC 600.

⁵⁸ Constitution of India 1950, art 20(3) reads: 'No person accused of any offence shall be compelled to be a witness against himself.'

⁵⁹ *Selvi* ([n 31](#)) [102].

⁶⁰ *Selvi* ([n 31](#)) [102].

⁶¹ *State of Bombay v Kathi Kalu Oghad* AIR 1961 SC 1808 [16].

⁶² AIR 1954 SC 300.

⁶³ *MP Sharma v Satish Chandra* AIR 1954 SC 300 [10].

⁶⁴ *MP Sharma* ([n 63](#)) [10].

⁶⁵ *Oghad* ([n 61](#)) [11].

⁶⁶ *Oghad* ([n 61](#)) [16].

⁶⁷ *Oghad* ([n 61](#)) [16].

⁶⁸ *Oghad* ([n 61](#)) [11].

⁶⁹ *Oghad* ([n 61](#)) [10].

⁷⁰ *Oghad* ([n 61](#)) [10].

⁷¹ *Selvi* ([n 31](#)).

⁷² *Selvi* ([n 31](#)) [102].

- ⁷³ Selvi (n 31) [249].
- ⁷⁴ Code of Criminal Procedure 1973, s 313(2).
- ⁷⁵ Code of Criminal Procedure 1973, s 313(3).
- ⁷⁶ Law Commission of India, *Article 20(3) of the Constitution of India and Right to Silence* (Law Com No 180, 2002) 42 <<http://lawcommissionofindia.nic.in/reports/180rpt.pdf>>, accessed November 2015.
- ⁷⁷ See eg, *Rajkumar v State of Madhya Pradesh* (2014) 5 SCC 353; *Phula Singh v State of Himachal Pradesh* (2014) 4 SCC 9; *Nagesh v State of Karnataka* (2012) 6 SCC 477; *Manu Sao v State of Bihar* (2010) 12 SCC 310. See, however, *State of Madhya Pradesh v Ramesh* (2011) 4 SCC 786; Selvi (n 31) [141].
- ⁷⁸ See eg, *Nandini Satpathy v PL Dani* (1978) 2 SCC 424 [29], where the Court held that although '[t]he first obligation of the criminal justice system is to secure justice by seeking and substantiating truth through proof', the means are as important as the ends.
- ⁷⁹ *Oghad* (n 61) [13].
- ⁸⁰ Selvi (n 31) [134]–[135].
- ⁸¹ AIR 1968 SC 147.
- ⁸² (1973) 1 SCC 471.
- ⁸³ *Yusufalli Esmail Nagree* (n 81) [9].
- ⁸⁴ *Malkani* (n 82) [31].
- ⁸⁵ *State of Madhya Pradesh v Paltan Mallah* (2005) 3 SCC 169 [31].
- ⁸⁶ *Umesh Kumar v State of Andhra Pradesh* (2013) 10 SCC 591 [35].
- ⁸⁷ *Maneka Gandhi v Union of India* (1978) 1 SCC 248.
- ⁸⁸ *J Jayalalithaa* (n 30). See also *Nirmal Singh Kahlon v State of Punjab* (2009) 1 SCC 441; *Jayendra Thakur v State of Maharashtra* (2009) 7 SCC 104.
- ⁸⁹ *Zahira Habibulla H Sheikh v State of Gujarat* (2004) 4 SCC 158 [36].
- ⁹⁰ *J Jayalalithaa* (n 30) [29].
- ⁹¹ *Sahara India Real Estate Corpn Ltd v SEBI* (2012) 10 SCC 603.
- ⁹² *Rafiq Ahmad v State of Uttar Pradesh* (2011) 8 SCC 300; Selvi (n 31).
- ⁹³ *Manu Sharma v State (NCT of Delhi)* (2010) 6 SCC 1.
- ⁹⁴ *MH Hoskot v Maharashtra* (1978) 3 SCC 544.
- ⁹⁵ *Natasha Singh v CBI* (2013) 5 SCC 741.
- ⁹⁶ *Natasha Singh* (n 95).
- ⁹⁷ *Natasha Singh* (n 95).
- ⁹⁸ *VN Sasikala v State* (2012) 9 SCC 771; *Manu Sharma* (n 93).
- ⁹⁹ *VN Sasikala* (n 98); *Manu Sharma* (n 93); *Kalyani Baskar v MS Sampooranam* (2007) 2 SCC 258.
- ¹⁰⁰ *Abdul Rehman Antulay v RS Nayak* (1992) 1 SCC 225 [86].
- ¹⁰¹ *J Jayalalithaa* (n 30); *Hardeep Singh* (n 27).
- ¹⁰² *J Jayalalithaa* (n 30) [29].
- ¹⁰³ *Zahira Sheikh* (n 89) [35].
- ¹⁰⁴ See also *Kartar Singh* (n 25).
- ¹⁰⁵ *Zahira Sheikh* (n 89) [35].
- ¹⁰⁶ *Hardeep Singh* (n 27).
- ¹⁰⁷ See, however, *DK Basu v State West Bengal* (1997) 1 SCC 416 [31].

- ¹⁰⁸ *Zahira Sheikh* ([n 89](#)) [36].
- ¹⁰⁹ (2012) 4 SCC 516.
- ¹¹⁰ *Rattiram* ([n 109](#)) [39].
- ¹¹¹ *Rattiram* ([n 109](#)) [58].
- ¹¹² *Rattiram* ([n 109](#)) [43].
- ¹¹³ *Manu Sharma* ([n 93](#)).
- ¹¹⁴ *Manu Sharma* ([n 93](#)) [218] (emphasis added).
- ¹¹⁵ *Manu Sharma* ([n 93](#)) [303].
- ¹¹⁶ *VN Sasikala* ([n 98](#)).
- ¹¹⁷ *VN Sasikala* ([n 98](#)) [20].
- ¹¹⁸ *VN Sasikala* ([n 98](#)) [20].
- ¹¹⁹ *Dharmendra Kirthal v State of Uttar Pradesh* (2013) 8 SCC 368; *Niranjan Sashittal v State of Maharashtra* (2013) 4 SCC 642; *Mohd Hussain v State* (2012) 9 SCC 408; *Vakil Prasad Singh v State of Bihar* (2009) 3 SCC 355; *Abdul Rehman Antulay* ([n 100](#)).
- ¹²⁰ *Noor Aga v State of Punjab* (2008) 16 SCC 417.
- ¹²¹ *PN Krishna Lal* ([n 25](#)) [52].
- ¹²² *PN Krishna Lal* ([n 25](#)) [52].
- ¹²³ (2014) 3 SCC 92 [9].
- ¹²⁴ *Devender Pal Singh v State (NCT of Delhi)* (2002) 5 SCC 234 [53].
- ¹²⁵ *Gurbachan Singh v Satpal Singh* (1990) 1 SCC 445 [4].
- ¹²⁶ *Inder Singh v State (Delhi Admn)* (1978) 4 SCC 161 [2].
- ¹²⁷ *Devender Pal Singh* ([n 124](#)) [54].
- ¹²⁸ *Devender Pal Singh* ([n 124](#)) [62]. The Court's reasoning was followed, verbatim, in *State v Karnail Singh* (2003) 11 SCC 271; *Sucha Singh v State of Punjab* (2003) 7 SCC 643; *Gangadhar Behera v State of Orissa* (2002) 8 SCC 381.
- ¹²⁹ *Maneka Gandhi* ([n 87](#)).
- ¹³⁰ *Hussainara Khatoon (IV) v Home Secretary, State of Bihar* (1980) 1 SCC 98; *MH Hoskot* ([n 94](#)).
- ¹³¹ *Hussainara Khatoon* ([n 130](#)) [6]–[9].
- ¹³² *Khatri (II) v State of Bihar* (1981) 1 SCC 627 [5]–[6].
- ¹³³ *Suk Das v Union Territory of Arunachal Pradesh* (1986) 2 SCC 401.
- ¹³⁴ *Satpathy* ([n 78](#)) [63]–[65].
- ¹³⁵ *Selvi* ([n 31](#)) [247].
- ¹³⁶ (1992) 3 SCC 259 [7].
- ¹³⁷ The two cases, *Ramesh Chandra Mehta v State of West Bengal* AIR 1970 SC 940, and *Illias v Collector of Customs, Madras* AIR 1970 SC 1065, in fact did not deal with the issue of right to counsel.
- ¹³⁸ (2011) 12 SCC 362.
- ¹³⁹ *Jugal Kishore Samra* ([n 138](#)) [29].
- ¹⁴⁰ *Navjot Sandhu* ([n 57](#)).
- ¹⁴¹ *Navjot Sandhu* ([n 57](#)) [160].
- ¹⁴² *Kasab* ([n 27](#)).
- ¹⁴³ Note, however, that *Kasab* was decided by a bench of two judges, whereas *Selvi* and *Satpathy* were

decided by a bench of three.

¹⁴⁴ *Kasab* (n 27) [466]–[475].

¹⁴⁵ *Kasab* (n 27) [478].

¹⁴⁶ *Navjot Sandhu* (n 57) [164].

¹⁴⁷ *Kasab* (n 27) [453]–[456].

¹⁴⁸ *Kasab* (n 27) [457].

¹⁴⁹ *Kasab* (n 27) [457].

¹⁵⁰ *Navjot Sandhu* (n 57) [167].

¹⁵¹ (2014) 4 SCC 747.

¹⁵² *Ashok Debbarma* (n 151) [39].

¹⁵³ (2008) 16 SCC 417 [71].

¹⁵⁴ *DK Basu* (n 107); *Joginder Kumar v State of Uttar Pradesh* (1994) 4 SCC 260.

¹⁵⁵ *Hema Mishra v State of Uttar Pradesh* (2014) 4 SCC 453. See also *Arnesh Kumar v State of Bihar* (2014) 8 SCC 273; *Lalita Kumari v State of Uttar Pradesh* (2014) 2 SCC 1.

¹⁵⁶ *Wong Sun v United States* 371 US 471 (1963).

¹⁵⁷ *DK Basu* (n 107).

¹⁵⁸ *Joginder Kumar* (n 154).

¹⁵⁹ *Gudikanti Narasimhulu v Public Prosecutor* (1978) 1 SCC 240 [10].

¹⁶⁰ *Gudikanti Narasimhulu* (n 159) [11].

¹⁶¹ *Bhagirathsingh v State of Gujarat* (1984) 1 SCC 284 [7]; *Sanjay Chandra v CBI* (2012) 1 SCC 40.

¹⁶² *State of Rajasthan v Balchand* (1977) 4 SCC 308 [2].

¹⁶³ *Sanjay Chandra* (n 161) [40].

¹⁶⁴ *Vaman Narian Ghiya v State of Rajasthan* (2009) 2 SCC 281; *Siddharam Satlingappa Mhetre v State of Maharashtra* (2011) 1 SCC 694 [84]; *Rajesh Ranjan Yadav v CBI* (2007) 1 SCC 70 [16].

¹⁶⁵ *Narinderjit Singh Sahni v Union of India* (2002) 2 SCC 210 [57].

¹⁶⁶ (2013) 7 SCC 439.

¹⁶⁷ *Kartar Singh* (n 25).

¹⁶⁸ *Kartar Singh* (n 25) [351]. Relying on this judgment, in *Supreme Court Legal Aid Committee Representing Undertrial Prisoners v Union of India* (1994) 6 SCC 731, the Court upheld the constitutionality of the NDPS Act 1985, s 37, which contained a similar bail provision in respect of drug-related offences. See also *Ranjitsing Bhahmajeetsing Sharma v State of Maharashtra* (2005) 5 SCC 294 [38], upholding the constitutionality of a similar provision in section 21, Maharashtra Control of Organised Crime Act 1999, but warning the legislature that such statutory restrictions on the power to grant bail should not be ‘pushed too far’.

¹⁶⁹ (1994) 6 SCC 731.

¹⁷⁰ (1996) 2 SCC 616.

¹⁷¹ *Constituent Assembly Debates*, vol 9 (Lok Sabha Secretariat 1986) 1497, 15 September 1949 (BR Ambedkar).

¹⁷² *Constituent Assembly Debates*, vol 9 (Lok Sabha Secretariat 1986) 1497, 15 September 1949 (BR Ambedkar).

CHAPTER 45

FREE SPEECH AND EXPRESSION

LAWRENCE LIANG

I. INTRODUCTION

THE legal history of freedom of speech and expression is a fertile site from which we can explore the relationship between constitutionalism and the imagination of a democratic public sphere. Given the public nature of censorship controversies, debates on the content and scope of the freedom of speech and expression in Article 19(1)(a) of the Constitution, as well as the ‘reasonable restrictions’ in Article 19(2), have animated public imagination and fuelled contestations over the nature of democracy in India.¹ A number of Supreme Court decisions have been quick to distinguish the free speech tradition in India from other jurisdictions. An illustrative instance is the Court’s observations in *Life Insurance Corporation v Manubhai D Shah*,² which, unlike the First Amendment in the United States, Article 19(1)(a), is not an absolute right and must be exercised in a way that does not jeopardise the rights of another or clash with ‘the paramount interest of the State or the community at large’.³ This observation summarises the key dilemmas that have characterised the history of free speech in India. While these themes are not unique to India, there is nonetheless a sense of an Indian exceptionalism that runs through discussions of Article 19(1)(a) and Article 19(2).

This chapter begins with the classical normative arguments for free speech. I argue that the democracy argument has been the primary justification used by the judiciary in free speech cases, and examine its consequences. I then investigate a recurring assertion about the colonial character of speech-restrictive laws and consider what exactly it is about the colonial history of the regulation of speech that informs our understanding of the constitutional design of Articles 19(1)(a) and 19(2). I suggest that a constitutive split between the universal speaking subject and the infantilised native subject in the colonial period transforms itself in the post-colonial period into a problem of the ‘social’ and examine what this means for free speech. I then look at the substantive scope of Article 19(1)(a), its expansion in particular domains, and the standards for

determining reasonableness. The chapter then traces the doctrinal history of seditious speech, before moving to a brief analysis of hate speech and obscenity. I conclude with thoughts about the necessity of supplementing the idea of a deliberative democracy with an idea of agonistic politics if we are to enrich and strengthen the free speech tradition that has evolved over the past sixty years.

II. JUSTIFYING FREE SPEECH

There are a number of competing theories that provide a normative justification for free speech. Scholars typically base free speech either on instrumental theories (which are aimed towards securing or promoting other values such as democracy) or intrinsic value theories (where speech is valued in and of itself).⁴ Familiar versions of instrumental theories are the ‘marketplace of ideas’, ‘speech promoting democracy’, ‘watchdog theory’, or ‘speech promoting the truth’. Non-instrumental theories, on the other hand, posit that speech and expression are essential to the development of the autonomy of an individual regardless of their social utility and this is a desirable end in and of itself. The Indian experience has a well-developed jurisprudence of the instrumental theory of speech, but a much weaker tradition of promoting the intrinsic value of speech. Similarly while many cases focus on the question of freedom of speech, very few actually address the scope of ‘expression’ in Article 19. Consider the example of someone who refuses to stand when the national anthem is played, claiming his right to do so under Article 19(1)(a). Does he automatically become an anti-nationalist? In 1987, in a significant free speech case, three students who belonged to the religious group ‘Jehovah’s Witnesses’ were suspended from their school in Kerala for refusing to sing the national anthem in school. The Supreme Court overturned their suspension on the grounds that the right to freedom of speech and expression included the right to remain silent.⁵ It held that while the students did not join in the singing of the anthem, they had not shown any disrespect, since they stood up along with the other students. Does this mean that the refusal to stand up would automatically qualify the act as being a disrespectful one and one which falls outside of the scope of protectable speech and expression under Article 19(1)(a)? This question hinges on how we understand the phrase ‘expression’. Debates on free speech often focus on the speech element but ignore the expression element. If the right to free speech includes the right to remain silent, then would free expression include a non-action? As per Section 3 of the Prevention of Insults to National Honours Act

1971, ‘Whoever intentionally prevents the singing of the Indian National Anthem or causes disturbances to any assembly engaged in such singing shall be punished with imprisonment for a term, which may extend to three years, or with fine, or with both.’ It is clear that the law requires an active act of disturbance to constitute an offence but does it include a quiet refusal to stand for the national anthem?⁶

Normative theories of free speech are not mutually exclusive and courts can use a particular justification in one case while relying upon a different justification in another. One way of thinking about the choice of the normative theory in free speech cases is to think of it as a framing device—an outer shell determining the basic shape that free speech disputes take, with a significant impact on the outcome of free speech cases.⁷ Consider, for instance, the contrasting approach of the US and Indian courts to the marketplace of ideas theory. The theory originated in Wendell Holmes J’s opinion in *Abrams v United States*: ‘the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out’.⁸

The analogy of the marketplace is rooted in economic theories and draws on underlying free market assumptions about liberty and competition being the best form of governance.⁹ Indian courts have adopted a more sceptical approach towards the marketplace of ideas. In the *Cricket Association of Bengal* case,¹⁰ the Supreme Court implicitly rejects the free-marketplace-of-ideas theory, preferring a balance of public interest approach in deciding whether the State could have a monopoly on airwaves. Even as it was uncomfortable with the idea of an absolute State monopoly, the Court, citing critiques of the marketplace theory, leaned towards independent regulation in the public interest and recommended the setting up of an independent regulatory body to oversee the use of airwaves. The outcome was clearly informed by the choice of the outer frame. In *S Rangarajan v P Jagjivan Ram*,¹¹ the Court similarly refused to extend the free marketplace metaphor to broadcast media, distinguishing between different media forms and concluding that while the metaphor could be used for newspapers, it could not be extended to films.

Of the various free speech theories, the Supreme Court has relied primarily on the relationship between free speech and the promotion of democracy. In its very first case on free speech, the Court held that the freedom of speech and of the press lay at the foundation of all democratic societies.¹² Under this account, free speech does not just promote democracy but is one of the defining ingredients of

democracy itself.¹³ In *Rangarajan*, the Court argued that:

Democracy is Government by the people via open discussion. The democratic form of government itself demands [from] its citizens an active and intelligent participation ... public discussion with people's participation is a basic feature and a rational process of democracy which distinguishes it from all other forms of Government.¹⁴

The Emergency imposed by Indira Gandhi in the 1970s is seen as one of the darkest periods of Indian democracy, with the suspension of fundamental rights, the gagging of the press, and the suppression of all dissent.¹⁵ It is arguably in light of the Emergency that we see the Supreme Court making its sharpest observations on free speech: 'Freedom to air one's views is the lifeline of any democratic institution and any attempt to stifle, suffocate or gag this right would sound a death-knell to democracy and would help usher in autocracy or dictatorship.'¹⁶ Yet one question which remains unaddressed, and to which I shall return, is the question of what conception of democracy the Court holds. One consequence of the democratic theory justification is an inclination towards speech that, in its view, advances the cause of democracy,¹⁷ and in the event that there is a conflict between free speech and other values the Court has held in favour of free speech.¹⁸

The Court has also carved out new rights from Article 19(1)(a) based on the democracy argument. In *State of Uttar Pradesh v Raj Narain*,¹⁹ the Court recognised a right to know from the freedom of speech. One can infer from its reasoning that the link between the right to speech and the right to know is built on the basis of transparency of governance. If free speech enables citizens to participate in political processes, this includes the right to demand accountability from those who govern. If democracy and free speech are understood to have a constitutive relation to each other, it is consistent to ground the right to know within the right to freedom of speech and expression. Yet one of the drawbacks of relying solely on the democracy argument is that it has almost been reduced to a normative cliché, with the Supreme Court simply recycling it in almost all free speech cases, rather than using each case as an opportunity to confirm, clarify, and create new political vocabularies for speech and democracy. If we turn, for instance, to a non-instrumental theory of speech such as the autonomy conception, which advocates the development of individual autonomy through speech, we find it to be on a much weaker footing in India.²⁰ An example of this is the silence in the Delhi High Court decision in the *Naz Foundation* case on the speech rights of sexual minorities.²¹ While the Court discussed the relationship between equality, dignity, and privacy via Articles 14, 15, and 21, it did not

address the question of the relationship between free speech and the expression of personal identity, despite it being raised by the petitioners. This reluctance, I would argue, stems from the absence of a tradition that links speech to a philosophy of expressive identity.

III. COLONIAL CONTINUITY, SEDITION, AND PUBLIC ORDER

A number of laws that curtail free speech have colonial origins.²² A recurring theme that emerges in evaluations of free speech in India is the assertion that the continued existence of such laws and their use testifies to the fact that in the domain of speech we face a problem of colonial continuity.²³ What is it about the colonial construction of the public sphere and the speaking subject that continues to influence the State and the judiciary's response to free speech? The Constituent Assembly debates reveal that India's founders were acutely aware of the political misuse of penal laws such as sedition to suppress free speech, and their motivation to recognise a strong free speech right stemmed partly from their desire to distinguish the democratic republic from colonial rule. At the same time we encounter a paradox, which began with the making of the Constitution and continues to date, as we encounter a reluctance to recognise an absolute right of free speech on the ground that the Indian polity is not ready for it, thereby recycling some assumptions that had informed the logic of colonial rule. The logic of colonial rule creates a split at its very origin between a universal rational subject (the enlightened European as a bearer of rights) and the native subject (marked by a hypersensitive excess) and this foundational split reappears in the post-colonial context in terms of class, gender, and literacy. In other words, the realm of the political is circumscribed by an excessive social sphere, which is unable to shed its positivity to emerge as the properly constituted public sphere.²⁴ If one were to map this out onto the terrain of the Constitution one can see a mirroring of this split in the distinction between Article 19(1)(a), which imagines the citizen as a rational speaking and listening subject, and Article 19(2), which circumscribes the possibilities of such speech through the incorporation of regulatory measures that have in mind an affective public sphere susceptible to outrage and provocation.²⁵

Asad Ali Ahmed, outlining the evolution of hate speech laws in colonial India, has shown that colonial subjects were portrayed by lawmakers like Macaulay and others as highly excitable subjects who were easily prone to taking offence

and responding violently to such offence.²⁶ These racially essentialist accounts created the context for the emergence of the colonial State as a rational and neutral arbiter of emotionally excitable subjects prone to emotional injury and physical violence. Arun Thiruvengadam characterises the different historical periods of free speech as encompassing a universalist nature (dominant during the anti-colonial struggle) which were subsequently replaced (during the Constituent Assembly debates) by particularistic concerns which led them to permit several grounds of restrictions of rights in response to such conditions.²⁷ One might add to this argument by suggesting that the paradox of free speech in India might be thought of in the following terms: while the right to free speech is one that is granted to all citizens, the question of who can occupy the space of the properly constituted citizen is far more tenuous. If the founding constitutional vision is seen against the backdrop of Partition and its impact on citizenship, Article 19(1)(a) can be understood as trying to create a space of deliberative democracy. It is at best a partial project where the deliberative nature of the reason underlying it is also accompanied by a sense of a nervous public sphere exemplified in Article 19(2), where the full citizen and the infantilised citizen occupy the same sphere.

IV. THE SCOPE OF ARTICLE 19(1)(A)

1. The Domain of Free Speech

Freedom of speech would mean very little if it were not able to respond to political, social, and technological changes. The Supreme Court has confirmed this in its assertion in *Manubhai Shah* that a constitutional provision is ‘never static, it is ever-evolving and ever-changing and, therefore, does not admit of a narrow, pedantic or syllogistic approach’.²⁸ This case is an instance of a dynamic approach to speech. The Life Insurance Corporation of India (LIC) had responded in its in-house magazine to critiques levelled against it, but denied the petitioner the right to respond in the magazine, claiming that it was an in-house publication. The Court held this to be in violation of free speech and characterised LIC’s refusal as ‘unfair and unreasonable’.²⁹ Fairness demanded that both views be placed before the readers to enable them to draw their own conclusions, and there was no logic or proper justification for refusing publication. Both reasons are premised on the right to communicate but also involve access to means of communication. By introducing the idea of fairness, the Court effectively expands the scope of Article 19(1)(a), since the fairness factor clarifies the substantive scope of Article 19(1)(a) along with reading a need for procedural fairness as a test for Article 19(2).

There are two ways in which judicial interpretations of free speech extend democratic space. One is through clarifying the scope of the right to speech and circumscribing restrictions strictly, and the other is by extending the boundaries of what amounts to protectable speech. The question of commercial speech and the right to broadcasting are examples of the latter. In *Hamdard Dawakhana*, the Supreme Court refused to grant commercial speech the same level of protection that it afforded other forms of speech, arguing that it does not have the same value as political or creative expression.³⁰ It reversed its position in *Tata Press Ltd v Mahanagar Telephone Nigam Ltd*, clarifying that commercial speech per se was not outside the domain of Article 19(1)(a) and *Hamdard* was applicable only to commercial speech that was deceptive and misleading.³¹ The crucial question is how courts restrict or widen democratic spaces and possibilities when they choose to either contract or expand the domain of protectable expression. UR Rai, in his reading of the judgment, suggests that the Court would have done better to have treated commercial speech within the ambit of Article 19(1)(g) rather than Article 19(1)(a), on the ground that the relational nexus it has to traditional free speech concerns is far less than its proximity with trade.³² While

Rai's reasoning seems to offer a pragmatic solution to the question of commercial speech, I would suggest that the significance of according commercial speech protection as a speech right has two important consequences. First, an expansion of the domain of protectable speech expands the possibilities of democratic space by widening the net of public participation and legally recognised expressive forms. Secondly, it renders commercial speech susceptible to free speech claims. In recent times this has become all the more important as the lines between commercial expression and free speech concerns get blurred in the overlap between trademark, copyright, and free speech.³³

The freedom of the press was read into Article 19(1)(a) in *Sakal Papers*,³⁴ *Bennett Coleman*,³⁵ and *Indian Express*,³⁶ despite not being formally recognised in Article 19(1)(a). In contrast, the right to broadcasting has had a harder time finding recognition.³⁷ Inheriting its doctrinal legacy from cases about film censorship, where the courts distinguished between different mediums to justify a differential treatment of cinema, there was an initial reluctance to afford a speech right to broadcasting.³⁸ In *Odyssey Communications*, the Court equated the right to express oneself on television with the right to use traditional media and held that the right to exhibit films was protected in Article 19(1)(a), thereby redeeming the hitherto low status accorded to film.³⁹ This judgment has been hailed for inaugurating a right to broadcast.⁴⁰ The Court then extended this further in the *Manubhai Shah* case, where it held that 'the words "freedom of speech and expression" must be broadly construed to include the freedom to circulate one's views by words of mouth or in writing or through audio-visual instrumentalities'.⁴¹ The right to broadcast culminated in the *Cricket Association of Bengal*,⁴² which unlike the previous cases did not involve a content-based restriction but a restriction based on State monopoly over airwaves. The judges effectively recognised a right to broadcasting under Article 19(1)(a) subject to the management of scarce resources in the interests of the public. The coming together of two forms of creative expression—namely film and cricket, which remain the largest mode of mobilising the public in India—along with a new public sphere created by television, allowed the Court to significantly expand the scope of freedom of speech and expression.⁴³ One way of thinking about how the scope of free speech expands is by evoking the media analogy 'incremental amplification' to understand how free speech metaphors that begin with the image of an individual speaker in a street corner begin to incorporate technologies from the microphone to newspapers to television, and finally the Internet. A spatial understanding of speech creates two innovative developments

in the understanding of free speech jurisprudence. First, it incorporates an understanding of the ecology of speech which includes recognition of infrastructure and access to infrastructures of communication; and, secondly, given the nature of broadcasting as a mass medium, it locates the right to broadcast not only within the logic of a speaking subject but also from the perspective of spectatorial rights.

2. The Test of Reasonableness

What tests and standards has the Supreme Court evolved in its interpretation of ‘reasonableness’ under Article 19(2)? It has applied multiple standards to determine reasonableness, including proximity, arbitrariness, and proportionality. Any law that overreaches in its attempt at curtailing free speech runs the risk of being declared unreasonable. An illustrative instance of this is Section 66A of the Information Technology Act 2000, which penalises speech on the grounds of information being ‘grossly offensive’, possessing ‘menacing character’, ‘causing annoyance’, *etc.* Would these restrictions stand the test of reasonableness under Article 19(2)? In March 2015, the Supreme Court answered this question.⁴⁴ Such grounds were declared to be vague and undefined, and the provision was struck down as unconstitutional.

The first major test with regard to Article 19(2) is that of proximity. In *Ram Manohar Lohia*, the Court emphasised that for a restriction to be reasonable, it must have a reasonable relation to the object the legislation has in view and must not go beyond it.⁴⁵ Here the Court was closely following the standards laid down in *State of Madras v VG Row*, which held that it is difficult to lay down an abstract test of reasonableness and what the judiciary needs to closely examine are ‘the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, [and] the prevailing conditions at the time’.⁴⁶

This introduces a second element, namely the test of proportionality, in deciding the reasonableness of a restriction. The proportionality test looks not just at proximity but also whether a legal restriction is excessive in nature. While courts have elaborated the proximity test, they have paid relatively less attention to the proportionality test. In *Virendra Ojha v State of Uttar Pradesh*, the Allahabad High Court observed that in administrative action affecting fundamental freedoms, proportionality has always been applied in India even though the word ‘proportionality’ has not been specifically used.⁴⁷ We find evidence of this in the Court’s reasoning in *Ram Manohar Lohia* when it says that a restriction becomes unreasonable if it is excessive. The proportionality test, which is more developed in administrative law, serves as an important test for determining whether the scope of restrictions sought to be imposed balance a legal right and a prohibition. *Chintaman Rao v State of Madhya Pradesh*,⁴⁸ though not a free speech case, nevertheless established the proportionality test

which can be usefully extended to free speech cases. Here the Court found that:

The phrase 'reasonable restriction' connotes that the 'limitation imposed on a person in enjoyment of the right should not be arbitrary or of an excessive nature, beyond what is required in the interests of the public'. The word 'reasonable' implies intelligent care and deliberation, that is, the choice of a course which reason dictates. Legislation which arbitrarily or excessively invades the right cannot be said to contain the quality of reasonableness.⁴⁹

This opinion was affirmed in *Sahara India Real Estate Corporation Ltd v Securities and Exchange Board of India*, in which the Court had to balance the right to free speech with the postponement of the publication of news.⁵⁰ Reading *Chintaman Rao* along with developments in European jurisprudence, the Court held that in passing orders of postponement, 'courts have to keep in mind the principle of proportionality and the test of necessity'.⁵¹ The 'necessity to pass such orders' has to be evaluated 'not only in the context of administration of justice but also in the context of the rights of the individuals to be protected from prejudicial publicity or misinformation'.⁵² Thus, we notice that when a law clearly violates Article 19(1)(a) by virtue of it not deriving its authority from Article 19(2), then it is not difficult for the judiciary to strike it down. However, in most instances, it is not that the constitutive offence which is missing (say, public order), but rather that the nature of the restriction sought to be imposed is either vague or overreaches. In such cases, the test to determine its reasonableness becomes the only mode to protect speech. The reasonableness test is therefore the crucial pivot that hinges a substantive commitment to free speech to procedural safeguards.

3. A Notable Failure

While the preceding sections have outlined the positive role of the Supreme Court in expanding the domain of speech, it would be incomplete without highlighting some of its monumental failures. An important recent example is *Baragur Ramchandrappa v State of Karnataka*,⁵³ in which an author appealed a Karnataka High Court decision upholding an order of forfeiture of his historical novel *Dharmakaarana* based on the life of Basavanna. The novel, which fictionalised the life of Basavanna, contained a section that speculated on the unclear parentage of the saint. Despite the fact that this is indeed an issue on which there has been no agreement between scholars and the assertion by the author that it was a historical novel, the Supreme Court upheld the order to ban the book. This judgment suffers from numerous conceptual problems but it is worth highlighting three.

First, Section 95 of the Code of Criminal Procedure 1973 empowers the government to issue an order forfeiture against any book when the book ‘appears to the State Government to contain any matter the publication of which is punishable under Section 124A or Section 153A or Section 153B or Section 292 or Section 293 or Section 295-A of the Indian Penal Code (45 of 1860)’. Section 95 provides the government preventive powers and hence has to be strictly interpreted. It was alleged by the petitioner that any opinion under Section 95 had to establish a *prima facie* case that it violated the substantive provisions cited and therefore a case had to be made that it was ‘malicious and intended to outrage the feelings of a group or class of citizens and in the absence of either of these ingredients, no order under Section 95 of the Code could be justified’.⁵⁴ The Supreme Court rejected the claim that the onus fell on the government to prove these ingredients and relying on generic observations made on public order in *Lalai Singh Yadav*,⁵⁵ the Court concluded that the word ‘appears’ does not:

[R]equire that it should be ‘proved’ to the satisfaction of the State Government that all requirements of the punishing sections including *mens rea* were fully established ... all that Section 95(1) therefore required was that the ingredients of the offence(s) should ‘appear’ to the government to be present.⁵⁶

This shifts the burden to the applicant challenging the order of forfeiture. Rather than holding the executive accountable through public reason for its actions, the Court presumes the validity of such actions even without any reason provided. It also paves the way for the executive to respond to inchoate claims of hurt

sentiment without regard to substantive principles that have emerged in judicial decisions that narrow the scope of vaguely worded laws.

Secondly, the Court cited a number of its own judgments, including *Rangarajan*, in which the test for determining whether someone was affected by a speech act was held to be that of an ‘ordinary man of common sense and prudence and not that of an out of the ordinary or hypersensitive man’.⁵⁷ It also reiterated the fact that the allegedly offending sections of a work had to be read in the context of the whole work and not in isolation, but then proceeded to ignore these principles by privileging the claims of a few members of a community and their interpretation of the work.

Finally, the Court arrogated for itself the role of literary-cum-historical interpreter of disputed claims of fact. Thus if any author writes a speculative work of fiction on a historical topic and is unable to prove the ‘facts’, and this speculation offends a small class of persons, the Court in *Baragur Ramchandrappa* effectively presumes that such work can be deemed to be ‘deliberately designed to be hurtful’.⁵⁸ The Court concluded that ‘We also have no hesitation in observing that the novel with its complimentary passages in favour of Basaveshwara is merely a camouflage to spin and introduce a particularly sordid and puerile story in [Chapter 12](#)’.⁵⁹ And it is precisely this kind of certitude without reason that undoes the reputation of the Supreme Court as a defender of free speech.

V. SUBVERSIVE SPEECH: PUBLIC ORDER AND SEDITION

The law of sedition was introduced by Section 124A of the Indian Penal Code (IPC) 1860, in 1870 as a draconian measure to counter anti-colonial sentiments. Several major leaders of the independence movement, including Gandhi and Tilak, were tried under this provision. Gandhi famously described Section 124A as the ‘prince among the political sections of the Indian Penal Code designed to suppress the liberty of the citizen’.⁶⁰ When the Constituent Assembly deliberated the scope and extent of restrictions that could be placed on free speech, the prominent exclusion from what eventually became Article 19(2) was the word ‘sedition’.⁶¹ In the original draft that was up for discussion the word ‘sedition’ had been included as one of the grounds for the restriction on speech. A number of the Constituent Assembly members took objection to this, highlighting the misuse of sedition laws during colonial rule.⁶² The first battles over free speech

in post-colonial India involved the troubling legacy of sedition. Granville Austin describes the Indian Constitution as one that encompassed three strands: 'building a strong state, establishing the institutions and spirit of democracy, and fostering a social revolution'.⁶³ Together, they formed the 'seamless web' of the Constitution, but within the very first year this web began to unravel, with conflicts between the democratic thread (free speech claims) and the sovereignty thread. Given Partition, Nehru's government was worried about two political impulses that he saw as being divisive: the extreme Left on one side and the religious right on the other. While Nehru constantly cautioned against India becoming a police state, he simultaneously mistrusted the inflammatory potential of many regional newspapers.

Two decisions of the Supreme Court triggered the first constitutional crisis in independent India. In its original form Article 19(2) used the words 'undermines the security of the State or tends to overthrow the State'. In *Romesh Thappar v State of Madras*,⁶⁴ the Government of Madras imposed a ban upon the entry and circulation of a magazine, *Crossroads*. Romesh Thappar approached the Supreme Court, arguing that the ban was a violation of his freedom of speech and expression.⁶⁵ The question was whether a law which allowed for the banning of books 'for the purpose of securing the public safety or the maintenance of public order' violated Article 19(2), since the latter did not contain the phrase 'public safety' or 'public order', and whether it fell within a 'law relating to any matter which undermines the security of or tends to overthrow the State'. The Court held that the phrase 'public safety' had a much wider connotation than 'security of the State', as the former included a number of trivial matters not necessarily as serious as the issue of the security of the State and concluded that:

[U]nless a law restricting freedom of speech and expression is directed solely against the undermining of the security of the State or the overthrow of it, such law cannot fall within the reservation under clause (2) of Article 19, although the restrictions which it seeks to impose may have been conceived generally in the interests of public order.⁶⁶

The Court alluded to the specific exclusion of the word 'sedition' in Article 19(2), suggesting that the intent had been to define a very narrow sphere of restriction.⁶⁷

The Supreme Court arrived at a similar decision in *Brij Bhushan*.⁶⁸ The key factor in both decisions was the absence of the phrase 'public order' in Article 19(2) and the Court interpreted restrictions on freedom of speech and expression as being legitimate only if they pertained to 'undermining the security of the

state or overthrowing of it'.⁶⁹ Mere criticism of the government could not be considered as speech that could be restricted for the purposes of Article 19(2). Fazl Ali J delivered a dissenting decision in both cases, and argued that the various phrases 'sedition', 'public safety', 'public order', and 'undermining the security' were fungible and any act that threatens public order had the tendency to overthrow the State as well.⁷⁰ From the Supreme Court's decisions in *Romesh Thappar* and *Brij Bhushan*, we can conclude that the judiciary did not share the same apprehensions and fears that the government had about the imminent implosion of the country. The government saw the two judgments as an erosion of the sovereignty of the State and introduced the First Amendment to the Constitution within a year of its inception. This amendment has had wide consequences for the development of free speech jurisprudence and the two salient features of the Amendment include the introduction of 'public order' as one of the grounds for restricting speech, but also a qualification through the addition of the word 'reasonable' before the word 'restrictions'.

The question of how much criticism a government can tolerate is indicative of the self-confidence of a democracy. On that count India presents a mixed picture where, on the one hand, we regularly see the use of sedition laws to curtail political criticism even as we find legal precedents that provide a wide ambit to political expression. At the heart of the debate on subversive speech is the question of how the law imagines the relationship between speech and action. JL Austin once distinguished between illocutionary speech acts and perlocutionary speech acts.⁷¹ While for the former there is no temporal gap between an utterance and its effect, in the latter there is a temporal disjuncture between utterance and effect. In thinking of the scope of free speech in relation to public order in Article 19(2) and sedition in Section 124A of the IPC, a key question has been how courts conceptualise the relationship between speech and effect. Is someone who advocates the use of violence to overthrow the government entitled to protection under Article 19(1)(a)? Does a harsh criticism of the government amount to an act that undermines the security of the State or a disruption of public order?

In understanding the relationship between free speech and subversive speech, Indian courts have explicitly rejected the American 'clear and present danger' test on the ground that fundamental rights guaranteed under Article 19(1) of the Indian Constitution are not absolute rights and are subject to the restrictions placed in the subsequent clauses of Article 19.⁷² The rejection of American standards by itself does not solve the problem of where the line between speech and action while interpreting Article 19(2) is drawn. Unlike the relatively

straight line that can be drawn to trace the doctrinal development of subversive speech and action in the US, in India it emerges more as a criss-crossing set of lines that move between different standards and across different forms of speech. If, in American constitutionalism, the ‘bad tendency’ test established a loose nexus between speech and effect and the ‘clear and present danger’ test demanded a closer proximity between speech and consequence, in India we find a slightly different spectrum, which runs between ‘bad feelings’, ‘bad tendency’, and the standards of ‘clear and present danger’. The interpretation of sedition during the colonial era tended towards a narrower space for any subversive speech and, in that sense, *Romesh Thappar* and *Brij Bhushan* were remarkable for their ability to distinguish between different levels of threat and impact in assessing speech in a post-colonial context.

The first major significant case after the First Amendment was *Ramji Lal Modi v State of Uttar Pradesh*.⁷³ While not being a sedition case, it was the first to examine the scope of the words ‘in the interest of’ and ‘public disorder’ in Article 19(2). The question in this case was whether Section 295A of the IPC was protected by Article 19(2). The petitioners argued that Section 295A sought to punish any speech which insulted a religion or the religious beliefs of a community, but not all insults necessarily lead to public disorder. Since the provision covers speech that does not create public disorder, it should be held to be unconstitutional. The Supreme Court disagreed with this interpretation and held that the phrase ‘in the interests of’ has a much wider connotation than ‘for the maintenance of’ public order.⁷⁴ Thus, ‘If ... certain activities have a tendency to cause public disorder, a law penalizing such activities as an offence cannot but be held to be a law imposing reasonable restriction “in the interests of public order” although in some cases those activities may not actually lead to a breach of public order.’⁷⁵ The Court also held that Section 295A did not penalise every act of insult, but only those which were perpetrated with the ‘deliberate and malicious intention of outraging the religious feelings of [a] ... class’.⁷⁶ It introduced two tests: ‘aggravated form’, which defines the criteria for what counts as an insult, and the ‘calculated tendency’ of the insult to disrupt the public order.⁷⁷ This is a confusing standard since while interpreting ‘in the interest of’ it comes close to the ‘bad tendency’ test with no requirement of any actual proximity between speech and consequence, at the same time it qualifies the ‘bad tendency’ test with ‘calculated tendency’.

The next major case was *Superintendent, Central Prison v Dr Ram Manohar Lohia*.⁷⁸ Here, the Court discussed the idea of public order and observed that under Article 19(2) the wide concept of ‘public order’ is ‘split up under different

heads' (security of the State, friendly relations with foreign States, public order, decency or morality, etc) and argued that 'while all the grounds mentioned ... can be brought under the general head "public order" in its most comprehensive sense', it was important that 'public order' be 'demarcated from the others'.⁷⁹ In its understanding, 'public order' was 'synonymous with public peace, safety, and tranquility'.⁸⁰ In its discussion of *Ramji Lal Modi*, the Court observed that the distinction between 'in the interest of' and 'for the maintenance of' 'does not ignore the necessity for [an] intimate connection between the Act and the public order sought to be maintained by the Act'.⁸¹ It added that after the word 'reasonable' had been added to Article 19(2), it was imperative that restrictions have a reasonable relation to the object that the legislation seeks to achieve, that is, the public order.⁸² If the restriction has no proximate relationship to the achievement of public order, it fails the reasonableness test. The Court cited, with approval, the Federal Court decision in *Rex v Basudeva*,⁸³ which established the proximity test where a restriction has to have a proximate connection or nexus with public order. *Ram Manohar Lohia* therefore introduced a double test—proximity and proportionality.⁸⁴

The Supreme Court had the opportunity to clarify the scope of public order in *Kedar Nath Singh v State of Bihar*, a case which challenged the constitutional validity of Section 124A.⁸⁵ The Court in *Kedar Nath Singh*, after examining the conflict in standards in the colonial decisions (between 'bad feelings' and 'bad tendency'), observed that since sedition was not included in Article 19(2) it implied that a more liberal understanding was needed in the context of a democracy. The Court made a distinction between a strong criticism of the government and those words that excite with the inclination to cause public disorder and violence. It also distinguished between 'the Government established by law' and 'persons for the time being engaged in carrying on the administration'.⁸⁶ The Court further held that:

[S]trong words used to express disapprobation of the measures of Government with a view to their improvement or alteration by lawful means would not come within the section. Similarly, comments, however strongly worded, expressing disapprobation of actions of the Government, without exciting those feelings which generate the inclination to cause public disorder by acts of violence, would not be penal.⁸⁷

The Court concluded that what is forbidden are 'words, written or spoken, etc. which have the pernicious tendency or intention of creating public disorder or disturbance of law and order'.⁸⁸ So if *Ramji Lal Modi* introduced the idea of 'calculated tendency', *Kedar Nath Singh* provided us with the phrase 'pernicious

tendency’. Does this effectively reintroduce the ‘bad tendency’ test? It appears that part of the confusion in *Kedar Nath Singh* emerges from the eagerness of the Court to save Section 124A from being invalidated. Towards this end, it wants to acknowledge that if sedition were interpreted to mean disaffection in the sense of creating bad feelings alone, it would be invalid on the basis of exceeding Article 19(2). It is only by drawing a nexus between speech and consequence in a manner consistent with Article 19(2) that the provision is saved. While *Kedar Nath* cited *Ramji Lal Modi*, it completely ignored *Ram Manohar Lohia*, which had reinterpreted *Ramji Lal Modi* to develop a strict test of proximity.

One of the most significant tests that have emerged after *Lohia* and *Kedarnath* is the analogy of ‘spark in a powder keg’ in the *Rangarajan* case.⁸⁹ In a crucial paragraph in *Rangarajan*, the Supreme Court explicitly held that while there has to be a balance between free speech and restrictions for special interest, the two cannot be balanced as though they were of equal weight. One can infer that the Court was making it clear that exceptions have to be construed precisely as deviations from the norm that free speech should prevail except in exceptional circumstances. But what counts as an exceptional circumstance?

Our commitment of freedom of expression demands that it cannot be suppressed unless the situations created by allowing the freedom are pressing and the community interest is endangered. The anticipated danger should not be remote, conjectural or far-fetched. It should have proximate and direct nexus with the expression. The expression of thought should be intrinsically dangerous to the public interest. In other words, the expression should be inseparably locked up with the action contemplated like the equivalent of a ‘spark in a powder keg’.⁹⁰

The Court in this paragraph clearly lays down the standard that has to be met in alleging a relation between speech and effect. The analogy of a spark in a powder keg brings in a temporal dimension of immediacy where the speech should be immediately dangerous to public interest. In other words, it must have the force of a perlocutionary speech act in which there is no temporal disjuncture between word and effect. A cumulative reading of the cases on public order and sedition suggests that as far as subversive speech targeted at the State is concerned, one can infer that even if there is no absolute consistency on the doctrinal tests, there is a consistency in the outer frame, namely that democracy demands the satisfaction of high standards of speech and effect if speech is to be curtailed.⁹¹

VI. HATE SPEECH AND OBSCENITY

While we do not have the space to enter into a detailed discussion of hate speech, I would like to raise one question about how we think of the two spheres (vertical speech relations and horizontal speech relations) and their intersection in hate speech doctrines. We have already seen that the law has a complex negotiation between the speech and consequences in our discussion of illocutionary and perlocutionary speech. Following Judith Butler, I will characterise the force that underlies an individual's speech act and its possible consequences as the sovereign force of words.⁹² When the words of a speaker have the possibility of effecting immediate consequences (for instance, urging a crowd to demolish a structure) there is a sovereign force that propels the speech into action. On the other hand, a person could urge the violent overthrow of the State with no consequences. As a principle this comes close to what Joel Feinberg would characterise as the harm principle, whereas the regulation of speech amongst communities, at least in statutes, seems to rely less on the harm principle than on an offence principle, namely hurt sentiment.⁹³ We have seen, however, that the Supreme Court, in adjudicating claims of hurt sentiment, has attempted to classify the nature of speech on a hierarchical scale requiring both a degree of intention ('calculated tendency') and magnitude ('aggravated insult') for it to fall foul of Section 295A.⁹⁴ Even if it is not made explicit, there seems to be an implied recognition of the fact that sometimes speech acts fail and do not achieve their intended goals (provoking action or hatred). This failure of the sovereign force of words should serve as a way to distinguish between vertical speech relations and horizontal speech relations. The difference between the two is characterised by the relative power relations that exist between the speaker and the listener. If, for instance, the speaker is a powerful figure (for instance, a politician or a religious leader) with knowledge that his speech has the capacity of instigating people to act upon such speech, then it is clear that his speech has a much higher sovereign force. On the other hand, an individual with relatively little capacity to influence others by virtue of his speech shares a horizontal speech relation to his listeners. One of the problems posed by hate speech legislation, which needs conceptual clarification by the courts, is the flattening out of the difference between these two relations.

VII. DOCTRINAL CONFUSION AND OBSCENITY STANDARDS

The standards to determine obscenity are an instance of the confusing development of doctrinal principles in free speech jurisprudence in India. I will

briefly highlight two moments separated by almost fifty years but united by doctrinal confusion.

The first case, *Ranjit D Udeshi v State of Maharashtra*,⁹⁵ applied and affirmed the *Hicklin*⁹⁶ test in 1965, while deciding whether DH Lawrence's *Lady Chatterley's Lover* was a book that could be considered obscene for the purposes of Section 292 of the IPC.⁹⁷ The appellants highlighted the redundancy of the archaic *Hicklin* test, arguing that the *Hicklin* test had given way to a more contemporary standard, the *Roth* test.⁹⁸ The *Roth* test moved obscenity away from a vulnerable populations test to a contemporary community standards test and also required that the material be without social value. The *Roth* test was eventually replaced by the *Miller* test,⁹⁹ where the necessity of 'utterly without redeeming social value' was rejected. In choosing to retain the *Hicklin* test, the Court rejected the contention that the *Hicklin* test chose to foreground the allegedly obscene sections of a work rather than looking at it as a whole. Hidayatullah J emphasised that Cockburn J's words that 'the matter charged' must have 'a tendency to deprave and corrupt' and this '[did] not suggest that even a stray word or an insignificant passage would suffice'.¹⁰⁰ While it appeared that the Court was qualifying the *Hicklin* test by insisting that a work had to be considered in its entirety, Hidayatullah J went on to observe that:

An overall view of the obscene matter in the setting of the whole work would, of course, be necessary, but the obscene matter must be considered by itself and separately to find out whether it is so gross and its obscenity so decided that it is likely to deprave and corrupt those whose minds are open to influences of this sort and into whose hands the book is likely to fall. In this connection the interests of our contemporary society and particularly the influence of the book *etc.* on it must not be overlooked.¹⁰¹

Through this move the Court strangely affirmed the *Hicklin* test, even while adding a layer of the *Roth* test to it. It then added a further dimension, the 'artistic redemption' test, and observed that 'where obscenity and art are mixed, art must be so preponderating as to throw the obscenity into a shadow or the obscenity so trivial and insignificant that it can have no effect and may be overlooked'.¹⁰² It concluded that the sexual portions of the book did not pass the permissible standards, and that there was no social gain from the book. The Court included the social value component from the *Roth* test into its last observation, thereby creating a confusing mutation of the *Hicklin* and *Roth* standards.

Ranjit Udeshi was the decision of a constitutional bench and a number of obscenity cases subsequently—all of which cite the case as prevailing law—moved significantly away from the *Hicklin* test without ever explicitly rejecting

it. This could be because of their inability to overrule *Ranjit Udeshi* by virtue of being lower courts or smaller benches.¹⁰³ If we turn now to the most recent judgment of the Supreme Court in *Aveek Sarkar v State of West Bengal* (incidentally a two-judge bench), the Court, for the first time, explicitly rejected the *Hicklin* test in favour of the *Roth* test.¹⁰⁴ Citing a number of cases holding that morality standards change over time and obscenity should be judged according to contemporary community standards, *Aveek Sarkar* adopted the community standards test from *Roth*. But while *Roth* had laid down a three-pronged test, including the necessity of the material to be ‘patently offensive’ and of no ‘redeeming social value’, the second and third parts of the test are conspicuously absent from the Court’s judgment. In essence, it seems to be saying that if, on applying community standards, a particular work ‘has the tendency to arouse the feeling of or revealing an overt sexual desire’, it can be criminalised as obscene.¹⁰⁵ What we are left with in the area of obscenity is an entangled labyrinth of doctrinal opacity. The only reasonable route left to the courts would either be to clarify, if they are borrowing an existing test, which particular one they are adopting, or if they are seeking to create an amalgam of standards, to address what they consider the moral standards in India, than to develop a lucid test around such standards.

VIII. CONCLUSION: SPEECH, DEMOCRACY, AND THE VALUE OF AN AGONISTIC PUBLIC SPHERE

The philosophical foundation of free speech in India lies primarily in the role that deliberative and communicative rationality plays in the promotion of democracy. Yet, the promise of free speech also runs the risk of being undone by the strong restrictions imposed on it. How do we reimagine a more robust sphere of speech that keeps in mind the complexities of India even as it refuses to be fated towards a perpetual infantilising of the public sphere? Further, what may be the role of constitutional interpretation towards the construction of a robust public sphere? Deliberative democracies rest on the principle of consensus building and on deliberation as the means towards the creation of consensus. They require, in other words, an agreement on the criteria through which we settle fundamental questions including questions about identity, belief, liberty, and so forth. But, given India’s profound diversity, can it ever be the case that we will arrive at a consensus on these fundamental questions? And can we ever

insist on the absoluteness of such agreement as a precondition to our democratic participation? If a set of shared principles is not the end but the starting point of democratic participation is there a way of thinking of rethinking the relationship between speech and democracy in a way that speaks to the realities of collective life in India?

We have seen that one way of imagining the reality of India has been to treat speech rather nervously, seeing it as a potential ally but also often as the greatest threat to democracy itself. This has resulted in the fundamental split between the confident aspirations of Article 19(1)(a) and the nervous apprehensions of ‘social realities’ of Article 19(2). But what if we were to take our differences as the starting point of our democracy and concede that a certain amount of conflict is not just inevitable but perhaps desirable in our imagination of Indian democracy? In recent times, political philosophers have alerted us to the need for thinking of an agonistic public sphere—one which privileges the idea of agonistic politics or a politics of conflict over a politics of resolution—and claims that democratic conflict and contestation are better suited for shaping policies, institutions, and practices in a heterogeneous democracy. Andrew Schapp suggests that the law plays a key role in shaping a healthy agonistic public sphere.¹⁰⁶ Rather than locating legitimacy in an external principle (a presumed ‘we the people’), the law can play a key role in permitting conflicts to take an ‘agonistic’ form, where opponents are not enemies but adversaries among whom exists a conflictual consensus.¹⁰⁷ William Connolly places the idea of ‘agonistic respect’ at the heart of a project that does not deny but accepts conflict as the basis of democracy. Agonistic respect, for Connolly, can be understood as a necessary ethos or sensibility which individuals and communities cultivate to reconcile with the ‘comparative contestability’ of their beliefs. Connolly conceptualises ‘agonistic respect’ as a democratic principle of social order in which a plurality of pursuits of identity adopt generous relations towards the differences that they require for their constitution.

The Supreme Court has had an admirable if inconsistent record on the protection and expansion of freedom of speech and expression, but it also remains beholden to a particular idea of democracy and consensus building. If the regulatory imagination of Article 19(2) and various speech-regulating laws is premised upon the idea of consensus through control, then this is a model that is clearly failing us, with the rise in the misuse of sedition and hate speech laws. Such regulating legislation has now entrenched itself within a political system where political parties, religious communities, and the moral police play the game of profitable provocation very effectively. If we are to preserve the erosion

of freedom of speech and expression, it might well be the responsibility of the judiciary to reimagine a democratic politics of speech which is not shy of asserting its fundamental relationship with agonistic politics and dissent and articulating a jurisprudence of Article 19(1)(a) which creates a safe ecology for such forms of speech.

As we look to the future, one reason for hope is the Supreme Court's decision in March 2015 in *Shreya Singhal*.¹⁰⁸ Here the Court struck down Section 66A of the Information Technology Act 2000 as being violative of Article 19(1)(a). Section 66A, which punished online communication causing 'annoyance' and was subject to extraordinary abuse, was declared unconstitutional for its vagueness, overreach, and chilling effects on speech. The Court distinguished between three forms of speech—discussion, advocacy, and incitement—and held that mere discussion or even advocacy of a particular cause, howsoever unpopular, is at the heart of Article 19(1)(a). It is only when such discussion or advocacy reaches the level of incitement that Article 19(2) might apply. As we have seen in this chapter, the relationship between speech and consequences is defined with regard to where the line between free speech and justified censorship lies. I have argued that the Supreme Court has often vacillated between two different standards: the 'bad tendency test' in *Ramji Lal Modi* and *Kedarnath*, on the one hand, and the 'proximity and proportionality' and 'clear and present danger test' in *Ram Manohar Lohia* and *Rangarajan* on the other. In *Shreya Singhal*, the judges weigh heavily in favour of the latter to conclude that Section 66A does not simply interfere with the right of the public to receive and disseminate information; it also fails to distinguish between discussion, advocacy, and incitement. The proximity between speech and consequences demanded in the judgment is one that requires both an incitement to action and a nexus between such incitement and consequences.

It is also important to note that the judges clarified the scope of 'reasonable restrictions' by highlighting that the restrictions can be justified only on the grounds explicitly laid down in Article 19(2). Arguments for the validity of speech-restricting laws often appeal to 'public interest', something seen in even landmark decisions like *Udeshi*. The judgment in *Shreya Singhal* adopts what may be considered the equivalent of a 'strict scrutiny' standard in determining the validity of speech restrictions. It also establishes a clear nexus between vagueness and overreach as the basis for invalidating a speech restrictive law. In other words, a law must make a clear distinction between legitimate and illegitimate forms of speech. In criminalising speech that could cause 'annoyance' or is 'grossly offensive', the Court found that Section 66A also takes within its sweep protected speech.

Shreya Singhal is the first judgment in decades in which the Supreme Court has struck down a legal provision for violating freedom of speech. Through a careful use of precedent and doctrine, it simultaneously builds upon a rich body of free speech cases in India, as well as paves the way for a jurisprudence of free speech for an era of the Internet and social media. It explicitly acknowledges that the Internet has radically democratised communication, and this space for participation must be safeguarded from arbitrary laws. The real legacy of *Shreya Singhal* will, however, lie in whether it can reshape free speech law in areas such as sedition, hate speech, and defamation. The judgment reminds us that the role of the judiciary in upholding democracy lies as much in redefining the agonistic threshold as in preserving the status quo.

¹ See Rajeev Dhavan, *Only the Good News* (Manohar Publishers 1987); Sita Bhatia, *Freedom of Press: Politico-Legal Aspects of Press Legislation in India* (Rawat Publications 1997).

² (1992) 3 SCC 637.

³ *Life Insurance Corporation* ([n 2](#)) [23].

⁴ See Eric Barendt, *Freedom of Speech* (2nd edn, Oxford University Press 2007).

⁵ *Bijoe Emmanuel v State of Kerala* (1986) 3 SCC 615.

⁶ Another interesting case which missed the opportunity to examine the scope of ‘expression’ is *Acharya Jagdishwaranand Avadhuta v Commissioner Of Police* (1983) 4 SCC 522 in which *Anandmargis* had to rely on religious freedom to claim a right to dance on the streets of Calcutta with a human skull, dagger, and trishul.

⁷ On frame mobilisation and the law, see Amy Kapczynski, ‘The Access to Knowledge Mobilization and the New Politics of Intellectual Property’ (2008) 117 Yale Law Journal 804.

⁸ 250 US 616 (1919) 630. See also Geoffrey Stone, *Perilous Times: Free Speech in Wartime from the Sedition Act of 1798 to the War on Terrorism* (WW Norton 2005).

⁹ Matthew D Bunker, *Critiquing Free Speech: First Amendment Theory and the Challenge of Interdisciplinarity* (Routledge 2014).

¹⁰ *Ministry of Information and Broadcasting v Cricket Association of Bengal* (1995) 2 SCC 161.

¹¹ (1989) 2 SCC 574.

¹² *Romesh Thappar v State of Madras* AIR 1950 SC 124.

¹³ *Superintendent, Central Prison v Dr Ram Manohar Lohia* AIR 1960 SC 633.

¹⁴ *S Rangarajan v P Jagjivan Ram* (1989) 2 SCC 574 [36].

¹⁵ Government of India, *White Paper on Misuse of Mass Media during the Internal Emergency* (Government of India 1977). See also Soli J Sorabjee, *The Emergency, Censorship and the Press in India 1975–77* (Writers and Scholars Educational Trust 1977).

¹⁶ *Life Insurance Corporation* ([n 2](#)) [8].

¹⁷ *Life Insurance Corporation* ([n 2](#)) [8].

¹⁸ *R Rajgopal v State of Tamil Nadu* (1994) 6 SCC 632.

¹⁹ (1975) 4 SCC 428.

²⁰ *Bijoe Emmanuel* ([n 5](#)).

²¹ *Naz Foundation v Govt of NCT of Delhi* (2009) 160 DLT 277.

²² An important example is the Indian Penal Code 1860, s 295A. On the origins of the provision, see Neeti Nair, 'Beyond the "Communal" 1920s: The Problem of Intention, Legislative Pragmatism, and the Making of Section 295A of the Indian Penal Code' (2013) 50 *Indian Economic Social History Review* 317.

²³ Arudra Burra, 'Arguments from Colonial Continuity: The Constitution (First Amendment) Act, 1951' (2008) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2052659>, accessed November 2015.

²⁴ Vivek Dhareshwar and R Srivatsan, '“Rowdy-Sheeters”: An Essay on Subalternity and Politics' in Shahid Amin and Dipesh Chakrabarty (eds) *Subaltern Studies IX* (Oxford University Press 1996) 201–31.

²⁵ See Rajeev Dhavan, 'Harassing Husain: Uses and Abuses of the Law of Hate Speech' (2007) 35 *Social Scientist* 16.

²⁶ Asad Ali Ahmed, 'Specters of Macaulay: Blasphemy, the Indian Penal Code, and Pakistan's Postcolonial Predicament' in Raminder Kaur and William Mazzarella (eds) *Censorship in South Asia: Cultural Regulation from Sedition to Seduction* (Indiana University Press 2009) 172–205.

²⁷ Arun K Thiruvengadam, *The Evolution of the Constitutional Right to Free Speech in India (1800–1950): The Interplay of Universal and Particular Rationales* (2013) Centre for Asian Legal Studies, National University of Singapore, Working Paper Series <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2470905>, accessed November 2015.

²⁸ *Life Insurance Corporation* (n 2) [6].

²⁹ *Life Insurance Corporation* (n 2) [12].

³⁰ *Hamdard Dawakhana v Union of India* AIR 1960 SC 554.

³¹ (1995) 5 SCC 139.

³² Udai Raj Rai, *Fundamental Rights and Their Enforcement* (PHI Learning Pvt Ltd 2011) 40–41.

³³ See *Tata Sons Limited v Greenpeace International* (2011) 178 DLT 705, in which the Delhi High Court held the parody of a trademark to be protected by principles of free speech.

³⁴ *Sakal Papers (P) Ltd v Union of India* AIR 1962 SC 305.

³⁵ *Bennett Coleman & Co v Union of India* (1972) 2 SCC 788.

³⁶ *Indian Express Newspapers v Union of India* (1985) 1 SCC 641. See also *MSM Sharma v Sri Krishna Sinha* AIR 1959 SC 395; *Re Arundhati Roy* (2002) 3 SCC 343. See also Rajeev Dhavan, *Publish and Be Damned: Censorship and Intolerance in India* (Tulika Books 2008).

³⁷ It is not as though the courts were not presented with challenges to the monopoly of the State over broadcasting, but in such cases, the monopoly of the State was upheld. See *Prakash Vir Shastri v Union of India* AIR 1974 Del 1; *AB Shorawal v LK Advani* AIR 1977 All 426; *PL Lakhanpal v Union of India* AIR 1982 Del 167.

³⁸ *KA Abbas v Union of India* (1970) 2 SCC 780.

³⁹ *Odyssey Communications Pvt Ltd v Lokvidayan Sanghatana* (1988) 3 SCC 410.

⁴⁰ See Vikram Raghavan, 'Reflections on Free Speech and Broadcasting in India' in C Raj Kumar and D Chockalingam (eds) *Human Rights, Justice and Constitutional Empowerment* (2nd edn, Oxford University Press 2011).

⁴¹ *Life Insurance Corporation* (n 2) [8].

⁴² *Cricket Association of Bengal* (n 10).

⁴³ See Monroe E Price and Stefaan G Verhulst (eds), *Broadcasting Reform in India: Media Law from a Global Perspective* (Oxford University Press 1998).

⁴⁹ *Chintaman Rao* (n 48) [6].

⁴⁴ *Shreya Singhal v Union of India* (2015) 5 SCC 1.

⁴⁵ *Ram Manohar Lohia* (n 13).

- ⁴⁶ *State of Madras v VG Row* AIR 1952 SC 196 [15].
- ⁴⁷ AIR 2003 All 102.
- ⁴⁸ AIR 1951 SC 118.
- ⁵⁰ (2012) 10 SCC 603.
- ⁵¹ *Sahara India Real Estate Corporation Ltd* ([n 50](#)) [34].
- ⁵² *Sahara India Real Estate Corporation Ltd* ([n 50](#)) [34].
- ⁵⁶ *Baragur Ramchandrapa* ([n 53](#)) [17].
- ⁵³ (2007) 5 SCC 11.
- ⁵⁴ *Baragur Ramchandrapa* ([n 53](#)) [14].
- ⁵⁵ *State of Uttar Pradesh v Lalai Singh Yadav* (1976) 4 SCC 213.
- ⁵⁷ *S Rangarajan* ([n 14](#)) [21].
- ⁵⁸ *Baragur Ramchandrapa* ([n 53](#)) [24].
- ⁵⁹ *Baragur Ramchandrapa* ([n 53](#)) [24].
- ⁶⁶ *Romesh Thappar* ([n 12](#)) [10].
- ⁸⁷ *Kedar Nath Singh* ([n 85](#)) [24].
- ⁹⁰ *S Rangarajan* ([n 14](#)) [45].
- ⁶⁰ See AG Noorani, *Indian Political Trials 1775–1947* (Oxford University Press 2008).
- ⁶¹ Article 13 in the Constituent Assembly Debates. These can be found in the debates on 1–2 December 1948, 16 October 1949, and 17 October 1949.
- ⁶² See eg, *Constituent Assembly Debates*, vol 7 (Lok Sabha Secretariat 1986) 750–52, 2 December 1948 (Seth Govind Das). See also *Constituent Assembly Debates*, vol 7 (Lok Sabha Secretariat 1986) 385–86, 30 April 1947 (Somnath Lahiri); *Constituent Assembly Debates*, vol 7 (Lok Sabha Secretariat 1986) 712–13, 1 December 1948 (Damodar Swarup).
- ⁶³ Granville Austin, *The Indian Constitution: Cornerstone of a Nation* (Oxford University Press 1966).
- ⁶⁴ *Romesh Thappar* ([n 12](#)).
- ⁶⁵ For an early evaluation of free speech, see PK Tripathi, ‘Free Speech in the Indian Constitution: Background and Prospect’ (1958) 67 *Yale Law Journal* 394.
- ⁶⁷ *Romesh Thappar* ([n 12](#)) [9].
- ⁶⁸ *Brij Bhushan v State of Delhi* AIR 1950 SC 129.
- ⁶⁹ *Romesh Thappar* ([n 12](#)) [8].
- ⁷⁰ *Brij Bhushan* ([n 68](#)) [21].
- ⁷¹ John L Austin, *How to Do Things With Words*, eds JO Urmson and Marina Sbisa (2nd edn, Clarendon Press 1975).
- ⁷² *Babulal Parate v State of Maharashtra* AIR 1961 SC 884.
- ⁷³ AIR 1957 SC 620.
- ⁷⁴ *Ramji Lal Modi* ([n 73](#)) [7].
- ⁷⁵ *Ramji Lal Modi* ([n 73](#)) [9].
- ⁷⁶ *Ramji Lal Modi* ([n 73](#)) [9].
- ⁷⁷ *Ramji Lal Modi* ([n 73](#)) [9].
- ⁷⁸ *Ram Manohar Lohia* ([n 13](#)).
- ⁷⁹ *Ram Manohar Lohia* ([n 13](#)) [11].
- ⁸⁰ *Ram Manohar Lohia* ([n 13](#)) [11].

⁸¹ *Ram Manohar Lohia* ([n 13](#)) [12].

⁸² *Ram Manohar Lohia* ([n 13](#)) [13].

⁸³ AIR 1950 FC 67.

⁸⁴ *Ram Manohar Lohia* ([n 13](#)) [13].

⁸⁵ AIR 1962 SC 955.

⁸⁶ *Kedar Nath Singh* ([n 85](#)) [24].

⁸⁸ *Kedar Nath Singh* ([n 85](#)) [26].

⁸⁹ *S Rangarajan* ([n 14](#)) [36].

⁹¹ *Balwant Singh v State of Punjab* (1995) 3 SCC 214. ‘Khalistan Zindabad’, shifting from what the words say (or, the message they communicate) to their proximate relationship with public disorder is Brandenburg reasoning.

⁹² Judith Butler, *Excitable Speech: A Politics of the Performative* (Routledge 1997).

⁹³ Joel Feinberg, *Harm to Others* (Oxford University Press 1987).

⁹⁴ Girja Kumar, *The Book on Trial: Fundamentalism and Censorship in India*, (Har-Anand Publications 1997).

¹⁰¹ *Ranjit D Udeshi* ([n 95](#)) [21].

⁹⁵ AIR 1965 SC 881.

⁹⁶ [1868] LR 3 QB 360.

⁹⁷ The *Hicklin* test:

Whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall . . . it is quite certain that it would suggest to the minds of the young of either sex, or even to persons of more advanced years, thoughts of a most impure and libidinous character.

⁹⁸ *Roth v United States* 354 US 476 (1957).

⁹⁹ *Miller v California* 413 US 15 (1973).

¹⁰⁰ *Ranjit D Udeshi* ([n 95](#)) [20].

¹⁰² *Ranjit D Udeshi* ([n 95](#)) [21].

¹⁰³ For a representative list, see *Samaresh Bose v Amal Mitra* (1985) 4 SCC 289; *Bobby Art International v Om Pal Singh Hoon* (1996) 4 SCC 1; *Ajay Goswami v Union of India* (2007) 1 SCC 143; *S Khushboo v Kanniammal* (2010) 5 SCC 600.

¹⁰⁴ (2014) 4 SCC 257 [23].

¹⁰⁵ *Aveek Sarkar* ([n 104](#)) [23].

¹⁰⁶ Andrew Schaap, *Law and Agonistic Politics* (Ashgate 2009).

¹⁰⁷ Chantal Mouffe, *Agonistics: Thinking the World Politically* (Verso 2013).

¹⁰⁸ *Shreya Singhal* ([n 44](#)).

CHAPTER 46

ASSEMBLY AND ASSOCIATION

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I. INTRODUCTION

THE freedom to assemble and the freedom of association are cornerstones of the life of citizens in a constitutional democracy. These freedoms enable organising for the achievement of collective aims and for the engagement of citizens with one another. These freedoms also enable political organising. They are thus amongst the first rights or freedoms to be restricted by any State. The Constitution of India provides for freedom to assemble and the freedom to associate. Article 19(1)(b) provides that all citizens shall have the right to assemble peaceably and without arms. Article 19(1)(c) accords all citizens the right to form associations or unions or cooperative societies.

The freedom to assemble is of special interest within constitutional law, since it is enabled and restricted by an intersection of the constitutional text and criminal procedure legislation. While the Constitution provides for it as a right, the procedural provisions radically restrict this freedom, by empowering the State to regulate its expression and peremptorily curtail its exercise. This incongruity is a reflection of a colonial legacy and the unquestioning adoption of most of the provisions of the Code of Criminal Procedure 1872, by the independent Indian State. While such a legal framework made sense in a colonial state, its continuation in modern India is unfortunate. The freedom of association, on the other hand, is not curtailed by any procedural code. Its character and breadth is shaped by the constitutional text and the jurisprudence of the Supreme Court. The reasoning of the Court, as this chapter demonstrates, has been weak when it comes to appreciating the freedom of association. Further, the Court has created categories of rights holders—government employees amongst others—whose freedom of association carries additional burdens.

In the early years following the Constitution's enactment, the Supreme Court's approach towards both freedoms was careful and nuanced. Since the 1970s, however, a clear shift has been discernible, with more and more cases having been heard by benches of two and three judges (and not five-judge

constitutional benches) less committed to engaging constitutional principles and more likely to arrive at conclusions based on the facts of individual cases.¹ The Court's lack of focus on the rights in question will be demonstrated through the various topics covered by this chapter. This chapter consists of four parts. This brief introduction is followed by a study of the freedom of assembly in Section II. Section III focuses on the freedom of association, and Section IV concludes.

II. FREEDOM TO ASSEMBLE PEACEABLY

1. Colonial Restrictions

The colonial State keenly regulated the ability to assemble. The imperative for this was the interest of the State in preventing organising around the freedom movement. Five colonial-era statutes gave wide powers to the colonial State—and continue to impact the freedom to assemble in modern India.

The Police Act 1861 provided the police with the ability to ‘direct the conduct ...’ of assemblies and processions.² Ones that were likely to cause ‘a breach of the peace ...’ were required to apply for licences.³ The Prevention of Seditious Meetings Act 1911 aimed to prevent public meetings that were likely to promote sedition or disaffection.⁴ The Defence of India Ordinance 1939 empowered the government to prohibit or regulate meetings, assemblies, and processions. The Criminal Procedure Code of 1872 curtailed assemblies and was meant to provide for employing the military in aid of the civil power.⁵ This legislation continues in its amended form—the Code of Criminal Procedure 1973.

The Armed Forces (Special Powers) Ordinance 1942, passed in response to the Quit India movement, continues to remain in force. The Armed Forces (Special Powers) Act 1958, enacted after Independence, is similar in spirit. It grants the armed forces special powers in ‘disturbed areas’ in order to maintain public order. Such powers include the power to prohibit the assembly of five or more persons.⁶ To disperse such an ‘unlawful’ assembly, officers of the armed forces, after giving due warning, are allowed to fire upon or use such force, even to the extent of causing death.⁷

2. Restrictions under the Criminal Procedure Code

In contemporary India, the Code of Criminal Procedure 1973 (henceforth CrPC) substantially impacts the right to freely assemble. The CrPC restricts assembly in two ways—prior to the convening of the assembly and once the assembly has gathered.

a. *Section 144*

Section 144 of the CrPC is typically used to pre-empt persons from forming an assembly, holding a meeting, taking out a procession, or participating in any of the above. It is widely enforced in India. For instance, specific parts of the capital, New Delhi, are almost permanently under Section 144 orders. The drafters of the Constitution were alive to the problems with Section 144. HJ Khandekar reminded the Constituent Assembly that this section had been ‘constantly reigning ...’ in the ‘big cities of this country’.⁸ Consequently, he argued that ‘there cannot be a public gathering of even five or seven persons in cities, nay, not even for carrying on conversation among themselves or giving vent to their ideas and feelings’.⁹

Section 144 provides that when a district magistrate or other specified official finds that there is ‘nuisance or apprehended danger ...’ which must be prevented or a ‘speedy remedy is desirable ...’, then she can ‘direct any person to abstain from a certain act ...’ or can pass orders ‘with respect to certain property ...’ in that person’s possession or management.¹⁰ A magistrate can pass such a direction, if she ‘considers that such direction is likely to prevent ... obstruction, annoyance or injury to any person lawfully employed, or danger to human life, health or safety, or a disturbance of the public tranquillity, or a riot, or an affray’.¹¹ Most cases that examine the import of the text, and the impact of the imposition of a Section 144 order, are usually decisions of the trial and High Courts. In this chapter, we limit our analysis to the Supreme Court’s interpretation of this provision.

b. Unlawful Assemblies

The CrPC provides that ‘Any Executive Magistrate or officer in charge of a police station ... may command any unlawful assembly, or any assembly of five or more persons likely to cause a disturbance of the public peace, to disperse ...’¹² Failure by the assembly to disperse could result in use of force or arrests by the police.¹³ The CrPC also enables the executive magistrate to use the armed forces to disperse an assembly, in the interests of ‘the public security ...’¹⁴ Significantly, the CrPC mandates that there can be no prosecution against any person for acts done with regard to dispersal of an assembly, except with the sanction of the government.¹⁵ The Indian Penal Code 1860 punishes participants in an unlawful assembly with imprisonment, which may extend to six months, or with a fine, or both.¹⁶

3. The Supreme Court's Jurisprudence

Before turning to the Supreme Court's jurisprudence on the constitutional text and the CrPC, it is important to note that Article 19(3) of the Constitution provides that nothing in the right to assemble peaceably 'shall affect the operation of any existing law in so far as it imposes, or prevents the State from making any law imposing, in the interests of the sovereignty and integrity of India or public order, reasonable restrictions on the exercise of the right ...' The restrictions pertaining to sovereignty and integrity were added after the adoption of the Constitution.

These restrictions (then public order and morality) did invite criticism at the founding. Damodar Swarup Seth, a member of the Constituent Assembly of India, for instance, argued that they placed the right at the 'mercy or the high-handedness of the legislature' and that the Supreme Court would 'have no alternative but to uphold the restrictive legislation'.¹⁷ Upon reviewing the jurisprudence of the Supreme Court, we find his fears to have been well founded.

The cases examined show that the Court's jurisprudence has been legally and philosophically vague. The Court has consistently upheld the constitutionality of Section 144 of the CrPC, a colonial relic, but has crafted no principles that could be used to guide its exercise. This would have been a useful contribution by the Court given that this power is invariably exercised in pre-emption of presumed acts that lead to a vitiation of public order. Additionally, the Supreme Court has not considered the utility of the strike as a means of protest in any depth. Therefore, outside of group-based analyses structured around particular professions—for instance, lawyers are not permitted to strike—the Court has offered no further rationale for its decisions.

a. Prior Permission for Public Meetings

In *Himat Lal K Shah v Commissioner of Police, Ahmedabad*,¹⁸ the Court considered whether a requirement that prior permission in writing from the police was necessary before holding a public meeting on a public street violated the petitioner's Article 19(1) rights. Here the rule in question enabled the Commissioner or an officer designated by her to refuse permission for such a meeting.¹⁹ Sikri CJ, writing for the majority, distinguished between a statutory provision that enabled the regulation of conduct of persons in assemblies and

processions and a rule that enabled the refusal of permission to hold public meetings on public streets without guidelines being prescribed for the officer responsible.²⁰ He found no fault with the prior permission requirement, as according to him ‘the right which flows from Article 19(1)(b) is not a right to hold a meeting at any place and time. It is a right which can be regulated ...’²¹ He invalidated the arbitrary powers conferred on the officer authorised by the Commissioner of Police.

b. *Government Employees*

In *Kameshwar Prasad v State of Bihar*,²² a rule that prohibited any form of demonstrations by government employees was examined.²³ The Court reasoned that a government servant did not lose her fundamental rights, and that the rule by prohibiting both orderly and disorderly demonstrations violated Article 19(1)(b). The Court did not take issue with the notion that government employees as a class could have their rights or freedoms burdened. It observed that:

By accepting the contention that the freedoms guaranteed by [Part III](#) and in particular those in Article 19(1)(a) apply to the servants of government, we should not be taken to imply that, in relation to this class of citizens, the responsibility arising from official position would not by itself impose some limitations on the exercise of their rights as citizens.²⁴

These additional restrictions on government employees will be examined further in the discussion on the freedom of association.

c. *Section 144 of the CrPC*

(I) THE POWER OF THE STATE

The Court confronted the dichotomy between the freedom to assemble and the power to curtail this freedom under Section 144, CrPC, in *Babulal Parate v State of Maharashtra*.²⁵ Here, the members of an association of millworkers assembled and blocked traffic. In response, the police prevented the millworkers from taking out a procession and then registered cases of rioting and trespass against them. The District Magistrate passed an order under Section 144, CrPC, which the petitioners unsuccessfully contended violated their freedom to assemble.

Mudholkar J found that the ‘anticipatory action of the kind permissible under Section 144 is not impermissible under clauses (2) and (3) of Article 19’.²⁶ He cited public order as one such instance of a ground that warranted restrictions activity in advance. The judge concluded that Section 144 did not suppress any lawful action, and only permitted anticipatory action by an authority where the danger to public order was ‘genuinely apprehended ...’²⁷ The distinction advanced by Mudholkar J between Section 144 and Articles 19(2) and (3) is difficult to discern. Both seem to allow for pre-emptory action. One is the power of a magistrate to pass an order, and the other is the power to make laws granted to the legislature. But the judge provided no conceptual clarity on the difference between the two powers.

(II) THE CONSTITUTIONALITY OF SECTION 144

The constitutionality of Section 144 was challenged in *Madhu Limaye v Sub-Divisional Magistrate, Monghyr*.²⁸ The Court framed the question as follows —‘whether the provisions of Section 144 and Chapter VIII of the Code can be said to be in the interests of public order insofar as the right of freedom of speech and expression, rights of assembly and formation of associations and unions are concerned[?] ...’²⁹ The Court referred to Subba Rao J’s much-cited passage in the context of Article 19(2) from *Superintendent, Central Prison, Fatehgarh v Dr Ram Manohar Lohia*: ‘“Public order” is synonymous with public safety and tranquillity: it is the absence of disorder involving breaches of local significance in contradistinction to national upheavals, such as revolution, civil strife, war, affecting the security of the State ...’³⁰

Here, Subba Rao J made the point that public order was local and not national in nature. Yet, the Supreme Court did not connect this with the question of whether Section 144 was constitutional. Instead, it noted that Section 144 was imposed depending on the ‘urgency of the situation ...’ to prevent ‘harmful occurrences’.³¹ It reasoned that the power had to be used in a manner that would stand ‘further judicial scrutiny ...’ into its ‘efficacy and in the extent of its application’.³² It did not either explain or illustrate what this meant. Finally, the Court found Section 144 to be constitutional and rejected the argument that the section was excessive.

(III) ‘POTENTIAL’ VIOLATION AND ‘UNLAWFUL’ ASSEMBLY

In *Re Ramlila Maidan Incident*,³³ the Court took *suo motu* cognisance of police action on the nights of 4 and 5 June 2011 at Delhi’s Ramlila Maidan. A

prohibitory order under Section 144 was sought to be enforced on a sleeping crowd that was dispersed by the police using force.

Swatanter Kumar J noted that ‘the provisions of Section 144 CrPC are attracted only in emergent situations. The emergent power is to be exercised for the purposes of maintaining public order.’³⁴ He explained that the power under Section 144 extended to an unlawful assembly as well as a ‘“potential” unlawful assembly’.³⁵ He clarified that he took no issue with police permissions being required for convening meetings or *dharnas* and that such requirements would not infringe the right under Article 19(1)(b) and would fall within reasonable restrictions under Article 19(3). However, he found that the conduct of the Delhi Police in using force to rouse and disperse a sleeping assembly was unwarranted and recommended criminal action against some of the police personnel involved.

The concurring judgment by Chauhan J provided no clarity on the extent, rationale, or utility of Section 144. Instead, he discussed the numerous procedural infractions by the authorities. First, there had been no service of the Section 144 order to the assembly. Secondly, there was no declaration that the assembly was unlawful. Thirdly, the aim of the assembly of yoga practitioners was ‘unobjectionable ...’—it was, according to the Judge, ‘to improve the material condition of the human race’; and finally, given that the assembly was asleep, and that there was a fundamental right to sleep, they could not be an unlawful assembly.³⁶ Would the Court have taken such a sympathetic view if the assembly was awake, and their aim was a different one, such as the practise of aerobics?

(IV) THE RIGHT TO STRIKE

In a set of three cases, the Supreme Court has categorically denied any right to strike. In *Harish Uppal v Union of India*,³⁷ the petitioners sought a declaration by the Court that strikes by lawyers were illegal. The Court referred to *Mahabir Prasad*,³⁸ wherein it had held that a lawyer could not fail to appear in court by claiming a strike or boycott. It also referred to the case of *Ramon Services*,³⁹ which upheld the principle that strikes by lawyers were illegal. It further noted that any resolutions passed by the Bar ‘expressing want of confidence in judicial officers ...’ would amount to contempt of the Court.⁴⁰ Curiously, the Court also declared that a strike could not be justified on any grounds save when there was an attack on the independence of legal institutions.⁴¹

In *Radhey Shyam Sharma v Post Master General*,⁴² pursuant to a strike in the Posts and Telegraph Department, proceedings were initiated and action taken

against the appellant. The appellant challenged the action taken as well as the validity of the Essential Services Maintenance Ordinance 1960, which prohibited strikes, as violating Article 19(1)(a) and (b) of the Constitution. The Court referred to *All India Bank Employees' Association*,⁴³ and held that there was no fundamental right to strike.

TK Rangarajan v Government of Tamil Nadu dealt with over two hundred thousand employees being terminated from employment by the State Government for going on strike.⁴⁴ The question before the Court was whether these employees had a fundamental right to strike. The Court referred to *Kameshwar Prasad*,⁴⁵ *Radhey Shyam Sharma*,⁴⁶ and *All India Bank Employees' Association*,⁴⁷ and held that Article 19 did not guarantee a right to strike.⁴⁸ Further, taking note of *Harish Uppal*⁴⁹ and *Communist Party of India*,⁵⁰ the Court held that a strike offended the 'fundamental rights of the masses'.

III. FREEDOM OF ASSOCIATION

Unlike the freedom of assembly, the freedom of association is governed solely by the Constitution. Article 19(1)(c) guarantees the freedom of association to all citizens. However, Article 19(4) provides that the right to form associations or unions can be limited by reasonable restrictions in the form of an existing or new law made 'in the interests of the sovereignty and integrity of India, or public order or morality ...' The restriction on the ground of the interest of the sovereignty and integrity of India was not in the original text of the Constitution.⁵¹

The jurisprudence of the Supreme Court on these provisions may be separated into six themes and subsections: (i) appropriate notice prior to designation as an unlawful association; (ii) the determination of an 'unlawful' association; (iii) the freedom to form an association versus achieving its aims; (iv) maintaining the composition of an association, and control of an association; (v) the right not to join an association; and (vi) restrictions specific to government employees.

1. Appropriate Notice Prior to Designation as an Unlawful Association

The first important issue regarding unlawful associations is the notice that must be served prior to their designation as unlawful in character. *State of Madras v VG Row* concerned the Indian Criminal Law Amendment (Madras) Act 1950, which empowered the State to declare associations to be illegal by a notification.⁵² Section 15(2)(b) of the Act provided that an association could be declared to be unlawful if it constituted a danger to the public peace, or had interfered with the maintenance of public order or the administration of the law. The statute did not provide for any judicial inquiry or for the service of even a notice. Patanjali Sastri J, writing for a five-judge bench, held that Section 15(2)(b) did not fall within the limits of authorised restrictions of Article 19(1)(c).⁵³

The Court opined that the curtailment of the right to form associations or unions had consequences in the religious, political, and economic arenas. Therefore, the Court reasoned that such curtailment without allowing such a decision to be ‘duly tested in a judicial inquiry’ agitated against the reasonableness of the restriction.⁵⁴ The Court was concerned that a fundamental freedom could be restricted simply by a ‘largely one-sided review ...’ or the subjective satisfaction of the government.⁵⁵ What troubled the Court further was that there was no provision for ‘adequate communication ...’ of the government’s notification to the association.⁵⁶ The basis of the Court’s concerns and its decision was that principles of natural justice—notice and hearing—were not provided for. The Court did not locate its rationale in a conception of the freedom or in the validity of the restrictions themselves.

2. Membership of an Unlawful Association

When we consider the Supreme Court's jurisprudence on the membership of an unlawful association, we again find that the Court has focused upon the facts of individual cases rather than on the nature of the constitutional right in question. In *Jamaat-E-Islami Hind v Union of India*,⁵⁷ the ban on the Jamaat-e-Islami Hind by a notification under the Unlawful Activities (Prevention) Act 1967 was upheld by the designated tribunal. Verma J, writing for the Court, overturned the decision of the tribunal and the government. The judge reasoned that there must be an appropriate and adequate adducing of factual evidence that could lead an adjudicatory body like the tribunal to conclude that an association was unlawful.⁵⁸ The simple 'subjective satisfaction' of the Union government was not enough of a ground for the tribunal to arrive at the same conclusion.⁵⁹ The judge noted that the only material produced by the Union government was a report prepared on the basis of intelligence reports and affidavits of the Joint Secretary of the Home Ministry and Joint Director of the Intelligence Bureau. Both affidavits in turn relied on the reports and did not speak from personal knowledge. The association also filed affidavits, whose deponents were cross-examined, unlike the State witnesses.

Verma J made it clear that the determination of whether an association is unlawful requires the tribunal to consider 'whether the material to support the declaration outweighs the material against it ...'⁶⁰ He called this 'the test of greater probability ...'⁶¹ The judge reasoned that a restriction under Article 19(4) that limited the freedom conferred by Article 19(1)(c) had to be reasonable. According to the judge, the tribunal accepted the version of the Union government without scrutinising the credibility of their case.

In *Arup Bhuyan v State of Assam*,⁶² Katju and Misra JJ, in a refreshingly short judgment, considered the issue of the petitioner's alleged membership of an unlawful association—the United Liberation Front Assam (ULFA). The only evidence against him was a police confession based on which the Designated Court, Assam, had convicted him under Section 3(5) of the Terrorist and Disruptive Activities (Prevention) Act 1987 (TADA), which makes it criminal to be a mere member of a banned organisation.

The Court noted the precarious value of police confessions, which are often acquired through 'third-degree methods ...'⁶³ This bench of the Supreme Court considered the jurisprudence of the Supreme Court of the United States in

Elfbrandt v Russell,⁶⁴ which was referred to by the Court in *State of Kerala v Raneef*.⁶⁵ Here, the American Supreme Court had held that sheer membership would not incriminate a person until active acts of violence could be attributed to him.

The Court finally held that a mere literal interpretation of Section 3(5) would offend Articles 19 and 21 of the Constitution. It reasoned that mere membership could not incriminate a person until there were acts of violence that could be associated with her.⁶⁶ Thus, it set aside the conviction of the appellant. It is unclear whether the reference to Article 19 by the Court was also intended to highlight this as an instance of violation of freedom of expression. Perhaps what also swayed the Court was that the only evidence of membership was a confession by the accused before a police officer, which is inadmissible under general law, and only here for an exceptional statute. It would be interesting to contemplate a case where the membership was evidenced by documentary or other evidence that was admissible under general law.

3. Forming an Association versus Achieving Its Aims

The Supreme Court's view has been that the freedom of association does not include the right to recognition or the fulfilment of the aims of that body. This was first explored in *Raja Kulkarni v State of Bombay*.⁶⁷ Since this case, decided in the early 1950s, the Supreme Court has been broadly committed to the principle that there is freedom to form associations. However, according to the Court, this freedom is not a guarantee in ensuring that the aims and objectives of any association will be achieved. State action, like the lack of recognition of an association without which it cannot function, is not part of this constitutionally recognised freedom. Perhaps a better test would be one that includes within its fold an assessment of whether the principles of natural justice and reasonableness have been adhered to. This next step has not been regarded as necessary by the courts.

In *Raghubir Dayal Jai Prakash v Union of India*,⁶⁸ the petitioner was part of an association of traders that engaged in forward trading, which was refused recognition by the Union government and hence could not function.⁶⁹ In the Supreme Court, the petitioner contended that the denial of recognition and resultant inability to function violated their rights under Article 19(1)(c). The Court ruled that the freedom of association did not involve a 'guaranteed right to

recognition'.⁷⁰ The Supreme Court explained its position by stating that the action of seeking recognition was voluntary and not mandated by the State.⁷¹ The Court was convinced that the control of forward trading was a legitimate subject of control, since it 'might have deleterious consequences on lawful trade and on the general public by causing violent fluctuations in prices'.⁷² However, by creating this distinction, the Court did not address the point that the objective of the association to enable its members to participate in forward trading of notified commodities could not be achieved without recognition of it by the State. So the denial of recognition amounted to negating the aims of the association and hence its rationale to come into existence.

In tune with the reasoning of *Raghubir Dayal is All India Bank Employees' Association*.⁷³ Here, unions comprising bank employees had challenged the constitutional validity of Section 34A of the Banking Companies Act 1949. This provided that the banking company could not be compelled to share books of accounts or other confidential information relating to case reserves and debts. The Indian Bank Employees Union challenged its constitutionality by arguing that it prevented them from effectively exercising the right of collective bargaining in respect of wages.

According to the plaintiffs, this right of collective bargaining was part of their Article 19(1)(c) right, since it was an objective of the association. Ayyangar J, speaking for the constitutional bench, disagreed with the petitioners. He reasoned that Article 19(1)(c) only guaranteed the right to form an association, not the achievement of its objectives. He observed that:

It is one thing to interpret each of the freedoms guaranteed by the several articles in [Part III](#) in a fair and liberal sense, it is quite another to read each guaranteed right as involving or including concomitant rights necessary to achieve the object which might be supposed to underlie the grant of each of those rights, for that construction would, by a series of ever expanding concentric circles in the shape of rights concomitant to concomitant rights and so on, lead to an almost grotesque result.⁷⁴

This line of reasoning was followed by the Supreme Court in *DAV College v State of Punjab*.⁷⁵

4. Composition and Control

The Supreme Court has also confronted the issue of maintaining the original composition of membership of an association. In *Damyanti Naranga v Union of India*,⁷⁶ the Court considered the UP Hindi Sahitya Sammelan Act 1956 that superimposed a newly created statutory body in the place of the Hindu Sahitya Sammelan—a registered society. Therefore, the Sammelan was now composed of existing members of the erstwhile society, and others who became members without the consent of these original members.⁷⁷ Bhargava J held that since the terms of admission of new members were not decided by the original members, the statute violated the right to form an association under Article 19(1)(c). The judge explained that the right in question could be ‘effective only if it is held to include within it the right to continue the Association with its composition as voluntarily agreed upon by the persons forming the Association’.⁷⁸

In contrast to *Damyanti Naranga* was *LN Mishra Institute of Economic Development and Social Change v State of Bihar*.⁷⁹ Here, the Bihar Government utilising the Bihar Private Educational Institutions (Taking Over) Act 1987 took over an educational institute run by an association. The only function of the association was to run this institute. By virtue of the institute being nationalised, the society lost its right of management and control of it. Dutt J in his judgment held that the State Government’s actions did not violate Article 19(1)(c), since the right of the society to form an association and to determine its composition or constitution had not been infringed.

The State Government’s takeover was viewed as being limited to restricting the activity of the association and not infringing the right to form an association. Interestingly, the Court here relied on Ayyangar J’s statement in *All India Bank Employees’ Association* that the ‘Constitution does not carry with it a concomitant right that unions formed for protecting the interests of labour shall achieve their object such that any interference to such achievement by any law would be unconstitutional unless it could be justified under Article 19(4) as being in the interests of public order or morality’.⁸⁰ The Court also did not accept the contention that this negated the right by virtue of the rationale for the continued existence of the association being impacted.

Dharam Dutt v Union of India,⁸¹ in tune with *LN Mishra*, concerned an ordinance that constituted the Indian Council of World Affairs as a statutory body, and did away with the registered society that had previously existed. This

registered society had the power to control and dispose of two acres of prime Delhi land. Pursuant to the ordinance, this land would revert back to the State. As in the *LN Mishra* case, the ordinance was challenged by the society. The Court concluded that the right to form an association guaranteed under Article 19(1)(c) did not imply the fulfilment of every object of the association.

In both *LN Mishra* and *Dharam Dutt*, the Court's reasoning was weak. The Court refused to engage with the impact of actions on the exercise of rights. It also did not appreciate that the text of the Constitution provided for specified restrictions on these freedoms. The Court in these two decisions and the one to follow in *MH Devendrappa* appeared to be swayed by the fact that it was governmental action that was in question in all three cases. Nationalisation and the affront to the prestige of a governmental entity appeared to be reason enough to maintain the restriction on the freedom. However, it was only in *Damyanti Naranga* that the Court considered the direct and indirect ways in which freedoms could be impacted. The unwillingness of the Court to assess the constitutionality of actions by considering whether the act in question indirectly impacted the exercise of the freedom diminished the conception and utility of the right.

5. Right Not to Join an Association

In *Tika Ramji v State of Uttar Pradesh*,⁸² the Supreme Court considered whether it was legal to mandate that sugar factories purchase cane only from cooperative societies formed by cane growers, given the right of freedom of association of those cane sellers who were not members of such bodies.⁸³ The Court held that the fundamental right to form an association did not extend to the negative right to not form an association.⁸⁴ The Court reasoned that as per the facts of the case there was no restriction on the rights of the petitioner. It explained that the petitioner was neither under any compulsion to join the society, nor were there any restrictions on the market that was available to him. Finally, the Court concluded that the State Government could mandate the purchase of sugar cane only under certain circumstances to ensure fair practice in the market.⁸⁵

A surprising departure to the decision in *Tika Ramji* is *M Sitharamachary v Senior Deputy Inspector of Schools*.⁸⁶ Here, the Andhra Pradesh High Court was petitioned by an elementary school teacher, who argued that he could not be forced to be part of an association, as mandated by Rule 3 of GOM No 418,

Education and Public Health, dated 24 February 1939. An obligation imposed on members included meeting at least once a month, with absences being punishable. Raju J, in contrast to *Tika Ramji* that was decided only about a year before, rightly reasoned that the right to form an association necessarily implied that a person was free to refuse to be a member of an association as well.⁸⁷ The judge located his rationale not simply in the 'forced' membership but the inconveniences caused by it, such as punishment for non-attendance of association meetings. He also relied on *Raja Suryapal Singh v UP Government* in arriving at his decision.⁸⁸

6. Government Employees

This section considers the restrictions on the rights of government employees, including members of the armed forces and security personnel. Even though the rights that are discussed involve their freedom of association, the restrictions imposed on them as a class have substantially restricted their ability to exercise this freedom.

In *OK Ghosh v EX Joseph*,⁸⁹ a five-judge bench of the Supreme Court upheld service rules that prevented government employees from striking.⁹⁰ However, Gajendragadkar J, in his judgment for the Court, struck down another rule of the same statute that proscribed government servants from joining or continuing as members of any association that was not recognised by the government. The judge applied the reasoning of *Kameshwar Prasad* and concluded that service rules that prohibited government employees from participating in demonstrations relating to their service violated their rights to freedom of expression and to associate.⁹¹

Gajendragadkar J reasoned that for the freedom of association to be restricted validly in the interests of public order (as was argued by the State), ‘the connection between the restriction and the public order ... [was] proximate and direct’.⁹² He concluded that he could not find a ‘proximate or reasonable connection ...’ between recognition of an association by the government and the discipline and efficiency of members of the association.⁹³ Similarly, he continued that he saw no ‘direct, proximate and rationale connection’ between recognition and public order.⁹⁴ Therefore, he found that the restriction infringed the freedom under Article 19(1)(c).⁹⁵

In *MH Devendrappa v Karnataka State Small Industries Development Corporation*,⁹⁶ the appellant, who was also the President of the employees’ welfare association, issued a press statement welcoming the dismissal of the chairman of the respondent corporation. Subsequently, he was dismissed from service by the corporation, relying on Rule 22 of its Service Rules, which allowed for an employee to be dismissed if she knowingly did ‘anything detrimental to the interests or prestige of the Corporation ...’ or was guilty of misconduct.⁹⁷ The appellant contended that he was dismissed for conduct that was an exercise of freedom of speech, expression, and association.

Manohar J, who wrote the Court’s judgment, traced cases where government employees were removed from service for either participating in assemblies

—*Kameshwar Prasad v State of Bihar*,⁹⁸ which was struck down, or *P Balakotaiah v Union of India*,⁹⁹ where an order dismissing ‘subversive’ workers as per the Railways Services (Safeguarding of National Security) Rules 1949 was upheld, since it did not violate the freedom of association. However, for Manohar J the critical point was that ‘the appellant had made a direct public attack on the head of his organisation’, that his conduct ‘amounted to lowering the prestige of the organisation in which he worked’, and therefore the rule could be validly applied to him.¹⁰⁰ Manohar J reasoned that individual freedom must be balanced with the proper functioning of a governmental organisation.¹⁰¹

The line of cases that Manohar J relied upon limited individual rights when they conflicted with the interests of a governmental institution. However, this reasoning is flawed. It might be argued instead that exercising freedom of expression and association to express criticism might lead to necessary change in the interests of society at large. Instead, the judge reasoned that the maintenance at all costs of the ‘prestige’ of a governmental institution served the larger well-being of society.

In *P Balakotaiah*, that Manohar J discussed, the Court in upholding the workers’ dismissal had concluded that there was not an Article 19(1)(c) violation, since the right to continue within the trade union had not been curtailed. A five-judge bench of the Supreme Court rejected the argument of the petitioners that their freedom of association was violated when they were dismissed from employment of the Railways as they attracted a service rule that prohibited any subversive activities. Here, the subversive activity was membership of a communist trade union. The Court held that the appellants ‘have no fundamental right to be continued in employment by the State ...’¹⁰² The Court reasoned that the only violations of the rights of government employees were under Article 311 of the Constitution, which governed their dismissal, removal, or reduction in rank. Their citizenship rights thus appear to be subordinated by the service requirements.

The logic of the Court is weak. When workers have to choose between the membership of a particular union and continuing in government service, then a fundamental freedom to associate and be part of a union of one’s choice is being burdened. The Court through both these cases suggests that an order must explicitly prohibit membership of an association or union for it to be unconstitutional. Therefore, orders for dismissal from service because of membership of an association or conduct that stems from such membership are constitutional.

The Court fails to appreciate that orders may directly and indirectly burden the

exercise of the fundamental rights and freedoms. The pervasive problem with the jurisprudence of the Court on freedoms to assemble and associate is the rather limited engagement with the restrictions that the text imposes through Articles 19(3) and 19(4). For instance, Manohar J should have necessarily tested the conduct in question against the requirements of Article 19(4) to assess whether it could be upheld. This lack of engagement with the restrictions that the Constitution allows has meant that the Court has upheld restrictions on an assortment of other grounds.

The freedom of association of members of the armed forces and security personnel is even more compromised than that of other government employees. In *Ous Kutilingal Achudan Nair v Union of India*,¹⁰³ members of the Civil Employees Union, who were employed as ‘non-combatants un-enrolled’ by the army, argued that their association not being recognised violated their freedom of association. The State argued that the Army Act 1950, whose Rules prohibited joining or forming a trade union, governed civilian employees. The appellants argued that they were not ‘members of the Armed Forces’ as envisaged by Article 33 of the Constitution, as they were civilian employees. The Court opined that such civilian employees of the army were an integral part of the armed forces and were within the purview of Article 33.¹⁰⁴ This provision enabled Parliament to modify the application of fundamental rights to members of the armed forces and other specified personnel—hence, the restrictions on fundamental rights of civilian members of the armed forces were valid.

Similarly, in *Delhi Police Non-Gazetted Karmachari Sangh v Union of India*,¹⁰⁵ the appellant union was derecognised under the Police Forces (Restrictions of Rights) Act 1966. The union contended that this violated their freedom under Article 19(1)(c). The union was initially recognised, but a change in the rules meant that the union could only consist of officers of the same rank. Since the union membership comprised a cross-section of ranks, before and after the change of the service rules, its recognition was withdrawn. The Supreme Court, while ruling against the appellants, reasoned that Parliament had the power to impose restrictions upon the fundamental rights of ‘members of Armed Forces’ under Article 33.¹⁰⁶ Hence, such restrictions could be imposed on unions and associations. It further held that this classification had its own rationale of discipline, which could not be questioned by the Court.¹⁰⁷

IV. CONCLUSION

The Supreme Court has been restrained in crafting jurisprudence that enables the exercise of the freedom of assembly and association. The Court has not considered the need to provide for greater conceptual clarity on the necessity of the two freedoms. Nor has the Court engaged in a discussion of principles that must guide it when interpreting these freedoms. Instead, the Court has largely performed a case-by-case analysis—while crafting jurisprudence as it sees fit based on categories or classes of bearers of these freedoms. For instance, instead of engaging in a discussion on strikes, it creates classes of citizens who cannot strike, such as lawyers or government employees. On Section 144 of the CrPC as well, we find that the Court has offered few guidelines to prevent its abuse outside of basic procedural safeguards.

The Court has been confronted by many more cases in the context of freedom of association. It has considered any array of questions, such as the freedom not to associate; the achievement of the aims and objectives of an association; the State takeover of the original control and management of an association; and changes in the original terms of membership of an association. It has accepted a weaker freedom of association when it pertains to employees of the State—civil and military.

Outside of changes in the original terms of membership of an association, the Supreme Court has generally replied in the negative to all the other questions posed by petitioners before it. Surprisingly, the Court has been rather protective of the freedom of association in the context of membership of an unlawful association. Thus far, the Court's position has been that membership of such an association cannot by itself be considered to be an act that is criminal. Here too, the Court has been driven by how the fact of membership was proved and not the nature of the freedom of association itself. Thus, the Supreme Court in general has been conceptually uninterested in exploring the various dimensions of these freedoms and their connection to democratic constitutionalism in India.

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¹ See generally, Nick Robinson and others, 'Interpreting the Constitution: Supreme Court Constitutional Benches since Independence' (2011) 46(9) *Economic and Political Weekly* 27.

² Police Act 1861, s 30(1).

³ Police Act 1861, s 30(2).

⁴ Prevention of Seditious Meetings Act 1911, s 5.

⁵ R Gopal, *Sohoni's Code of Criminal Procedure*, vol 2 (20th edn, Butterworths India 2002) 1151.

⁶ Armed Forces (Special Powers) Act 1958, s 4(a). See also Armed Forces (Jammu and Kashmir) Special Powers Act 1990.

- ⁷ Armed Forces (Special Powers) Act 1958, s 4(a).
- ⁸ *Constituent Assembly Debates*, vol 7 (Lok Sabha Secretariat 1986) 765, 2 December 1948.
- ⁹ *Constituent Assembly Debates*, vol 7 (Lok Sabha Secretariat 1986) 765, 2 December 1948.
- ¹⁰ Code of Criminal Procedure 1973, s 144(1).
- ¹¹ Code of Criminal Procedure 1973, s 144(1).
- ¹² Code of Criminal Procedure 1973, s 129(1).
- ¹³ Code of Criminal Procedure 1973, s 129(2).
- ¹⁴ Code of Criminal Procedure 1973, s 130(1).
- ¹⁵ Code of Criminal Procedure 1973, s 132.
- ¹⁶ Indian Penal Code 1860, s 143.
- ¹⁷ *Constituent Assembly Debates*, vol 7 (Lok Sabha Secretariat 1986) 712, 1 December 1948.
- ¹⁸ (1973) 1 SCC 227.
- ¹⁹ Bombay Police Act 1951, s 33(1)(o) and Rules for Processions and Public Meetings, Rule 7.
- ²⁰ *Himat Lal K Shah* ([n 18](#)) [70]–[73].
- ²¹ *Himat Lal K Shah* ([n 18](#)) [42].
- ²⁴ *Kameshwar Prasad* ([n 22](#)) [18].
- ²² AIR 1962 SC 1166.
- ²³ Bihar Government Servants' Conduct Rules 1956, Rule 4-A.
- ²⁵ AIR 1961 SC 884.
- ²⁶ *Babulal Parate* ([n 25](#)) [27].
- ²⁷ *Babulal Parate* ([n 25](#)) [28].
- ²⁸ (1970) 3 SCC 746.
- ²⁹ *Madhu Limaye* ([n 28](#)) [6].
- ³⁰ AIR 1960 SC 633 [18].
- ³¹ *Ram Manohar Lohia* ([n 30](#)) [24].
- ³² *Ram Manohar Lohia* ([n 30](#)) [24].
- ³³ (2012) 5 SCC 1.
- ³⁴ *Re Ramlila Maidan Incident* ([n 33](#)) [54].
- ³⁵ *Re Ramlila Maidan Incident* ([n 33](#)) [60].
- ³⁶ *Re Ramlila Maidan Incident* ([n 33](#)) [325]–[328].
- ³⁷ (2003) 2 SCC 45.
- ³⁸ *Mahabir Prasad Singh v Jacks Aviation Pvt Ltd* (1999) 1 SCC 37 [15]–[16], cited in *Harish Uppal* ([n 37](#)) [13].
- ³⁹ *Ramon Services Pvt Ltd v Subhash Kapoor* (2001) 1 SCC 118 [15]–[17], cited in *Harish Uppal* ([n 37](#)) [19].
- ⁴⁰ *Harish Uppal* ([n 37](#)) [20].
- ⁴¹ *Harish Uppal* ([n 37](#)) [35].
- ⁴² AIR 1965 SC 311 [5].
- ⁴³ *All India Bank Employees' Association v The National Industrial Tribunal* AIR 1962 SC 171.
- ⁴⁴ (2003) 6 SCC 581.
- ⁴⁵ *Kameshwar Prasad* ([n 22](#)).
- ⁴⁶ *Radhey Shyam Sharma* ([n 42](#)).

⁴⁷ *All India Bank Employees' Association* ([n 43](#)).

⁴⁸ *TK Rangarajan* ([n 44](#)) [12]–[16].

⁴⁹ *Harish Uppal* ([n 37](#)).

⁵⁰ *Communist Party of India v Bharat Kumar* (1998) 1 SCC 201.

⁵¹ Constitution (Sixteenth Amendment) Act 1963, s 2.

⁵² AIR 1952 SC 196.

⁵³ *VG Row* ([n 52](#)) [16].

⁵⁴ *VG Row* ([n 52](#)) [16].

⁵⁵ *VG Row* ([n 52](#)) [16].

⁵⁶ *VG Row* ([n 52](#)) [18].

⁵⁷ (1995) 1 SCC 428.

⁵⁸ *Jamaat-E-Islami Hind* ([n 57](#)) [11].

⁵⁹ *Jamaat-E-Islami Hind* ([n 57](#)) [19].

⁶⁰ *Jamaat-E-Islami Hind* ([n 57](#)) [11].

⁶¹ *Jamaat-E-Islami Hind* ([n 57](#)) [11].

⁶² (2011) 3 SCC 377.

⁶³ *Arup Bhuyan* ([n 62](#)) [4].

⁶⁴ 384 US 11 (1966), wherein the Supreme Court of the United States had rejected the doctrine of ‘guilt by association’.

⁶⁵ (2011) 1 SCC 784.

⁶⁶ *Arup Bhuyan* ([n 62](#)) [12].

⁷⁴ *All India Bank Employees' Association* ([n 43](#)) [20].

⁶⁷ AIR 1954 SC 73.

⁶⁸ AIR 1962 SC 263.

⁶⁹ Forward Contracts (Regulation) Act 1952, ss 5(1) and 6(1).

⁷⁰ *Raghubir Dayal Jai Prakash* ([n 68](#)) [11].

⁷¹ *Raghubir Dayal Jai Prakash* ([n 68](#)) [11].

⁷² *Raghubir Dayal Jai Prakash* ([n 68](#)) [11].

⁷³ *All India Bank Employees' Association* ([n 43](#)).

⁷⁵ (1971) 2 SCC 269.

⁷⁶ (1971) 1 SCC 678.

⁷⁷ *Damyanti Naranga* ([n 76](#)) [5].

⁷⁸ *Damyanti Naranga* ([n 76](#)) [6]. A notable exception to the decision in *Damyanti Naranga* is a series of cases relating to cooperative societies. In *Daman Singh v State of Punjab* (1985) 2 SCC 670, State enactments providing for the compulsory amalgamation of cooperative societies were challenged as violating Article 19(1)(c). The Court, however, refused to apply *Damyanti Naranga*, stating that cooperative societies were ‘created ... [and] controlled by statute and so, there can be no objection to statutory interference with their composition on the ground of contravention of the individual right of freedom of association’. *Daman Singh* was cited with approval in *State of Uttar Pradesh v COD Chheoki Employees' Cooperative Society Ltd* (1997) 3 SCC 681 to uphold compulsory statutory reservations in cooperative societies for women, SCs, STs, and OBCs. In *Zoroastrian Cooperative Housing Society v District Registrar* (2005) 5 SCC 632, the Court upheld the validity of a by-law restricting membership of the society only to members of the Parsi community, but did so only after noting the lack of ‘legislative

intervention' to prevent religion-based restrictions on society membership.

⁷⁹ (1988) 2 SCC 433.

⁸⁰ *All India Bank Employees' Association* ([n 43](#)) [28], cited in *LN Mishra* ([n 79](#)) [32].

⁸¹ (2004) 1 SCC 712.

⁸² AIR 1956 SC 676.

⁸³ The UP Sugarcane (Regulation of Supply and Purchase) Act 1953 through a notification dated 27 September 1954 mandated this.

⁸⁴ *Tika Ramji* ([n 82](#)) [43].

⁸⁵ *Tika Ramji* ([n 82](#)) [43].

⁸⁶ AIR 1958 AP 78.

⁸⁷ *M Sitharamachary* ([n 86](#)) [8].

⁸⁸ AIR 1951 All 674, cited in *M Sitharamachary* ([n 86](#)) [5].

⁸⁹ AIR 1963 SC 812.

⁹⁰ Central Civil Services (Conduct) Rules 1955, Rule 4(A).

⁹¹ *OK Ghosh* ([n 89](#)) [8].

⁹² *OK Ghosh* ([n 89](#)) [10].

⁹³ *OK Ghosh* ([n 89](#)) [11].

⁹⁴ *OK Ghosh* ([n 89](#)) [12].

⁹⁵ *OK Ghosh* ([n 89](#)) [12].

⁹⁶ (1998) 3 SCC 732.

⁹⁷ *MH Devendrappa* ([n 96](#)) [9].

⁹⁸ *Kameshwar Prasad* ([n 22](#)).

⁹⁹ AIR 1958 SC 232.

¹⁰⁰ *MH Devendrappa* ([n 96](#)) [19].

¹⁰¹ *MH Devendrappa* ([n 96](#)) [19].

¹⁰² *P Balakotaiah* ([n 99](#)) [12].

¹⁰³ (1976) 2 SCC 780.

¹⁰⁴ *Ous Kutilingal Achudan Nair* ([n 103](#)) [12].

¹⁰⁵ (1987) 1 SCC 115.

¹⁰⁶ *Delhi Police Non-Gazetted Karmachari Sangh* ([n 105](#)) [17].

¹⁰⁷ *Delhi Police Non-Gazetted Karmachari Sangh* ([n 105](#)) [20].

CHAPTER 47

MOVEMENT AND RESIDENCE

ANIRUDH BURMAN

I. INTRODUCTION

ARTICLE 19(1)(d) guarantees all citizens the right to move freely throughout the territory of India. Article 19(1)(e) guarantees all citizens the right to reside and settle in any part of the territory of India. Article 19(5) enables the State to impose 'reasonable restrictions' on these freedoms in the interests of the general public, or for the protection of the interests of any Scheduled Tribe. What import does the right of the State to impose reasonable restrictions have? The exception allows for the promotion of reciprocal individual rights, and also for restrictions imposed in furtherance of the State's governance functions. Patti Tamara Lenard categorises these restrictions into two types: a restriction on individuals from going to a location of their choice, and when individuals are forced to move away from a location, where they would prefer to stay.¹

The rights to free movement and residence, as they exist within the Constitution, were envisaged as protections against sub-national restrictions on movement and residence. The debate focused on restrictions that may be imposed to preserve law and order. When the first draft of these freedoms was introduced before the Constituent Assembly, ZH Lari, while discussing the subject, referred to the restrictions by saying that the rights have been hemmed in 'by such provisos and conditions that they reduce them to a nullity ...'² He proceeded to observe that the Article 19 (then Article 13) freedoms are 'indefinite, insufficient and ... vague'.³ Kazi Syed Karimuddin sought to bring attention to existing laws that would be saved by the suggested restrictions. According to him, the Goonda Public Safety Acts in all the provinces, in which there is 'neither appeal, nor any warrant is necessary for arrest, and searches can be made without justification,' would be one such law.⁴

Article 16(3) of the Constitution explicitly permits discrimination in public employment on the basis of residence. Laws also provide for preferential treatment on the basis of residence in education. The balance between laws in public employment and education that discriminate against non-residents and the

rights of movement and residence has not been explicitly decided. The resolution of this conflict is, however, essential to the question of whether our Constitution effectively enables a principle of sub-citizenship, and therefore a national market for labour. The clear concern that free movement and residence would be curtailed by parochial concerns of ensuring greater regional representation and opportunity has been borne out by the wide variety of legal requirements that operate to restrict free movement and residence today.

II. CONTEXT AND CONFLICT

[Table 47.1](#) provides an illustrative list of laws and measures that impede the rights of free movement and residence.

The traditional paradigm of discourse on these rights focuses on ‘law and order’ issues such as externment, deportation, and police surveillance.⁵ As [Table 47.1](#) highlights, such issues are a small subset of a larger set of restrictions on movement and residence.

A major category of restrictive laws and measures are related to residency requirements. In January 2010, the Maharashtra Government barred people not domiciled in the State from acquiring taxi licences in Mumbai.⁶ In many instances, law enforcement authorities have allegedly acted in a discriminatory fashion while handling complaints of ‘outsiders’ from other Indian States.⁷ Such practices are not recent. Katzenstein documents such practices in the State of Maharashtra from the 1960s and reports that while State Governments are constrained from imposing formal residency requirements in the private sector, they were using informal tactics such as ‘issuing of licenses, permits, and inspections’.⁸ In 1973, the Maharashtra Commissioner of Industries wrote to private employers asking them to create quotas for locals.⁹

States also impose residency requirements for holding property in certain States in India. Himachal Pradesh¹⁰ and Uttarakhand are prominent examples. Notably, in 2011 the Uttarakhand High Court struck down the residency requirement that prevented non-residents from acquiring more than 250 square metres of land.¹¹ Many such laws and administrative practices have a direct effect on the freedom of movement and residence, as they place an effective bar on residency. Many State Governments condition the receipt of social welfare benefits on conditions of local residency. Reservation of seats for local residents in educational institutions and employment is quite common,¹² as are restrictions

on the transfer of land to non-residents for the protection and promotion of the deprived. Examples of the latter are the Kerala Restriction on Transfer by and Restoration of Lands to Scheduled Tribes Act 1999 and the Gujarat Prohibition of Transfer of Immovable Property and Provision for Protection of Tenants from Eviction from Premises in Disturbed Areas Act 1991.

Table 47.1 Measure Impeding Movement and Residence

Law/Measure	Subject of intervention/Restriction	Movement/ Residence	Examples
Arrest, imprisonment, and detention laws	(a) Allow the State to imprison persons. (b) Allow the State to detain persons who could potentially commit certain crimes.	Movement	Indian Penal Code 1860
Land/Property transfer laws	(a) Prevent transfers of land/property on the basis of residence. (b) Provide for compulsory acquisition of land and rehabilitation.	Residence	(a) Gujarat Prohibition of Transfer of Immovable Property and Provision for Protection of Tenants from Eviction from Premises in Disturbed Areas Act 1991 (b) Himachal Pradesh Tenancy and Land Reforms Act 1972
Benefits based on residence/domiciliary requirements	(a) Land/Property transfer/Ownership laws. (b) Business permissions. (c) Reservations in educational institutions and employment. (d) Welfare benefits and subsidies.	Both	Public Employment (Requirement as to Residence) Act 1957
Public health, environment, and safety laws	(a) Requirement to wear crash helmets while driving. (b) Prevention of trafficking of women. (c) Allow the State to isolate persons suffering from diseases.	Both	(a) Andhra Pradesh Motor Vehicles Rules 1964 (b) Immoral Traffic (Prevention) Act 1956 (c) Goa, Daman, and Diu Public Health Act 1985
Restriction on movement	(a) Direct prevention of movement in certain areas within the territory of India. (b) Externment: allows law and order authorities to direct a person to remove himself from a particular geographical area.	Movement	(a) Chin Hills Regulation 1896 (b) Madhya Pradesh Public Security Act 1959 (c) Bombay Police Act 1951

In spite of such examples, there is substantive internal movement of individuals within the country. The 2001 census data states that out of a then population of 1.02 billion people, 307 million people were reportedly ‘migrants by place of birth’—that is, they were residing in a place different from their place of birth.¹³ There is, however, one important point to be considered. Only 42.3 million out of this 307 million migrant population was reportedly interState migration. Most of the migration has been intraState. This may be caused at least partly due to residency requirements acting as effective checks on interState migration, compared to a relative lack of sub-State residency barriers. As the

Report on Conditions of Work and Promotion of Livelihoods in the Unorganised Sector states, migrant labour faces various disadvantages compared to resident labour.¹⁴

To what extent are these residency requirements legitimate and constitutionally permissible? Court judgments and legislative practice have ensured that a vast proportion of State-provided/backed educational and employment opportunities are reserved for residents. While courts have held that residence cannot be the sole ground for reservation, they have also stated that it can be one of the factors that may be taken into account.

A third broad category of restrictions is those on grounds of public health, safety, and order. Courts have construed such restrictions broadly, and sometimes justified extreme measures in 'public interest'. In many cases, these restrictions may directly impact the economic interests of individuals. Courts have not paid adequate attention to whether the measures imposed were the least restrictive measures to achieve the desired objective of the impugned law. A further reconsideration of the specific impact of these restrictions is therefore required.

III. THE JUDICIAL APPROACH

There are three broad classifications of the judicial approach to free movement and residence:

1. On restrictions imposed for promoting law and order, courts have used Article 21 principles of procedural fairness and natural justice to scrutinise externment, deportation, and preventive detention laws.
2. On restrictions imposed in order to promote equality interests (including rehabilitation for land acquisition), there is an absence of engagement with the curtailment of the freedom interests by the impugned laws or measures.
3. On restrictions imposed in order to promote public health, safety, and the environment, courts have given wide latitude to State action, in one instance expressly disavowing a more costly, but less restrictive method of regulation.

1. 'Law and Order' Restrictions

The willingness to move and/or settle is premised upon a guarantee of legal certainty. In a constitutional democracy effectively promoting fundamental rights, the promise of a right to move and reside freely mitigates the economic risks of relocation. Laws that exacerbate legal uncertainty on these issues therefore undermine this freedom itself. Such laws therefore fundamentally undermine the citizen–State compact of legal certainty and fairness, and disincentivise the development of a nationally mobile labour force.

a. *Preventive Detention Cases*

Preventive detention laws in India are valid under Article 22 of the Constitution. In *AK Gopalan v State of Madras*,¹⁵ a writ was filed challenging the order of detention under section 3 of the Preventive Detention Act 1950. It was contended that the Act contravenes Articles 13, 19, 21, and 22 of the Constitution. According to the Court, since Article 22 specifically deals with preventive detention, Article 19 has no effect on preventive or punitive detention.¹⁶ The Supreme Court also noted that the right to move freely throughout the territory of India is very different from the right to life under Article 21. In his minority judgment, Fazl Ali J disagreed, and stated that Articles 19, 21, and 22 overlap, and that a deprivation of personal liberty also affects the freedom of movement throughout the territory of India.¹⁷

The majority judgment carving out separate spheres for Article 19 and Articles 21–22 (also effectuated by laying down a direct-effect test for the interpretation of fundamental rights) created a situation where a law affecting an Article 21 or Article 22 right was valid even if it infringed an Article 19 freedom. The direct-effect test, and the distinction between ‘personal liberty’ and ‘freedom’ therefore had the result of *narrowing* the scope of examination of an impugned law against the Constitution. The direct-effect test is particularly problematic in cases where multiple constitutional provisions are applicable. Laws on preventive detention are explicitly covered under Article 22. However, as later cases have clearly held, laws affecting one right may also incidentally affect other rights.¹⁸ This is clearly visible in the following sections discussing affirmative action laws and their effect on movement and residence. An implicit focus on direct effects in such cases has led to inadequate scrutiny of such measures with regard to fundamental freedoms.

In 1954, the Calcutta High Court decided otherwise. In *Kshitindra Narayan*

Roy Choudhury's case,¹⁹ the petitioners were originally detained under the Bengal Criminal Law Amendment Act 1930, and then the Preventive Detention Act. Holding the preventive detention law void in light of it not being a reasonable restriction under Article 19(5), the High Court held that under the law there is no effective relief by way of prayer to the courts as it prevents the disclosure of the grounds of detention to the courts, and there is no requirement that the detention order has to be made after the satisfaction of the competent authority on reasonable grounds.²⁰ In doing so, the Court sought to ensure procedural safeguards later explicitly read into Article 21. It then explicitly stated that laws of preventive detention are subject to Article 19.

b. Externment Laws and Orders

The power to direct a person to leave a particular area existed in many police statutes present in the country. Goonda laws of various States continue to give the local administration the power to extern people declared as 'goondas'.²¹ One commentator notes (based on an empirical study of goonda police files in Calcutta) that 'in official discourse, the "goonda" came to be more described than defined ...', pointing to the effort of the administrative machinery to 'peripheralise' persons labelled as 'goondas'.²² In recent years, States have brought in amendments to these laws. Some States have expanded the definition 'goonda' to include offences under the Information Technology Act 2000 and the Copyright Act 1957.²³ Critically, these amendments enable the police to take *preventive* action, including externment, against persons suspected of being about to commit offences under these laws. This is significant, especially since the penalties in these laws themselves do not provide for externment. The scope of 'reasonable restrictions' that may be imposed on Article 19(1)(d) and (e) is therefore expanding into a set of laws that do not contemplate such restrictions.

The Indian Supreme Court has construed the provisions of such laws liberally to allow these laws to exist, but has also required minimum procedural fairness in the application of these laws. The Supreme Court heard one of the first major challenges to such powers in a five-judge bench in *Hari Khemu Gawali's* case.²⁴ The vires of certain provisions of the Bombay Police Act 1951 were challenged (section 57). The police under section 57 against the petitioner passed externment orders, as he was a previously convicted citizen. Under section 57, if a person had committed certain offences previously, and the police felt that he

was likely to commit the same or similar offences again, it could issue an externment order against such person. Laws, it said, can be made to prevent the commission of crimes, and these are reasonable restrictions in the interest of the general public: ‘In doing so the State may have to curb an individual’s activities and put fetters on his complete freedom of movement and residence in order that the greatest good of the greatest number may be conserved.’²⁵

The minority disagreed. Jagannadhadas J, writing for the minority, argued that the constitutional validity of the laws of preventive restriction as opposed to preventive detention have to strike a balance between fundamental rights and ‘social control’:

[I]n a state where personal liberty is a guaranteed fundamental right, the range of such preventive action must be limited to a narrow compass ... the proper balance between the fundamental right and social control is not achieved by vesting the power ... in such wide terms as in Section 57 ... Such a provision would lead to serious encroachment on the personal liberty of a citizen.²⁶

The minority argued for what we now understand as Article 21 conceptions of natural justice to be read into laws imposing restrictions on fundamental rights. By 1967, the Supreme Court had substantially come round to the minority view and narrowed the majority’s construction in *Maneka Gandhi*’s case. Similar considerations of procedural safeguards were considered while scrutinising the impugned measures in *Gurbachan Singh*’s case²⁷ and *Baldeo Prasad*’s case.²⁸

The majority judgment, however, seems dismissive of necessary procedural safeguards. One illustration of this is its judgment with regard to the absence of an advisory board under the impugned law.²⁹ It was contended that while preventive detention laws had the requirement of scrutiny of the material on which a preventive detention is based, such a provision was absent in the impugned law. Rather than examine the absence of such a provision as forming part of a larger absence of procedural safeguards, the majority stated: ‘Hence it cannot be said that the existence of an Advisory Board is a sine qua non for the constitutionality of a legislation such as the one before us.’³⁰

Perhaps, more significantly, it undermines the principle of ‘innocent until proven guilty’ by sanctioning the use of past criminality as a basis for imposing coercive force on such citizens (by externing them) without such citizens actually being adjudged guilty of committing a criminal act.

c. Arrest, Bail, and Related Procedures

The history of preventive detention and reforms surrounding it has been inexorably tied to the development and reform of laws surrounding bail.³¹ In *Madhu Limaye's* case,³² the question of whether section 144 of the Code of Criminal Procedure is constitutional when tested under Articles 19(1)(a), (b), (c), and (d) came up before the Supreme Court. A seven-judge bench came to the conclusion that 'Section 144 is not unconstitutional if properly applied and the fact that it may be abused is no ground for striking it down'.³³ In *Gurbaksh Singh Sibbia's* case,³⁴ a five-judge bench of the Supreme Court discussed the provisions of anticipatory bail in section 438 of the Code of Criminal Procedure 1973. The Court held that the denial of bail is a deprivation of personal liberty. It stated that unnecessary additional constraints should not be put on the scope of section 438 as the 'right to personal freedom cannot be made to depend on compliance with unreasonable restrictions'.³⁵ While this judgment tested the vires of section 438 against Article 21 of the Constitution, it discussed the imposition of constraints on 'personal freedom' and 'unreasonable restrictions', thereby using tests borrowed from Article 19.

The Court makes a distinction between bail, when a person has been arrested and already lost his freedom, and anticipatory bail, when a person not yet arrested is asking for freedom in the event of an arrest. Interestingly, the Court may have used this observation to circumscribe the scope of anticipatory bail. However, it goes on to state, 'That is the stage at which it is imperative to protect his freedom ... and to give full play to the presumption that he is innocent.'³⁶ The emphasis of the Court on the presumption of innocence contrasts strikingly with the decision in *Hari Khemu Gawali's* case, decided in 1956. One reason for this may be the increasing suspicion of the Indian State after the Emergency in 1975–76, and the conscious effort of the Court in recasting its role as an active protector of fundamental rights.

In *Prem Shankar Shukla's* case,³⁷ the petitioner sent a telegram to the Supreme Court stating that handcuffs were forced on him and others. As per then prevalent practices, ordinary undertrials were routinely handcuffed. The three-judge bench held that handcuffing is prima facie unreasonable and 'at the first flush, arbitrary'.³⁸ According to it, an '[i]nsurance against escape does not compulsorily require handcuffing'.³⁹ Striking down the practice, the Supreme Court held that the application of handcuffs is not a reasonable restriction.

In the few cases that laws imposing restrictions have been held to be unreasonable, the criteria for unreasonableness have been similar to 'due process' requirements under Article 21. For example, in *Kshitindra Narayan Roy*

Choudhury's case, the High Court of Calcutta struck down the relevant law, since it did not give any effective relief against adverse administrative order, and there was no requirement of the reasonable satisfaction of the administrative authority passing a detention order. Similarly, in *Baldeo Prasad's* case, the Supreme Court struck down a portion of a law providing for externment, stating that there were no sufficient safeguards against the deprivation of liberty under Articles 19(1)(d) and (e). Under the impugned law, there was no provision requiring the District Magistrate to come to an *ex-ante* determination about the applicability of the law to the concerned individual, thereby defeating certain principles of natural justice.

It is therefore important to question whether 'liberty' and 'freedom' refer to the same thing, necessitating the application of judicial principles relevant to one constitutional provision to another. Freedom is generally understood to be a state of existence where an individual is free from control. Liberty, on the other hand, is understood to mean freedom that is conferred or granted by an external agency. Therefore, while the tests under Article 21 are definitely relevant for Article 19(1), they need not be the only tests for examining the validity of reasonable restrictions (the Supreme Court, for example, has evolved such tests on the freedom of speech).⁴⁰

2. Laws and Measures Aimed at Positive Discrimination

Does protection from discrimination, or constitutionally permissible positive discrimination, also protect freedom? Articles 15 and 16 of the Constitution provide affirmative action measures that Parliament and State legislatures can take. Article 16 prohibits discrimination in unemployment on the grounds of residence, but enables reservations for backward classes. Though Article 15 does not explicitly mention residence as a consideration for affirmative action, States have in fact imposed domiciliary requirements for reserving seats in educational institutions.

The tension between equality and freedom sought to be highlighted in this section is the classical tension between positive and negative rights.⁴¹ The Constitution explicitly allows the Indian State to take affirmative action. The judgments on this issue are important not because of the tension between positive and negative rights, but because of the lack of engagement with this tension. In a situation where a balance between the two needs to be clearly delineated, the lack of engagement implicitly makes one subservient to the other.

As the following cases highlight, affirmative action seems to be a higher constitutional norm than the freedom of residence, even though courts have not explicitly stated the same. This has direct consequences for the national market in labour, as courts uphold restrictions that inhibit free movement and residence.

a. *Education*

One such case is *Saurabh Chaudri's* case,⁴² where the petitioners challenged practices of educational institutions reserving seats on the basis of domicile and institutional preference. The key issue was whether reservations in educational institutions based on domicile are constitutional. The petitioners argued that Article 15(1) explicitly bars reservation on a residential basis. It was argued that all Indians should have one domicile, and not separate State domiciles. The Court held that unlike Article 16(2), Article 15(1) prevents discrimination only on the basis of 'place of birth', and not domicile or residence.⁴³ Reservation on the basis of domicile is therefore permissible in educational institutions. The Supreme Court, however, did not discuss the interference with Article 19(1)(e). It examined the impugned measures from a non-discrimination perspective, reiterating its earlier judgment in *Pradeep Jain's* case.⁴⁴ There are, however, a few interesting points of note. First, the judges refused to apply a strict scrutiny test as followed in the United States. Its reason for doing so was nothing more than that 'Such a test is not applied in the Indian Courts.'⁴⁵ Secondly, it said that for admissions to postgraduate courses there should not be any reservation based on residence following the decision in *Pradeep Jain's* case.

In *DP Joshi v State of Madhya Bharat*,⁴⁶ the Supreme Court upheld the imposition of differential capitation fees on students of a college based on 'bona-fide residence' within the then State of Madhya Bharat. *Bona fide* residency was defined in terms of both domicile and residence, with added requirements of length of residency based on the person's domiciliary status.⁴⁷ There was thus a clear nexus between residency and the basis of discrimination. Yet, the Court did not examine the impugned law from this perspective. The majority judgment focused around the discriminatory aspects of the impugned law, but did not discuss the measure's impact on residency. Jagannadhadas J, in his minority judgment, observed that the intent of the impugned rule was that 'the benefits of the exemption from capitation fees should be available only to persons born in Madhya Bharat and the burden of the capitation fees should be borne by persons

not born in Madhya Bharat’.⁴⁸

However, he also confined his analysis to whether the provision was unfairly discriminatory. One observable methodology of judicial construction that emerges from this and the following cases is that the Court is confining its analysis of the impact of such measures on a State/local basis, rather than a national one. While an analysis of discrimination in such cases necessitates a comparison between the insider (State resident) and the outsider (non-resident), an analysis of the impact on freedom equally requires the measurement of the law’s impact on a national scale. While at a local level the imposition of residency requirements is merely a condition for transferring benefits, from a national perspective it inhibits movement and therefore contributes to fragmentation.

Pradeep Jain’s case is perhaps the most significant case discussing residency requirements in reservation measures. At the outset, Bhagwati J declared that there is no concept of a State domicile in India. However, he agreed that ‘domicile’, as used by State Governments while prescribing domiciliary requirements, is used loosely and has the same meaning as residence, and proceeded to:

[S]trongly urge upon the State Governments to exercise this wrong use of the expression ‘domicile’ from the rules regulating admissions to their educational institutions and particularly medical colleges and to desist from introducing and maintaining domiciliary requirement as a condition of eligibility for such admissions.⁴⁹

The judgment went on to decry the use of residency requirements from an equality paradigm:

It is axiomatic that talent is not the monopoly of the residents of any particular State... What is necessary is equality of opportunity and that cannot be made dependent upon where a citizen resides ... it would be against national interest to admit in medical colleges or other institutions giving instruction in specialties, less meritorious students when more meritorious students are available, simply because the former are permanent residents or residents for a certain number of years in the State while the latter are not ...⁵⁰

The judgment then proceeded to reiterate previous decisions holding intraState residency requirements as invalid. However, on the core issue of whether residence is a permissible criterion of eligibility, it upheld the impugned laws. Citing the judgment in *DP Joshi*, it stated that since classification based on residence is valid, a residency requirement of ten years or more as an eligibility criterion is equally valid.⁵¹ It then drew a peculiar distinction in the case of

postgraduate courses and stated that admissions to these should be on an all-India basis, observing that ‘it would be eminently desirable not to provide for any reservation based on residence requirement within the State or on institutional preference’.⁵² While the Court is avowedly against diluting the principle of merit, it considers itself bound by precedence, and is cognisant of the need for special measures with respect to certain categories of persons.

b. *Employment*

In January 1969, the Andhra Pradesh government passed a series of measures called the ‘Telangana Safeguards’. The State Government relieved all non-Telangana domiciled government officers who were holding posts reserved for Telangana domiciles. Section 3 of the rules under the Public Employment (Requirement as to Residence) Act stated that a person would not be eligible for appointment to a post within Telangana unless residency requirements were satisfied. A five-judge bench in *AVS Narasimha Rao’s* case held the rules invalid.⁵³ The Court held that though Article 16 permits certain discriminatory action on the basis of residence, it does not permit intraState discrimination. This power too, has been conferred on Parliament, and not on State Governments. In *KC Sharma’s* case,⁵⁴ the validity of the selection process of the posts of primary school teachers was challenged. The selection criteria gave bonus marks to candidates from that particular district, in addition to domiciles of Rajasthan.⁵⁵ The Court explicitly stated that discrimination only on the basis of residence or place of birth was prohibited.⁵⁶ The Court accordingly struck down the selection criteria.

These and other cases have judged the issues relating to residential requirements within an equality framework.⁵⁷ There is a lack of engagement with the right to free movement and residence that begs the question—is the right to free movement and residence not curtailed in such cases, or if it is, is the curtailment implicitly assumed to be a reasonable restriction? Clearly, the impugned laws and measures do not *prevent* either movement or residence. They merely *disadvantage* individuals on the basis of residence. However, the extent and impact of the disadvantage to those disadvantaged by such affirmative actions should be moot when judging the validity of laws under [Part III](#) of the Constitution.

The fact is that the nature and permissibility of discrimination has faced far

greater judicial scrutiny than the discriminatory measure's impact on freedom. In *Pradeep Jain's* case, residential requirements were held to have a reasonable nexus to the object sought to be achieved—that is, increasing availability of medical facilities in underserved areas. A strict scrutiny standard of review⁵⁸ may have highlighted that the same object could have been achieved by requiring post-education service requirements instead of prescribing residency requirements.

3. Laws and Measures Aimed at Public Safety, Health, Environment, and Land Acquisition

In cases pertaining to this third category of cases, the Court's inability to define a clear balancing principle between rights and permissible restrictions is evident. In the cases discussed below, courts have given wide deference to State action.

a. Land Acquisition

Land acquisition is the taking of property by the State, and by doing so, in many cases, residence. Though the right to reside is not extinguished on the taking of residential property, the impact of such taking on residence is undeniable. Courts have not directly considered the impact of land acquisition measures on the right to reside and settle freely. However, there have been indirect references to the nature of interference with this right, and consequent State action.

For example, in *Narmada Bachao Andolan*,⁵⁹ the High Court of Madhya Pradesh had issued directions for the allotment of agricultural land in lieu of the land acquired for the construction of the Omkareshwar Dam in Madhya Pradesh.⁶⁰ The Supreme Court explicitly stated that the 'acquisition of land does not violate any constitutional/fundamental right of the displaced persons'.⁶¹ While discussing the obligation of the State Government to rehabilitate persons who had been displaced, the Court said that:⁶²

It is desirable for the authority concerned to ensure that *as far as practicable* persons who had been living and carrying on business ... on the land acquired, if they so desire, and are willing to purchase and comply with any requirement of the authority ... be given a piece of land ...⁶³

b. Restrictions on General Physical Movement

In *Ebrahim Vazir Mavat*,⁶⁴ the Supreme Court struck down section 7 of the Pakistan Control Act 1949 for infringing the right to reside and settle freely under Article 19(1)(e). According to the Court, to allow a citizen to be removed from the country for the commission of an offence would be to destroy an individual's right to citizenship under the Constitution.⁶⁵ Section 7 of the Act that provided for this power therefore was an unreasonable restriction on the petitioner's right under Article 19(1)(e).

One of the most contentious issues litigated within the ambit of [Part III](#) of the Constitution has been the right of a person to carry a passport and travel abroad. Article 19(1)(d) only guarantees the freedom to move freely within the territory of India. In 1967, the Supreme Court held that the existing law governing the issuance and regulation of passports violated Article 21 in *Satwant Kumar Sawhney*'s case.⁶⁶ Though this case is not directly related to Article 19(1)(d), it does have a direct bearing on the following case of *Maneka Gandhi v Union of India*.⁶⁷ SK Sawhney was an Indian citizen carrying on the business of export–import and manufacture of automobile parts. The Assistant Passport Officer called upon him to return the passports. Sawhney alleged a violation of Articles 14 and 21 of the Constitution. The Supreme Court struck down the relevant provision of the law on the ground that the law did not have adequate procedural safeguards against an order asking the person to return the passport. Parliament went back and enacted a new law, the Passports Act 1967. Section 10(3)(c) of this Act was challenged before the Supreme Court in *Maneka Gandhi*'s case. The Supreme Court upheld the validity of the law, but in doing so, made significant statements as to the nature and interrelationship between various provisions in [Part III](#) of the Constitution. The pronouncements relevant to our discussion are the following.

First, the Supreme Court held explicitly that the right to movement within and outside India is not a part of the freedom of speech and expression. The two rights are independent, even if a restriction on one has an impact on the other. Secondly, Chandrachud J, in his concurring opinion, noted that fundamental rights are not mutually exclusive. He stated that a law affecting personal liberty under Article 21 would have to satisfy the tests under Articles 14 and 19.⁶⁸ Significantly, he observed that:

[T]he ambit of a freedom cannot be measured by the right of a State to pass laws imposing restrictions on that freedom ... Article 19(1)(a) ... does not delimit that right in any manner and there is no reason ... why the courts should strain the language of the article to cut down the amplitude of

that right ... subject of course to ... reasonable restrictions ...⁶⁹

c. Public Safety/Public Morals Related Restrictions

In *Kaushailiya's* case,⁷⁰ the Supreme Court dealt with the constitutional validity of the Suppression of Immoral Traffic in Women and Girls Act 1956 and orders made under it. Section 20 of the law allows for the deportation/externment of prostitutes in the vicinity of certain areas and buildings such as educational and religious institutions. The respondents were prostitutes carrying on their trade in Kanpur. The City Magistrate Kanpur asked them to show cause why they should not be removed from their place of residence. The judgment upheld the validity of the law and overturned the decision of the Allahabad High Court that had declared the law invalid.

The Supreme Court held that while a 'prostitute has a fundamental right to move freely throughout the territory of India; and under sub-clause (e) thereof to reside and settle in any part of the territory of India ...',⁷¹ 'uncontrolled movement' in crowded areas 'not only helps to demoralise the public morals ... to spread diseases not only affecting the present generation, but also the future ones. Such trade in public may also lead to scandals and unseemly broils.'⁷²

According to the Court, the test of reasonableness depends on the 'values of life in a society', the circumstances at the time the restriction is imposed, and the degree and urgency of the evil sought to be controlled.⁷³ It went on to observe that 'If the evil is rampant, it may also be necessary to provide for deporting the worst of them from the area of their operation ... There cannot be two views on the question of its control and regulation.'⁷⁴

In discussing the validity of section 20 of the impugned law under Article 19(1)(d) and (e), the Court held that while section 20 is certainly a restriction, it is not unreasonable.⁷⁵ Importantly, the Court engages with an independent framework of interpretation of Article 19(1) rights. It does so by stating that restrictions imposed ought not to be arbitrary and excessive.⁷⁶ It explains how section 20 of the law meets the requirements of procedural due process. It then proceeds to substantively discuss whether the power to deport is unreasonable, and concludes that once the legislature has agreed that prostitution as an activity is illegal and punishable, externment cannot be held to be unreasonable. While it examines the test of what constitutes arbitrariness in some detail, it concludes that the measure is not excessive, based on the assumption that procedural

fairness is a check against excessiveness. Therefore, while there is an engagement of what measures are excessive under Article 19(2) to (5), the axis of engagement does not change in comparison to other cases.

In *Ajay Canu*,⁷⁷ the validity of Rule 498-A of the Andhra Pradesh Motor Vehicles Rules 1964 was challenged as violating Article 19(1)(d) of the Constitution. Rule 498-A mandated drivers of motorcycles and scooters to wear crash helmets. The Supreme Court held that Rule 498-A was enacted for the safety and benefit of individuals. It is so because it increases freedom of movement by freeing the driver of the apprehension of a fatal head injury if an accident takes place. On this basis, it concluded (remarkably), that ‘We do not think there is any fundamental right against any act aimed at doing public good.’⁷⁸ However, it said, even if it is assumed that there is a restriction on a fundamental right here, such a restriction is reasonable.⁷⁹ Though the Court highlights the tension between an individual’s right and the public good, it fails to articulate a clear standard for determining when one ought to weigh against the other.

A similar tension emanates from the judgment of the High Court of Bombay in *Lucy R D’Souza’s* case.⁸⁰ The petitioner challenged the validity of section 53 of the Goa, Daman, and Diu Public Health Act 1985. Section 53 allows the State Government to isolate persons found to be positive for AIDS for such periods as may be considered necessary and in such institutions or wards as prescribed. The High Court upheld the provision. It stated that while isolation has serious consequences, ‘in matters like this individual rights has to be balanced [against] the public interest’. The ‘former must yield to the latter’ in cases like this.⁸¹

d. Restrictions Imposed Directly on Economic Activity

In the *Kerala Trawlnet Boat Operators’* case,⁸² the activities of certain fishing boats off the coast of Kerala were sought to be regulated by the State Government. They were barred from bottom trawling in certain parts of the sea during specific periods of the year. In their defence, it was argued in their defence that there was no reason for a complete prohibition on passage over such areas. If the boats indulged in any violations, they could be checked, caught, and prosecuted. The Supreme Court responded to this particular argument by stating:

[H]aving regard to the vast area involved. It is not practicable. The cost of an effective supervision would be prohibitive. It would not be in the interest of the general public. Since the reasonableness of

the restriction has to be judged on the touchstone of general public interest, whether under clause (5) or clause (6) of Article 19 of the Constitution, the above considerations (cost and practicability) are not irrelevant.⁸³

This judgment justifies the imposition of a more restrictive State action in favour of a less restrictive one on the ground of the cost of ‘effective supervision’. While the cost of regulation is a valid consideration while taking into account the restrictions imposed, the judgment does not highlight any calculation of the relative costs of these two measures. A judiciary more committed to carving out greater freedoms for citizens may have required the State to demonstrate that the measure sought to be imposed is indeed the least restrictive curb on fundamental rights.

In *R Chingaravelu*,⁸⁴ the appellant was carrying Rs 65 lakh in cash to negotiate a sale of property from Hyderabad to Chennai. As soon as he landed at Chennai airport, income tax intelligence officials caught hold of him, took him to an office, questioned, and detained him for fifteen hours. They confiscated his cash, and finding nothing a few days later, returned his money. The Supreme Court stated that when a passenger carries large amounts of cash and his claims regarding its source and legitimacy have to be verified, ‘delay and inconvenience is inevitable’.⁸⁵ In such a situation the rights of the passenger have to yield to the public interest:

The nation is facing terrorist threats. Transportation of large sums of money is associated with distribution of funds for terrorist activities, illegal pay-offs, etc ... rampant circulation of unaccounted black money destroying the economy of the country. In this background ... such action [of the officers] cannot be termed as high-handed or unreasonable.⁸⁶

Intelligence officers are therefore required to satisfy themselves that ‘such a large amount is being carried for a legitimate purpose’.⁸⁷ If the tone and tenor of these cases does not make it apparent, there is an inherent bias exhibited by courts towards blunt instruments of control. Once a restriction is imposed, courts seem to be unwilling to go beyond the veil of government mechanisms of imposing these restrictions. This category of cases highlights the reticence of the judiciary in evolving new dimensions of the fundamental rights of movement and residence. Rights can be dynamically expanded by two methods: positively creating more rights by reading in freedoms within the constitutional text, or by adopting a more conservative attitude towards restrictions that may be considered ‘reasonable’. The decisions of the judiciary show a proclivity for the former and a reticence to engage in the latter. This is evident in a long chain of cases—land acquisition (*Narmada Bachao Andolan*) and prostitution

(*Kaushailiya*), among others. In all these cases, blunt instruments for imposing restrictions have been allowed without substantive discussions on the *least* restrictive methods of imposing restrictions in the public interest. In certain cases, such blunt instruments have been explicitly defended (*Kerala Trawlnet Boat Operators*).

IV. CONCLUSION

Of the three categories of laws and jurisprudence discussed above, those that pertain to the maintenance of law and order probably have the least impact on a national labour market. While courts have examined these on the basis of procedural and substantive safeguards, many of them can potentially be used to deter movement and/or residence. There has been no expansion of these freedoms through a whittling down of what restrictions are considered reasonable (except *Prem Shankar Shukla*'s case, where handcuffing per se was held to be an unreasonable restriction, to be applied only in extreme cases).⁸⁸ Except in stray cases, the judiciary has consistently refused to apply a strict scrutiny test.

With regard to the class of cases pertaining to the maintenance of public safety and morals, we find that the judiciary has not actively required precision in regulatory instruments designed to impinge on the freedoms of movement and residence. Consequently (or perhaps this is the actual cause), there is an insignificant degree of evolution in the conception of what these freedoms mean.⁸⁹ The judiciary seems to continue to believe that 'The state is virtuous, the citizen infirm.'⁹⁰

In *Katz v United States*,⁹¹ the United States Supreme Court had held that a warrantless phone tapping of the petitioner's telephone constituted a violation of the Fourth Amendment of the United States Constitution. However, while doing so, the United States Supreme Court carved out a narrow 'automobile exception'⁹² to the general prohibition against warrantless searches. It stated, 'when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest search the passenger compartment of that automobile'.⁹³ This is an example of how courts have sought to preserve the scope of the right while allowing law enforcement the minimal effective powers of search and seizure without a warrant.⁹⁴

The patchwork of laws and measures requiring residency requirements, on the

other hand, directly impact the mobility of labour. In a government-dominated economy, parochial considerations can considerably benefit local constituencies by limiting educational and employment opportunities. As envisaged by the drafters of the Constitution, the freedoms of movement and residence were intended to guard against precisely such nativist tendencies. Although this might well be a coincidence, it is worth considering the correlation between the judiciary's firm and explicit stand against intraState residency requirements, and the markedly greater volume of intraState migration compared to interState migration.

While the promotion of the freedom interest encourages competitiveness and merit, the promotion of the equality interest under the Constitution encourages protectionism. Additionally, equality interests may be better served by a careful balancing of the freedom interests sought to be protected, such as by requiring post-educational service obligations on graduates from educational institutions in a specific region, as opposed to residency requirements during admission. The existing jurisprudence in such cases, however, completely fails to perform this balancing act.

The approach of the United States Supreme Court provides a useful comparison in similar circumstances. The United States Supreme Court has held the right to travel to be a part of 'liberty', which a citizen cannot be deprived of without due process of law under the Fifth Amendment.⁹⁵ In *Shapiro v Thompson*,⁹⁶ the Court held that statutes imposing a one-year residency requirement for payment of aid to families with dependent children were unconstitutional denials of equal protection. Since the residents had a fundamental right to interState migration, the Court used a 'strict scrutiny' standard for striking down the requirement.⁹⁷ According to the United States Supreme Court, legislation must serve a valid State purpose, and it must be reasonable in attaining its purpose. Now, in order to retain a residency requirement, a State has to show some compelling interest that cannot be reasonably attained in any other way.⁹⁸ The Indian Supreme Court explicitly refused to follow such an approach.⁹⁹

Each of the three broad categories of restrictions discussed above has significant impact on free movement and residence. Taken together, they present a wide-ranging series of laws and measures that not only affect both public and private spheres of individuals, but also impose significant constraints on the national labour market. In addition to directly preventing movement and residence, they disincentivise labour mobility across India.

¹ Patti Tamara Lenard, 'Culture, Free Movement, and Open Borders' (2010) 72(4) *The Review of Politics* 627, 630. Lenard goes on to argue that the right to reside is therefore an important part of the right to movement.

² *Constituent Assembly Debates*, vol 7 (Lok Sabha Secretariat 1986) 299, 8 November 1948.

³ *Constituent Assembly Debates*, vol 7 (Lok Sabha Secretariat 1986) 299, 8 November 1948.

⁴ *Constituent Assembly Debates*, vol 7 (Lok Sabha Secretariat 1986) 756, 2 December 1948.

⁵ See eg, MP Jain, *Indian Constitutional Law*, eds Justice Ruma Pal and Samaraditya Pal, vol 2 (updated 6th edn, LexisNexis 2013) 1486–92.

⁶ 'Marathi chauvinism to drive Mumbai taxi licences' (*Outlook*, 20 January 2010) <<http://news.outlookindia.com/items.aspx?artid=673177>>, accessed November 2015.

⁷ See eg, Kriti Omprakash, 'Bangalore: N-E students feel like outsiders in India' (*IBN Live*, 24 May 2012) <<http://ibnlive.in.com/news/bangalore-ne-students-feel-like-outsiders-in-india/260724-57.html>>, accessed November 2015.

⁸ Mary Fainsod Katzenstein, 'Governmental Response to Migration: A Study of Employment Preferences for Local Residents in Bombay' (1976) Migration and Development Study Group, Center for International Studies, Massachusetts Institute of Technology, 3 <<http://dspace.mit.edu/bitstream/handle/1721.1/81851/02571955.pdf?sequence=1>>, accessed November 2015.

⁹ Katzenstein (n 8) 9–10. The report states that the definition of 'local' was simultaneously broadened to include not just those locally domiciled, but also all native Marathi speakers.

¹⁰ 'Himachal Pradesh allows outsiders to buy property' *Times of India* (New Delhi, 23 June 2006) <<http://timesofindia.indiatimes.com/edit-page/Himachal-Pradesh-allows-outsiders-to-buy-property/articleshow/1672316.cms?>>, accessed November 2015.

¹¹ *Sarvesh Sharma v State of Uttarakhand* (2012) 2 UC 1157. The High Court held that the law violated art 14 of the Indian Constitution.

¹² See eg, Tamil Nadu Non-Resident Tamils Welfare Act 2011, s 2(s); the 'possession of either Sikkim Subject Certificate or Certificate of Identification issued by the Competent Authority under relevant orders of the State Government' in the Sikkim Public Service Commission: Advertisement No., 12/ SPSC, 12 September 2012; Orissa Reservation of Posts and Services (For Socially and Educationally Backward Classes) Act 2008.

¹³ Census of India 2001, 'Data Highlights: Migration Tables (D1, D1 (Appendix), D2, and D3 Tables)' (2001) Census data, Ministry of Home Affairs, Government of India <http://censusindia.gov.in/Data_Products/Data_Highlights/Data_Highlights_link/data_highlights_D1D2D3>, accessed November 2015.

¹⁴ Report on Conditions of Work and Promotion of Livelihoods in the Unorganised Sector (National Commission for Enterprises in the Unorganised Sector 2007) 94–100 <http://nceuis.nic.in/Condition_of_workers_sep_2007.pdf>, accessed November 2015.

¹⁵ AIR 1950 SC 27.

¹⁶ *AK Gopalan* (n 15) [10] (Kania CJ).

¹⁷ *AK Gopalan* (n 15) [58].

¹⁸ *Maneka Gandhi v Union of India* (1978) 1 SCC 248.

¹⁹ *Kshitindra Narayan Roy Choudhury v The Chief Secretary to the Government of West Bengal* (1954) ILR 1 Cal 1.

²⁰ *Kshitindra Narayan Roy Choudhury* (n 19) [33]–[34].

²⁶ *Hari Khemu Gawali* (n 24) [13].

²¹ See eg, Goondas Act 1923 (West Bengal); Uttar Pradesh Control of Goondas Act 1970; Tamil Nadu

Prevention of Dangerous Activities of Bootleggers, Drug Offenders, Goondas, Immoral Traffic Offenders, Forest Offenders, Goondas and Slum-Grabbers and Video Pirates Act 1982; Karnataka Prevention of Dangerous Activities of Bootleggers, Drug-Offenders, Gamblers, Goondas, Immoral Traffic Offenders and Slum-Grabbers Act 1985; Kerala Anti-Social Activities (Prevention) Act 2007.

²² Suranjan Das, 'The "Goondas": Towards a Reconstruction of the Calcutta Underworld through Police Records' (1994) 29(44) Economic and Political Weekly 2877, 2877.

²³ See Gautam Bhatia, 'Goondagiri of the Goonda Act' (*Outlook*, 5 August 2014) <<http://www.outlookindia.com/article/Goondagiri-Of-The-Goonda-Act/291593>>, accessed November 2015; 'Tamil Nadu to bring sexual, cyber crime offenders under Goondas Act' (*DNA*, 11 August 2014) <<http://www.dnaindia.com/india/report-tamil-nadu-to-bring-sexual-cyber-crime-offenders-under-goondas-act-2009806>>, accessed November 2015.

²⁴ *Hari Khemu Gawali v Deputy Commissioner of Police* AIR 1956 SC 559.

²⁵ *Hari Khemu Gawali* (n 24) [6].

²⁷ *Gurbachan Singh v State of Bombay* AIR 1952 SC 221 [7].

²⁸ *State of Madhya Pradesh v Baldeo Prasad* (1961) 1 SCR 970 [8]–[10].

²⁹ *Hari Khemu Gawali* (n 24) [8].

³⁰ *Hari Khemu Gawali* (n 24) [8].

³¹ Kurt X Metzmeier, 'Preventive Detention: A Comparison of Bail Refusal Practices in the United States, England, Canada and Other Common Law Nations' (1996) 8 *Pace International Law Review* 399.

³² *Madhu Limaye v Sub-Divisional Magistrate* (1970) 3 SCC 746.

³³ *Madhu Limaye* (n 32) [28].

³⁴ *Gurbaksh Singh Sibbia v State of Punjab* (1980) 2 SCC 565.

³⁵ *Gurbaksh Singh Sibbia* (n 34) [26].

³⁶ *Gurbaksh Singh Sibbia* (n 34) [12].

³⁷ *Prem Shankar Shukla v Delhi Administration* (1980) 3 SCC 526.

³⁸ *Prem Shankar Shukla* (n 37) [22].

³⁹ *Prem Shankar Shukla* (n 37) [23].

⁴⁰ *Hamdard Dawakhana v Union of India* AIR 1960 SC 554.

⁴¹ Frank B Cross, 'The Error of Positive Rights' (2001) 48 *UCLA Law Review* 857.

⁴⁹ *Pradeep Jain* (n 44) [8].

⁵⁰ *Pradeep Jain* (n 44) [10].

⁴² *Saurabh Chaudri v Union of India* (2003) 11 SCC 146.

⁴³ *Saurabh Chaudri* (n 42) [29].

⁴⁴ *Pradeep Jain v Union of India* (1984) 3 SCC 654.

⁴⁵ *Saurabh Chaudri* (n 42) [36].

⁴⁶ *DP Joshi v State of Madhya Bharat* AIR 1955 SC 334.

⁴⁷ *DP Joshi* (n 46) [4].

⁴⁸ *DP Joshi* (n 46) [26].

⁵¹ *Pradeep Jain* (n 44) [19].

⁵² *Pradeep Jain* (n 44) [22].

⁵³ *AVS Narasimha Rao v State of Andhra Pradesh* (1969) 1 SCC 839.

⁵⁴ *Kailash Chand Sharma v State of Rajasthan* (2002) 6 SCC 562.

- ⁵⁵ *Kailash Chand Sharma* ([n 54](#)) [6].
- ⁵⁶ *Kailash Chand Sharma* ([n 54](#)) [14].
- ⁵⁷ See eg, *Anant Madaan v State of Haryana* (1995) 2 SCC 135; *Union of India v Dudh Nath Prasad* (2000) 2 SCC 20.
- ⁵⁸ As the petitioners argued for in *Saurabh Chaudri's* case.
- ⁶³ *Narmada Bachao Andolan* ([n 59](#)) [26].
- ⁵⁹ *State of Madhya Pradesh v Narmada Bachao Andolan* (2011) 7 SCC 639.
- ⁶⁰ *Narmada Bachao Andolan* ([n 59](#)) [32].
- ⁶¹ *Narmada Bachao Andolan* ([n 59](#)) [28]–[31].
- ⁶² While the violation of art 19(1)(e) was never discussed in the judgment, the Court did note that there was an interference with the right to livelihood under art 21, even though the right was not violated. This is one example of cases where the freedom of residence has increasingly been co-opted under the right to life under art 21. The Court cites its judgment in *State of Kerala v Peoples Union for Civil Liberties* (2009) 8 SCC 46.
- ⁶⁹ *Maneka Gandhi* ([n 18](#)) [52]–[53].
- ⁶⁴ *Ebrahim Vazir Mavat v State of Bombay* AIR 1954 SC 229.
- ⁶⁵ *Ebrahim Vazir Mavat* ([n 64](#)) [6].
- ⁶⁶ *Satwant Kumar Sawhney v D Ramarathnam, Assistant Passport Officer, New Delhi* AIR 1967 SC 1836.
- ⁶⁷ *Maneka Gandhi* ([n 18](#)).
- ⁶⁸ *Maneka Gandhi* ([n 18](#)) [48]. Bhagwati, Untwalia and Fazal Ali JJ also reiterated this position (1978) 1 SCC 248 [4]–[7].
- ⁷⁰ *State of Uttar Pradesh v Kaushailiya* AIR 1964 SC 416.
- ⁷¹ *Kaushailiya* ([n 70](#)) [11].
- ⁷² *Kaushailiya* ([n 70](#)) [7].
- ⁷³ *Kaushailiya* ([n 70](#)) [7].
- ⁷⁴ *Kaushailiya* ([n 70](#)) [11].
- ⁷⁵ *Kaushailiya* ([n 70](#)) [12].
- ⁷⁶ *Kaushailiya* ([n 70](#)) [11].
- ⁷⁷ *Ajay Canu v Union of India* (1988) 4 SCC 156.
- ⁷⁸ *Ajay Canu* ([n 77](#)) [13].
- ⁷⁹ *Ajay Canu* ([n 77](#)) [13].
- ⁸⁰ *Lucy R D'Souza v State of Goa* AIR 1990 Bom 355.
- ⁸¹ *Lucy R D'Souza* ([n 80](#)) [8].
- ⁸³ *Kerala Swathanthra Malaya Thozhilali Federation* ([n 82](#)) [27].
- ⁸⁶ *Rajendran Chingaravelu* ([n 84](#)) [16].
- ⁸² *Kerala Swathanthra Malaya Thozhilali Federation v Kerala Trawl-net Boat Operators' Association* (1994) 5 SCC 28.
- ⁸⁴ *Rajendran Chingaravelu v RK Mishra, Additional Commissioner of Income Tax* (2010) 1 SCC 457.
- ⁸⁵ *Rajendran Chingaravelu* ([n 84](#)) [16].
- ⁸⁷ *Rajendran Chingaravelu* ([n 84](#)) [19].

⁸⁸ *Prem Shankar Shukla* (n 37).

⁸⁹ The sole exception being *Prem Shankar Shukla*'s case.

⁹⁰ Pratap Bhanu Mehta, 'Minimum arbitrariness' *The Indian Express* (27 May 2014, New Delhi) <<http://indianexpress.com/article/opinion/columns/minimum-arbitrariness/99/>>, accessed 12 January 2015.

⁹¹ *Katz v United States* 389 US 347 (1967).

⁹² *New York v Belton* 453 US 454 (1981) 460.

⁹³ As quoted in William M Phillips, 'Toward a Functional Fourth Amendment Approach to Automobile Search and Seizure Cases' (1982) 43 Ohio State Law Journal 861, 865.

⁹⁴ See Phillips (n 93) for a discussion on automobile exceptions to the prohibition on warrantless wire tapping, and generally on the methods adopted to narrowly tailor State instruments of control while preserving liberty.

⁹⁵ James L Kirschnik, 'Constitutional Law: Residency Requirements' (1970) 53(3) Marquette Law Review 441.

⁹⁶ *Shapiro v Thompson* 394 US 618 (1969).

⁹⁷ See also *Dunn v Blumstein* 405 US 330 (1972) and *Memorial Hospital v Maricopa County* 415 US 250 (1974), discussed in David A Donahue, 'Penalizing the Poor: Durational Residency Requirements for Welfare Benefits' (1998) 72(2) St. John's Law Review 451.

⁹⁸ Kirschnik (n 95) 442.

⁹⁹ *Saurabh Chaudri* (n 42) [36].

CHAPTER 48

PROFESSION, OCCUPATION, TRADE, OR BUSINESS

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I. INTRODUCTION

ONE of the most heavily litigated provisions of the Indian Constitution is Article 19(1)(g), which grants every citizen the right, with some limitations, to practise any profession, or to carry on any occupation, trade, or business.¹ This seemingly simple statement of a fundamental right has spawned an impressive array of case law covering a wide range of activities. Such an industrious constitutional provision merits careful discussion and analysis. In this chapter, I describe the analytical structure applied to this provision, examine how certain limitations on the right are assessed, identify key debates and themes, and provide some thoughts on its interaction with the political economy in India.

Article 19(1)(g) appears in [Part III](#) of the Indian Constitution, granting it the status of a fundamental right. However, like many rights, these are not without limits. Article 19(6) allows the State to impose reasonable restrictions on these rights in the interests of the general public.²

The structure of Articles 19(1)(g) and (6) suggests competing interests at play. Indeed, protecting the liberty of individuals in pursuing their livelihoods, enhancing the legitimacy of restrictive laws, and public safety concerns may cut in opposite directions at times. For example, if it is easy for the State to regulate economic activity via Article 19(6), then groups may try to influence the State so that it regulates in a manner that benefits them. This raises the spectre of private interests driving regulation and sparks concerns about rent seeking and crony capitalism.³ On the other hand, limiting the State's ability to regulate in the public interest may harm public safety and allow for parties to impose costs on others. Moreover, if the State is able to put tight limits on certain activities, then that is likely to have an impact on economic growth by deterring or channelling entry into that activity. In light of this, it is not surprising that much of the case law involves a delicate balancing of interests and effects and in this sense bears some similarity to substantive due process jurisprudence in the US.⁴

This kind of balancing raises many issues one might examine, but this chapter focuses on four key questions. First, when is an activity treated as a profession, occupation, trade, or business (POTB) because only such activities are protected under Article 19(1)(g). The courts rely on a *mélange* of morality, historical, and social effects to come to conclusions about the status of a given activity, but, as we will see, this multi-factor analysis has hardly been a model of clarity or predictability. Indeed, there are good reasons to prefer a very broad definition of POTB for Article 19(1)(g) and then rely on the social, historical, and morality factors in assessing the reasonableness of any restrictions under Article 19(6), as the courts have increasingly been doing.

Secondly, when are restrictions considered ‘reasonable’? The breadth of factors considered by the courts is vast, leaving commentators with a rather disorienting state of affairs. The most common recurrent themes appear to be that the restriction must be reasonably connected to the stated purposes of the legislation (or regulation) creating the restriction and the restriction must not be arbitrary. These suggest a desire to reduce the possibility of misuse of the legislative and regulatory processes in order, at least in part, to reduce the prospect of regulation being used to serve private interests and exacerbate rent seeking. However, as discussed below, the more recent applications of these considerations suggest that the scope for rent seeking may be increasing.

Thirdly, how do analyses of Articles 19(1)(g) and 19(6) apply to a particularly timely and critical issue: the development of private educational institutions? The jurisprudence here leaves the reader in something of an analytical quagmire as the Supreme Court has moved between different bases for regulating such institutions. This is not entirely surprising, given that the Court is regulating an increasingly private educational sector with tools more suited for a State-supported sector. However, the experiences here are instructive as India is increasingly relying on private parties to provide services (either alone or in conjunction with the State) that were previously provided primarily by the State.

Fourthly, the above analysis raises intriguing jurisprudential and political economy questions. At a jurisprudential level, the case law has been moving towards broadening the concept of POTB, which means more activities will receive the protection of Article 19(1)(g)—thereby constraining State discretion. However, at the same time, the case law on what is a reasonable restriction under Article 19(6) seems to be edging towards weakening the protection—thereby enhancing State discretion. The somewhat contradictory developments in the case law appear, at first cut, to be a puzzle. This chapter suggests that these moves may have more to do with enhancing judicial discretion as a way to counterbalance the heavy role of the State in society at that time. However,

replacing State discretion with judicial discretion may simply be replacing one type of whimsy for another, unless the courts provide some guidance on how their discretion will be exercised.

However, the case law also raises questions related to how the law might adapt to changes in the role of the State. For example, post-liberalisation, we might expect private parties to play a larger role in the provision of products or services. In this situation the prospect of State regulation being either outdated or motivated by private interests might increase. Whether, and how, the understanding of Articles 19(1)(a) and 19(6) might change to reflect the changing role of the State is of considerable importance both as a matter of law and as a matter of political economy. After all, much of the Articles 19(1)(g) and 19(6) jurisprudence developed at a time when the State had a very heavy hand in Indian life. As that role changes, perhaps it is time to consider whether the Articles 19(1)(g) and 19(6) case law should also adjust.⁵ This chapter begins an exploration of this question, but leaves more fulsome discussion for future work.

Section II begins by examining the case law that defines the key terms in Article 19(1)(g)— profession, occupation, trade, or business. Section III explores what a ‘reasonable restriction’ is under Article 19(6) and how that interacts with Article 19(1)(g). Section IV examines how the analyses from earlier sections apply in the context of setting up and running a private educational institution—a matter that has been the subject of many recent Supreme Court decisions. Section V delves into the broad themes and trends witnessed in the case law and what implications these have, and Section VI concludes.

II. ARTICLE 19(1)(G)—WHAT IS A PROFESSION, OCCUPATION, TRADE, OR BUSINESS?

Article 19(1)(g) protects activities that are POTB, but these terms are not defined in the Indian Constitution. Rather, case law has taken up the gauntlet and provided a series of factors that are relevant in deciding whether an activity is a POTB. In particular, the case law focuses on how the activity was perceived historically and morally and what its likely social effects might be. Although courts have erred towards being inclusive in defining POTB,⁶ unless the activity was very harmful (eg, trading in adulterated food, trafficking in women),⁷ there has been considerable uncertainty about the application of these factors to some

activities. To obtain a deeper understanding of these uncertainties let us explore some of the better-known examples.

In *Fatehchand Himmatlal v State of Maharashtra*,⁸ the Supreme Court held that moneylending in rural environments—which was often unscrupulous and at usurious rates—need not be considered a POTB, even though providing credit was a trade with a lengthy history. Thus, an activity that is generally considered a trade can be demoted, so to speak, where it has socially pernicious effects or is otherwise ‘diabolic’ in the Court’s language.⁹

Although social effects could be important, it appears the courts do not always follow them in defining a POTB. For example, in *State of Maharashtra v Indian Hotel and Restaurants Association* (hereinafter *IHRA*)¹⁰ the Supreme Court was faced with a law—the Bombay Police Act 1951—which prohibited dance performances in certain venues (eg, beer bars), but allowed it in other venues (eg, three-star or higher hotels). The argument in favour of such disparate treatment was that dancing in beer bars was likely associated with trafficking in women and an entry point to prostitution, amongst other things, whereas dancing in the ‘higher-end’ venues was not. This tracks the arguments in *Fatehchand* (rural moneylending is pernicious, but not general lending). The Court rejected this argument and held that dancing is a POTB and that any concerns with its social effects in particular contexts should be addressed under the Article 19(6) analysis of ‘reasonable’ restrictions in the public interest, rather than in the definition of POTB in Article 19(1)(g).¹¹ The Court then further found that the restriction in the Bombay Police Act 1951 was not reasonable and hence invalid.¹²

Thus, social effects were important in assessing whether a restriction on an activity was reasonable (under Article 19(6)), but not in defining whether an activity was a POTB (under Article 19(1)(g)). This move—changing the stage of analysis when a factor (eg, social effects, history) is considered is something we also see in cases concerning liquor trading.

In *Coovergee B Bharucha v Excise Commissioner*, the Supreme Court held that liquor trading was not a POTB because it was outside the realm of regular commerce.¹³ Moral and social factors influenced the Court in reaching its decision. A decade later the Supreme Court expressed concern—in *Krishna Kumar Narula v State of Jammu and Kashmir*—that sole reliance on morality as the basis for POTB status was problematic.¹⁴ Rather, the Court preferred treating moral concerns as relevant considerations in assessing whether a restriction on a POTB was reasonable under Article 19(6). This is consistent with *IHRA*.

Later Supreme Court decisions—perhaps taking a cue from *Krishna Kumar*

Narula—have increasingly relied on history and social effects, rather than morality, in deciding whether liquor trading was a POTB.¹⁵ In addition, later decisions appear more inclined to hold that the social, moral, and historical considerations could be used either at the POTB definitional stage or at the stage of assessing a restriction’s reasonableness.¹⁶

Thus, we are witnessing a shift in when the social, moral, and historical factors are being considered from the POTB definitional stage to the reasonable restriction stage. That, of course, raises the question of whether this movement is simply aesthetic or whether it carries some practical import. One suspects this shift is a subtle, but important, change.

To see this, let us note that when something is not a POTB then any restrictions the State imposes upon it are not required to be ‘reasonable’ under Article 19(6), but if an activity is a POTB, then restrictions on it must meet the reasonableness language. Thus, by taking these factors out of the POTB definitional stage, it is more likely that an activity will be considered a POTB, thereby requiring the State to justify its restrictions as reasonable. This might be a good way to curtail the State’s discretion and may be valuable if one is concerned that the State’s discretion could be used capriciously, or perhaps that the State might act to further private interests rather than public interests. This is particularly palpable when looking at moral concerns. For example, in a country as heterogeneous as India, relying on moral concerns to decide on whether something is a POTB seems fraught with trouble (as the Court in *Krishna Kumar Narula* indicated). One can imagine that one group could lobby the State to prohibit an activity carried on by other groups on the grounds that it is not a POTB. If so, then the State would not need to justify its prohibition of the activity. However, if the activity were a POTB, then any restrictions on it—even if motivated by moral concerns—would still need to meet the reasonableness test. This, however, presumes that the reasonableness language is not an easy standard to satisfy. It is to that question that we now turn.

III. RESTRICTIONS ON ACTIVITIES WITHIN ARTICLE 19(1)(G)

If an activity is a POTB, then the key question becomes what kinds of restrictions may be placed on it. Article 19(6) provides the broad framework for assessing such restrictions. Generally speaking:

1. Article 19(6) allows the State to impose ‘reasonable’ restrictions on a

POTB in the interests of the general public.

2. Article 19(6)(i) allows the State to impose restrictions in the form of professional and technical qualifications on those wishing to engage in a POTB. These restrictions need to satisfy the reasonable restrictions language, as with Article 19(6).¹⁷

3. Article 19(6)(ii) allows the State to nationalise (partly or fully) any industry or POTB. Such restrictions are not required to be reasonable under Article 19(6).¹⁸

The primary focus of this section is on what ‘reasonable’ restrictions mean under Articles 19(6) and 19(6)(i), and thus nationalised industries (under Article 19(6)(ii)) are not discussed because restrictions on them are not required to be ‘reasonable’. The Supreme Court has held that what is ‘reasonable’ is likely to vary by context and is based, in some measure, on the nature of the activity and conditions in that industry.¹⁹ Thus noxious items may be prohibited altogether, but activities of lesser concern would require stronger justifications for more restrictive regulation.²⁰ The general approach can perhaps best be summarised in *Chintaman Rao v State of Madhya Pradesh*, where the Court says:

Legislation which arbitrarily or excessively invades the right cannot be said to contain the quality of reasonableness and *unless it strikes a proper balance between the freedom guaranteed in Article 19(1)(g) and the social control permitted by Clause (6) of Article 19, it must be held to be wanting in that quality.*²¹

The balancing indicated in this quote can be seen in the case law, where judicial scrutiny focuses on two questions.

The first is whether the restriction seems likely to obtain the stated objectives of the law creating it. If it does not, then the courts seem likely to invalidate the restriction. If it does, then the courts often ask whether a less restrictive alternative may have also obtained the objectives of the law creating the restriction.²² If a lesser restriction will do, the courts may find the current restriction unreasonable.

Holding restrictive laws to this test may have desirable attributes, because by requiring that the restriction be related to the stated objectives of the law we reduce the prospect for arbitrary laws that can be easily misused by officials or those hoping to benefit from the behaviour of officials. Cases developing this jurisprudence are explored below.

The second question the courts focus on is when a restrictive law allows for substantial discretion to government or its officials, does it provide significant guidance on how to exercise that discretion and how a decision could be

reviewed? If it does, then the courts are likely to find the restrictive law reasonable, but if it does not, then the courts seem inclined to strike down the law as being unreasonable and arbitrary. This also seems desirable because granting someone unfettered power with little guidance on how to use it seems like a recipe for that person using the power to benefit themselves rather than the public interest (eg, rent seeking). Cases exploring this idea are explored in Section II below.^{[23](#)}

1. Excessive or Drastic Restrictions

A series of important cases lay out the excessive or drastic effects jurisprudence. One of the earliest is *Chintaman Rao v State of Madhya Pradesh*,²⁴ where the State Act granted the State government the power to prohibit people in certain areas from engaging in the manufacture of *bidis*. The stated objective of this law was to ensure the supply of adequate labour for agricultural purposes in areas where *bidi* manufacturing was an alternative source of employment to those likely to be otherwise engaged in agricultural labour. The Court held that to satisfy this stated objective, the State need not have prohibited *all* labourers from engaging in *bidi* manufacturing *throughout the year*. Instead, the State could (i) have prohibited those people from engaging in *bidi* manufacturing who are likely to be involved in agricultural activity (because not all labourers are agricultural workers); and (ii) prohibit *bidi* manufacturing only *during* agricultural seasons, not all year round. In light of this, the restriction was held to be excessive and hence unreasonable under Articles 19(1)(g) and (6).²⁵

The reasoning from this case has perhaps had its most interesting applications in a series of highly contested ‘cow slaughter’ cases. In *Mohd Hanif Quareshi v State of Bihar* (hereinafter *Quareshi*) the Court was faced with a series of State legislation that prohibited or restricted the slaughter of various categories of cows and other animals belonging to the bovine species.²⁶ This legislation was apparently enacted to implement Article 48 of the Constitution (part of the Directive Principles of State Policy), which states:

The State shall endeavour to organize agriculture and animal husbandry on modern and scientific lines and shall, in particular, take steps for preserving and improving the breeds, and prohibiting the slaughter of cows and calves and other milch and draught cattle.²⁷

The Court held that the concern for cows and cattle is in the public interest because ‘[t]he country is in short supply of milch cattle, breeding bulls and working bullocks’.²⁸ A total ban on the slaughter of these was a reasonable restriction in the interests of the general public.

Following this reasoning, the Court upheld the prohibition on slaughtering cattle that provide, or are capable of providing, milk and can work as draught cattle.²⁹ However, for those cattle that cannot, or can no longer, provide these services there is little reason to prohibit their slaughter under Article 48. This led the Court to hold that the total ban on slaughtering ‘she-buffaloes, bulls and bullocks (cattle or buffalo) after they ceased to be capable of yielding milk or of

breeding or working as draught animals' was unreasonable.³⁰ This decision tracks the reasoning in *Chintaman Rao* by requiring the courts to compare the restrictive law with its stated objectives (and asking whether there is a less restrictive alternative) to determine whether it is unreasonable.

However, this decision also highlights a few more points of significance. First, it indicates that a total prohibition on certain things (eg, slaughter of milk-producing cows of any age throughout the year) can be reasonable even if the activity itself is not noxious per se. Secondly, the decision indicates that although the Directive Principles (like Article 48) are subject to the fundamental rights contained in [Part III](#) of the Constitution (such as Article 19), those principles can influence a court's judgment on what amounts to a reasonable restriction of a fundamental right.³¹

Quareshi has been followed many times,³² but in more recent years courts have increasingly held stronger restrictions on slaughterhouses to be reasonable. Perhaps the most significant case in this regard is *State of Gujarat v Mirzapur Moti Kureshi Kassab Jamat* (hereinafter *Mirzapur Moti*).³³ In this case the Court, a constitutional bench of seven justices, had to decide whether *Quareshi* should be reconsidered with respect to slaughter of cow progeny.

The Court held that the state of knowledge had changed since *Quareshi* was decided in 1958 and that now, the available evidence suggested that bulls and bullocks were useful even as they got older.³⁴ This meant that the State's total prohibition on the slaughter of cows and cow progeny could be seen as reasonable under the tests laid down in *Quareshi*.

The Court went further and put a gloss on the interaction between fundamental rights and Directive Principles. Thus, restrictions designed to further a Directive Principle would be considered presumptively reasonable unless the restriction was in direct conflict with a fundamental right. On the facts here, Articles 48 (prohibiting slaughter of certain types of cows), 48A (protecting and improving the environment), and 51A(g) (improving the environment and having compassion for living entities) all suggest that restricting the rights of butchers to slaughter cow progeny is reasonable (especially in light of what the Court describes as changed knowledge).

The holding and reasoning in *Mirzapur Moti* could have been limited to the situation where scientific evidence had provided new or additional information. However, later cases seem to have expanded the holding even further.

In a string of cases, the Supreme Court upheld bans on cow slaughter for limited periods of time, even when there was no change of scientific evidence (eg, *Municipal Corporation of the City of Ahmedabad v Jan Mohammed*

*Usmanbhai*³⁵) and where a prohibition was put in place for nine days to avoid offending the sensibilities of certain religious groups during a festival (*Hinsa Virodhak Sangh v Mirzapur Moti Kureshi Jamat*³⁶). Further, the desire to avoid offending certain groups' sensibilities has been used to extend the prohibition from a short time (eg, nine days) to an indefinite time and to extend it from cow slaughter to other activities.

For example, in *Om Prakash v State of Uttar Pradesh*,³⁷ the Court upheld as reasonable a complete ban on the sale of eggs in public in the city of Rishikesh throughout the year due to the religious sensibilities of the inhabitants (who were primarily Hindu vegetarians). It underscored this by noting that Articles 51A(e) and (f) (part of the Directive Principles) state that individuals should seek:

(e) to promote harmony and the spirit of common brotherhood amongst all people of India transcending religious, linguistic and regional or sectional diversities; to renounce practices derogatory to the dignity of women;(f) to value and preserve the rich heritage of our composite culture.

This seems inconsistent with *Mohd Faruk v State of Madhya Pradesh*, where the Court held that prohibiting an activity simply because a section of the community might be offended would be unreasonable.³⁸ Both *Om Prakash* and *Hinsa Virodhak* overcame this objection by referring to the Directive Principles in *Mirzapur Moti* (specifically Article 51A(e) and (f)), which encourage citizens to promote harmony and common brotherhood.³⁹

The move towards relying more on the Directive Principles—especially Article 51A(e)—is intriguing. It is quite broad and appears to depend on how large a percentage of the residents in an area might feel offended by the behaviour of others and whether that might result in some disharmony or public unrest. Of course, public unrest is important, but it seems somewhat unusual that the courts are interpreting the Constitution—which has many provisions designed to protect minorities—in this manner. Moreover, allowing for limits on fundamental rights because of the sensibilities of certain groups of residents may appear expedient, but it seems to set up incentives for people to become more disruptive (ie, engage in more public unrest) in order to achieve their ends. This raises concerns akin to those in the 'Heckler's veto' context discussed in the US.⁴⁰ Indeed, there seems little limit on what restrictions might be imposed on the right to a POTB in the name of preventing public unrest or giving respect to one's neighbours.

2. Arbitrariness

The courts have also examined whether the restrictive law has appeared arbitrary or granted unconstrained discretion to authorities. In some cases that involved the grant of, or conditions attached to, licences (ie, the growth of the ‘licence raj’), the courts have held these laws to be arbitrary and hence unreasonable.⁴¹

Consider *RM Seshadri v District Magistrate, Tanjore*.⁴² In this case, the State of Madras had issued two notifications under section 8 of the Cinematograph Act 1952 that led the District Magistrate to impose conditions on the licence granted to the petitioner (a cinema theatre owner). The condition at issue required that:

[t]he licensee shall exhibit at each performance one or more approved films of such length and for such length of time, as the Provincial Government or the Central Government may, by general or special order, direct.⁴³

The Court held this condition was unreasonable because it was drafted in very broad language without guidance as to what kinds of films should be shown (eg, educational) and was likely to operate ‘harshly’ on the owner.

The absence of guidance has been held to invalidate restrictions in spheres as diverse as coal,⁴⁴ gold trading,⁴⁵ as well as in assessing labour restrictions (eg, restrictions on the ability to close businesses).⁴⁶ Further, if there is no opportunity (or a limited opportunity) to review an official’s decision, then that too can amount to arbitrariness.⁴⁷ On the other hand, it is noteworthy that the courts have upheld restrictions that appear narrowly drafted (ie, limiting discretion and the potential for arbitrariness) and targeted to concerns associated with conducting the business at issue (eg, conditions on ticket prices and the number of daily shows), such that the restrictions appear associated with the stated objectives of the regulation.⁴⁸

It is understandable that the courts would recoil against laws that granted largely unfettered powers to officials with little guidance on how to use them and little ability for review. This seems like a recipe for inducing rent-seeking behaviour, enhancing idiosyncratic decision making, and generally undermining respect for the law.

IV. IS SETTING UP AND RUNNING A PRIVATE EDUCATIONAL INSTITUTION PROTECTED UNDER ARTICLES 19(1)(G) AND (6)?

Articles 19(1)(g) and 19(6) have received a great deal of attention recently because of how they have been used by the Supreme Court in assessing restrictions on the setting up and running of private educational institutions. The Court has had to address both whether this is a POTB and whether the restrictions are reasonable.

The Court has held on multiple occasions that because education has historically not been pursued as a means of commerce in India, it cannot be considered a profession, trade, or business as all of these imply commerce (see *Unni Krishnan v State of Andhra Pradesh*⁴⁹ and *TMA Pai Foundation v State of Karnataka*⁵⁰). Instead, setting up an educational institution could be considered an ‘occupation’ and in that capacity protected under Article 19(1)(g),⁵¹ but that did not grant the institution the right to be recognised, or accredited, by the State.⁵² Further, the right to set up educational institutions did not depend on whether the institution was funded by the State.⁵³

This approach reflects the Court’s deep concern with the ‘commercialisation’ of education. The concern seems to be that a profit-oriented educational institution might be inclined to ‘sell’ admissions to those who were willing to pay the most, rather than take candidates who possessed the most merit (however defined). Moreover, if education was a business, then there may be high variance in quality and often ‘fake’ products (ie, degrees) being sold or fake universities being established.⁵⁴ The Court seemed aghast at these possibilities, given how they might undermine one of the only ways in which people can improve their lives—by obtaining an education.

The Court’s concern with these issues is to be applauded. However, one may find it useful to maintain a distinction between the harms noted above (eg, ‘purchased’ admissions, fake degrees) and the identity of the entity offering educational services (ie, public or private). These harms—‘profiting’ on education, fake degrees, and general dysfunction—are possible at both public and private universities, although the likelihood might appear higher at one kind of institution. Moreover, there are many examples of private educational institutions throughout the world that have stellar reputations, while some public universities run into quite impressive problems.⁵⁵

Nonetheless, these harms may be reduced through sensible and effective regulation that can serve to monitor quality, reduce the likelihood of fake degrees, and make it more difficult to ‘sell’ seats at institutions. Perhaps in light

of this, the Court has on multiple occasions laid down guidelines for what might be reasonable restrictions on institutions. The key concerns are usually ensuring fair and equal treatment in admissions and sufficient quality education.⁵⁶

The *TMA Pai* Court, a constitutional bench of eleven justices, provides detailed guidance on this issue. The Court held:

[T]hat while the state has the right to prescribe qualifications necessary for admission, private unaided colleges have the right to admit students of their choice, subject to an objective and rational procedure of selection and the compliance with conditions, if any, requiring admission of a small percentage of students belonging to weaker sections of the society ... Furthermore, in setting up a reasonable fee structure, the element of profiteering is not as yet accepted in Indian conditions. The fee structure must take into consideration the need to generate funds to be utilized for the betterment and growth of the educational institution, the betterment of education in that institution and to provide facilities necessary for the benefit of the student.⁵⁷

Thus, regulation of capitation fees, profiteering, and an objective admissions process are within the kinds of restrictions that courts will entertain. However, if the State nominates specific individuals to be on a private unaided institution's governing board (or to be a teacher) or sets a rigid fee structure, then that would be considered an unreasonable restriction on the institution's autonomy and a violation of Article 19(6).⁵⁸

The balance established in *TMA Pai* has decidedly shifted in the past few years towards greater micromanagement. Thus (i) the fee structure of these institutions can be micromanaged to assuage concerns about commercialisation so that only a 'reasonable surplus' could be had;⁵⁹ (ii) curriculum and textbooks can be regulated;⁶⁰ (iii) the conditions under which private unaided institutions can be set up are subject to regulation;⁶¹ (iv) special provisions can be promulgated for admission of Scheduled Castes or Tribes or socially and educationally backward classes to private unaided institutions;⁶² and (v) a seemingly countless array of other items as well.⁶³ It thus appears that the Supreme Court has become one of the most important regulators of educational services in India.

The greater judicial involvement is likely triggered by the fact that, due to the underprovision of educational institutions by the State, we have witnessed the rather dramatic growth of private institutions over the past twenty years and litigation against them (as documented in recent work by Kapur and Khosla).⁶⁴ Although judicial monitoring may prove useful in curtailing the worst abuses, one should note that heavily restricting the private educational sector would probably deter entry into it (thereby exacerbating the underprovision concern),⁶⁵ while potentially giving the opportunity for very high profits to the lucky few

who are approved to run such institutions by the State (thereby creating rent-seeking opportunities). This doesn't mean regulation is a bad idea, but rather that the type of regulation needs to be carefully considered to target the key concerns in the current context.

These developments, however, have left the judiciary in an unenviable position. It is left to struggle with developing rules for an increasingly private educational sector when the tools at its disposal seem more suited to a State-supported sector. Examples of this tension, and consequent uncertainty, abound.

For example, the courts are not terribly consistent in how they conceptualise educational services. If a private unaided institute offers degrees or certificates, then many of the restrictions on fees, admissions standards and so forth apply. However, if a private entity offers coaching services for admission into a degree programme at a private unaided institute, but not the degree itself, then there is little if any regulation imposed on it (eg, coaching institutes to help students clear the Common Admission Test to enter the IIMs). Indeed, fees charged to students and salaries paid to teachers are often an order of magnitude greater at coaching institutes than at degree-granting institutions.⁶⁶ But why should the presence or absence of an immediate degree matter if our concerns are about commercialisation, fraud, profiteering, charity, and autonomy?

Generally speaking, some of these concerns might be reduced if students had many good options to choose from in deciding where to receive their education. In such an environment, competition amongst these educational institutions for students may reduce (but not necessarily eliminate) undesirable and predatory behaviour.⁶⁷ Competition may also generate some of its own concerns that merit regulation. However, the more conditions and restrictions imposed on private educational institutions (especially if not targeted to the core concerns in the current context), the more likely it is that there will be fewer of them. If the State cannot (or will not) fill this gap with its own institutions, then there is less competition, which is likely to worsen the behaviour courts are concerned about. Indeed, as the State increasingly pulls out (or reduces its size) in certain sectors of India's economy, the gaps will likely be filled by private actors. If, however, those newly opened sectors are made unattractive for private actors, the gaps will remain, and perhaps widen.

This underscores one of the key issues moving forward—as the role of the Indian State changes from being the primary provider of many services to working with the private sector to provide these services, one imagines that the regulation of activity (and the judicial review of it) may need to change accordingly as well. An exploration of that issue is pursued in Section V.

V. SOME TRENDS AND THEMES

The jurisprudence related to the right to practice a POTB is voluminous and provides many avenues for further inquiry. However, this section focuses on two broad themes that are likely to have an influence on this area going forward.

1. Jurisprudential Themes

At a jurisprudential level the courts seem to be moving in opposite directions at times. The cases defining a POTB seem to be making it easier for something to be considered a POTB, thereby requiring the State to justify any restrictions as reasonable—this curtails State discretion. On the other hand, the cases assessing ‘reasonableness’ seem to be allowing for more factors to be considered (eg, Directive Principles of State Policy, public unrest), thereby making it somewhat easier for the State to impose restrictions that are found to be reasonable. Simultaneously limiting State discretion and then permitting more of it seems puzzling at first glance.

One potential explanation is that the courts are in essence increasing judicial discretion through these tests.⁶⁸ This may be quite a sensible approach when the State plays a heavy role in society (as was the case prior to the onset of liberalisation) because there may be little else to counterbalance the State in such a situation besides the judiciary. Although a plausible explanation, it raises the spectre of judicial ‘whimsy’ replacing State ‘whimsy’. To constrain this possibility one would hope the judiciary would be willing to provide some guidelines for how it will exercise its enhanced discretion.

For example, in the more recent cow slaughter cases the courts have held that maintaining harmony (and thereby avoiding public unrest) can be an important consideration in limiting or prohibiting cow slaughter. Some guidance from the courts on how to use ‘public unrest’ would be very valuable because it is such a broad term that it threatens to swallow the right (and worse yet, people might generate ‘public unrest’ to achieve their ends). Similarly, when using morality with respect to defining an activity as a POTB, the courts could provide guidance on how to ascertain what morality means in a place as heterogeneous as India and how to address the fact that morality tends to change over time in difficult-to-predict ways (eg, social views on smoking, private educational institutions).

2. Role of the State and Articles 19(1)(g) and 19(6)

Another important issue is what impact should the changing role of the State have on the analysis under Articles 19(1)(g) and 19(6). When the State was the

primary provider of many goods and services and directed the economy, then it might have made good sense for the judiciary to act as a strong counterbalance to the State with respect to protecting fundamental rights.⁶⁹ However, as the State reduced its influence in many sectors with the onset of liberalisation and allowed private parties to become important players, then the identity of the key actors was changing and so might the constraints on these actors.⁷⁰ Thus, with a more lively market we might witness it constraining some undesirable behaviours, while exacerbating others. As re-regulation of these sectors continues, one might anticipate that the jurisprudence protecting fundamental rights may adjust to reflect the concerns present in the changing environment.⁷¹

Thus, as the State takes a lesser role as a provider of key products and services, we witness courts having to contend with the issues that arise. An example of this is the growth of private educational institutions noted in Section IV. The courts have struggled mightily with concerns about the ‘selling of seats’ and poor-quality education on the one hand, and with the underprovision of educational services on the other. If one prohibits the opportunity for open profit, then one might curtail the establishment of private educational institutions (thereby worsening underprovision concerns) while trying to assuage concerns with the ‘selling’ of seats.

Here it seems that consideration of additional factors in a ‘reasonableness’ inquiry are likely to be important. First, the identity of the provider (ie, public or private) is only a partial indicator of the likely concerns of selling seats and poor-quality education as all types of providers are open to abuse. Moreover, even among private providers there is considerable variety (eg, non-profit as opposed to for-profit private providers). This suggests that regulation policing the key concerns while taking into account the different incentives of the providers may be valuable.

Another worthy consideration is that when private parties enter the fray the prospect of competition amongst these players may influence the degree of State regulation. If competition reduces some of the concerns with a particular activity (as perhaps it might in the education sector), then certain State restrictions on that activity may be less valuable than before, and hence perhaps the courts might consider them less likely to be reasonable.

However, the presence of a more competitive market may also generate new concerns of its own that justify other State regulation, which in turn may influence how courts assess the reasonableness of a restriction. For example, private provision of educational services might lead to different salaries for professors across parts of the country. Some of this may reflect cost of living

differences, but some may not. If so, then one might be concerned about some parts of the country not being able to obtain access to quality education. How might this influence an assessment of reasonableness? Further, if regulation limited the salaries of professors (to address the concerns noted above) that might deter some talented individuals from entering academia or lead them towards other sectors of education (eg, coaching institutes).⁷²

Although these considerations urge us towards examining what factors might be relevant in reasonableness assessments in the changed environment, thus far courts do not appear to be moving quickly to explore these factors. The discussion here is not intended to be fulsome, but rather to encourage greater analysis. Greater discussion of these factors will be critical for the judiciary as it deals with restrictive laws in an environment where the State is no longer the primary provider for many goods and services. Indeed, education may just be one of the early areas of concern—health care, infrastructure, and other areas of reduced State involvement all appear to be racing to the horizon.

VI. CONCLUSION

The right to practise any profession or carry on any occupation, trade, or business in Article 19(1)(g) of the Indian Constitution is a fundamental right. The jurisprudence on it and the acceptable restrictions on it (under Article 19(6)) are vast and have played an important role in defining the contours of the right. This chapter explored the case law in this area, analysed how it has developed over time, identified key debates and themes, and provided some thoughts on its interaction with the political economy in India.

The case law in this area has spanned a number of different sectors and left the courts with the hefty task of defining what is a profession, occupation, trade, or business and explaining what restrictions on these activities might be considered reasonable and why. The courts have relied on an amalgam of social effects, morality, history, and concerns with arbitrariness in coming to their decisions. This chapter highlighted these concerns and how they have influenced the case law, as well as provided critiques on these decisions (and suggested potential reforms, at times). It also provides an extended discussion of how the case law influences an increasingly important topic that has occupied many reams of pages in Supreme Court decisions—the right to start and run a private educational institution. These decisions are important not only because education is a critical issue for India with its large and young population, but also because

it highlights two broad themes associated with this jurisprudence: increasing judicial discretion and how the changing role of the State may be influencing this area of law. Moreover, the experience with the education sector may foretell important insights for likely judicial oversight of legislation or regulation addressing other sectors where the State traditionally played a dominant role, but is now more welcoming of private involvement.

This chapter then explored the implications of these two broad themes. Growing judicial discretion in this area is the result, in large part, of an increasing number of factors, often difficult to define precisely, which are considered by courts in their decisions, but with little guidance on how to use or balance those factors. This increases the likelihood that decisions will depend on an individual judge's views, resulting in the somewhat ironic situation that the discretion of the State is being limited by increasing the discretion of the judiciary. One way to address this problem is to encourage courts to provide more guidance on how these factors are defined as well as on how they may influence the final analysis.

The changing role of the State can have a large influence on jurisprudence in this area. If the objective of judicial review here is to contain State interference with a fundamental right, then if the State's role or influence changes, that might be expected to influence how the judiciary contains it. This would suggest that courts should begin to consider how changes, such as the advent of liberalisation, may influence its analyses. Although courts have not made large strides in this area yet, they are increasingly being required to face these issues. This chapter makes a few suggestions on how courts may begin to bring newer factors into the analyses, but these are necessarily speculative and tentative at this stage—leaving more detailed and sustained inquiry for future work.

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¹ For excellent commentaries on cases in this area, see Durga Das Basu, *Commentary on the Constitution of India*, vol C (6th edn, JN Ghose & Sons 1977) 315–68; HM Seervai, *Constitutional Law of India*, vol 1 (4th edn, Universal Book Traders 2002) 907–47; Arvind P Datar, *Commentary on the Constitution of India*, vol 1 (2nd edn, LexisNexis Butterworths Wadhwa Nagpur 2010) 326–45; MP Jain, *Indian Constitutional Law*, eds Justice Ruma Pal and Samaraditya Pal (updated 6th edn, LexisNexis 2013) 1493–526; MP Singh (ed) *VN Shukla's Constitution of India* (12th edn, Eastern Book Company 2013) 172–91.

² Article 19(6) provides a little more detail for restrictions applying to the qualifications to practise a profession and on the ability of the State to nationalise certain industries. See Constitution of India 1950, art 19(6)(i) and (ii).

³ See eg, James M Buchanan and Gordon Tullock, *The Calculus of Consent: Logical Foundations of*

Constitutional Democracy (University of Michigan Press 1962); Cass R Sunstein, 'Naked Preferences and the Constitution' (1984) 84 Columbia Law Review 1689; Herbert Hovenkamp, 'The Political Economy of Substantive Due Process' (1988) 40 Stanford Law Review 379; Robert D Cooter, *The Strategic Constitution* (Princeton University Press 2002).

⁴ See Hovenkamp (n 3). However, Articles 19(1)(g) and (6) jurisprudence is not the same as US due process jurisprudence. See Arvind P Datar, 'Privilege, Police Power and *Res Extra Commmercium*—Glaring Conceptual Errors' (2009) 21(1) National Law School of India Review 133.

⁵ Hovenkamp (n 3).

⁶ In *Sodan Singh v New Delhi Municipal Committee* (1989) 4 SCC 155 [28] Kuldeep Singh J said: 'The object of using four analogous and overlapping words in Article 19(1)(g) is to make the guaranteed right as comprehensive as possible to include all the avenues and modes through which a man may earn his livelihood.' This broad approach has found favour in many other decisions. See eg, *Saghir Ahmad v State of Uttar Pradesh* AIR 1954 SC 728; *Excel Wear v Union of India* (1978) 4 SCC 224; *Fertilizer Corporation Kamgar Union v Union of India* (1981) 1 SCC 568.

⁷ The Supreme Court has held that trading in adulterated food (*State of Uttar Pradesh v Kartar Singh* AIR 1964 SC 1135; trafficking in women and slavery (*Khoday Distilleries Ltd v State of Karnataka* (1995) 1 SCC 574) and gambling (*State of Bombay v RMD Chamarbaugwala* AIR 1957 SC 699) are not POTB for purposes of Article 19(1)(g).

⁸ (1977) 2 SCC 670. See Maharashtra Debt Relief Act 1976. This holding was followed in approving a parallel statute in Gujarat. See *State of Gujarat v Vora Saiyedbhai Kadarbhai* (1995) 3 SCC 196.

⁹ *Fatehchand Himmatlal* (n 8) [22].

¹⁰ (2013) 8 SCC 519.

¹¹ *IHRA* (n 10) [126].

¹² This is because the restriction (prohibition) imposed on the practice (beer bar dancing) was not targeted to the perceived problem (ie, it seemed counterproductive for the women likely affected by it because the Court thought it might induce them to enter prostitution). Maharashtra has recently put forward a Bill making dancing illegal in both beer bars and other venues. See Chittaranjan Tembhekar, 'Maharashtra Assembly passes law to ban dance bars across the State' *Times of India* (New Delhi, 13 June 2014) <<http://timesofindia.indiatimes.com/india/Maharashtra-assembly-passes-law-to-ban-dance-bars-across-the-state/articleshow/36502595.cms>>, accessed November 2015.

¹³ AIR 1954 SC 220. Other judgments have held that trade in noxious items is *res extra commercium*. Datar (n 4).

¹⁴ AIR 1967 SC 1368 [11].

¹⁵ *Har Shankar v Excise & Taxation Commissioner* (1975) 1 SCC 737 (this tracks the Court's ruling in *RMD Chamarbaugwala* (n 7) (with respect to gambling)); *Nashirwar v State of Madhya Pradesh* (1975) 1 SCC 29 (holding that it was clear that liquor had always been treated differently to other trades).

¹⁶ See *PN Kaushal v Union of India* (1978) 3 SCC 558 (holding that social effects and moral and historical considerations might be used to decide whether liquor trading is a POTB or assuming liquor trading is a POTB, use these considerations in assessing any restrictions imposed (including total prohibition)).

²¹ AIR 1951 SC 118 [6] (emphasis added). See also *Oudh Sugar Mills Ltd v Union of India* AIR 1970 SC 1070.

¹⁷ There are, broadly speaking, two types of qualifications restrictions. First are professions created by statute (such as the legal profession), where Article 19(1)(g) goes to protect the rights granted in that statute (subject to the terms of that statute). See *Mulchand Gulabchand v Mukund Shivram Bhide* AIR 1952 Bom 296; *AN Rangaswami v Industrial Tribunal* AIR 1954 Mad 553; *Devata Prasad Singh Chaudhuri v Chief Justice* AIR 1962 SC 201. Thus, if the creating statute has restrictions on the profession, then Article 19(6) (i) is generally not used to assess those restrictions. Second are activities that are not created by statute per

se and their qualifications restrictions are required to be reasonable under Article 19(6)(i). See *Taracharan Mukherjee v BC Das Gupta* AIR 1954 Cal 138; *Udai Singh Dagar v Union of India* (2007) 10 SCC 306; *Rajasthan Pradesh Vaidya Samiti Sardarshahar v Union of India* (2010) 12 SCC 609.

¹⁸ See *Saghir Ahmad* (n 6); *JY Kondala Rao v AP State Road Transport Corporation* AIR 1961 SC 82; *Akadasi Padhan v State of Orissa* AIR 1963 SC 1047; *Rashbihari Panda v State of Orissa* (1969) 1 SCC 414; *Virajlal Manilal and Co v State of Madhya Pradesh* (1969) 2 SCC 248; *Rustom Cavasjee Cooper v Union of India* (1970) 1 SCC 248;

¹⁹ A number of decisions have held that public interest is a very capacious concept and covers ‘public order, public health, public security, morals, economic welfare of the community, and the objects mentioned in [Part IV](#) of the Constitution’. *Municipal Corporation of the City of Ahmedabad v Jan Mohammed Usmanbhai* (1986) 3 SCC 20 [19].

²⁰ *Basu* (n 1) 315–68; *MP Singh* (n 1) 172–91.

²² *Chintaman Rao* (n 21) [6]. Orders related to how to transport commodities, fixing of maximum prices, and how much of a commodity a dealer can hold might be valid if the process (or formula) for determining these restrictions is not unreasonable. See *Dwarka Prasad Laxmi Narain v State of Uttar Pradesh* AIR 1954 SCC 224; *State of Rajasthan v Nath Mal* AIR 1954 SC 307 (freezing stock); *Harishankar Bagla v State of Madhya Pradesh* AIR 1954 SC 465 (on transport); *Suraj Mal Kailash Chand v Union of India* (1981) 4 SCC 554 (on how much a dealer can hold).

²³ Before discussing these cases, it is noteworthy that courts do not generally look behind the stated objectives of the statute (to examine whether these are, in reality, the true objectives) or whether the stated purposes of the law are in the public interest or not. Thus, courts generally take the stated objectives for granted when beginning their assessment of the reasonableness of the restriction.

²⁷ Constitution of India 1950, art 48.

²⁴ *Chintaman Rao* (n 21).

²⁵ A similar approach was followed in *MRF Ltd v Inspector, Kerala Government* (1998) 8 SCC 227 (with the test of reasonableness being connected to the stated objective of the restrictive law). One might also view this analysis as being representative of the less restrictive alternative as well.

²⁶ AIR 1958 SC 731.

²⁸ *Quareshi* (n 26) [42].

²⁹ *Quareshi* (n 26) [45].

³⁰ *Quareshi* (n 26) [45].

³¹ In this regard, the opinion explicitly follows *State of Madras v Smt Champakam Dorairajan* AIR 1951 SC 226 and is consistent with the thirteen-justice constitutional bench decision in *Kesavananda Bharati v State of Kerala* (1973) 4 SCC 225.

³² See eg, *Mohd Faruk v State of Madhya Pradesh* (1969) 1 SCC 853.

³³ (2005) 8 SCC 534.

³⁴ *Mirzapur Moti* (n 33) [104]. First, their urine and dung can serve useful purposes, such as being used as manure and other things. Secondly, due to scientific progress, cattle’s life expectancy had increased and they appeared to be useful for some tilling and draught work even as putative senior citizens. *Mirzapur Moti* (n 33) [109], [137], [142].

³⁵ (1986) 3 SCC 20. The Court held this was a reasonable restriction because the State could require that certain days be holidays for the staff working in these slaughterhouses and if these holidays coincided with festivals where people did not eat meat, then closure on these days was in the public interest and also reasonable.

³⁶ (2008) 5 SCC 33.

³⁷ (2004) 3 SCC 402.

³⁸ *Mohd Faruk* (n 32).

³⁹ In *Hinsa Virodhak*, the Court, while referencing *Mohd Faruk*, mentioned the *Mirzapur Moti* case and its use of Directive Principles, which provided a basis for taking into account the views of the majority of residents in an area. See *Hinsa Virodhak* ([n 36](#)) [22]–[24]. These cases suggest that the views of a majority may carry greater weight, perhaps not only because of their sentiments, but also because of a desire to live in harmony.

⁴⁰ See Harry Kalven, Jr, *The Negro and the First Amendment* (University of Chicago Press 1966); Robert M O’Neil, *Free Speech, Responsive Communication Under Law* (2nd edn, Bobbs-Merrill Press 1972).

⁴³ *RM Seshadri* ([n 42](#)) [1].

⁴¹ In *Diwan Sugar & General Mills (P) Ltd v Union of India* AIR 1959 SC 626, the Court held that the imposition of a licence fee or the requirement of obtaining a licence to engage in certain activity is a restriction on Article 19(1)(g), but it may well be reasonable if the conditions for the grant of a licence are reasonable. See also *Dwarka Prasad Laxmi Narain* ([n 22](#)).

⁴² AIR 1954 SC 747.

⁴⁴ *Dwarka Prasad Laxmi Narain* ([n 22](#)).

⁴⁵ *Harakchand Ratanchand Banthia v Union of India* (1969) 2 SCC 166.

⁴⁶ In *Excel Wear* ([n 6](#)), the Court held certain restrictions related to the ability of an employer to close down her business under the Industrial Disputes Act 1947 (IDA) to be unreasonable.

⁴⁷ In *Dwarka Prasad Laxmi Narain* ([n 22](#)) [9], the Court was much concerned by the fact that the decision to grant or cancel a coal-mining licence fell within the unguided and unreviewable discretion of one individual. Similarly, in *Corporation of Calcutta v Liberty Cinema* AIR 1965 SC 1107, the Court held that a law making orders of the Corporation of Calcutta conclusive and non-justiciable was unreasonable and invalid. On the other hand, in *Mineral Development Ltd v State of Bihar* AIR 1960 SC 468, the Court held the right to cancel a licence under the relevant legislation was reasonable because cancellation could occur only for specified reasons and the licensee was given an opportunity to have a hearing.

⁴⁸ *Deepak Theatre v State of Punjab* (1992) Supp (1) SCC 684 (on ticket prices); *Minerva Talkies v State of Karnataka* (1988) Supp SCC 176 (on daily number of shows). However, if a narrowly written condition bears little connection to issues of importance to the relevant sector it is likely to be struck down. See *Raja Video Parlour v State of Punjab* (1993) 3 SCC 708.

⁵⁷ *TMA Pai Foundation* ([n 50](#)) [53].

⁴⁹ (1993) 1 SCC 645 [197], where the Court said: ‘The Parliament too has manifested its intention repeatedly (by enacting the UGC Act, IMC Act and AICTE Act) that commercialisation of education is not permissible and that no person shall be allowed to steal a march over a more meritorious candidate because of his economic power.’ The Court notes that even though educational institutions may be treated as an ‘industry’ for purposes of the Industrial Disputes Act 1947 (*Bangalore Water Supply and Sewerage Board v Rajappa* (1978) 2 SCC 213 (Krishna Iyer J)), that does not appear relevant in determining whether they are a POTB. Finally, individuals engaged in teaching may be engaged in a profession. *Unni Krishnan v State of Andhra Pradesh* (1993) 1 SCC 645 [202].

⁵⁰ (2002) 8 SCC 481. A number of later decisions have followed: *TMA Pai Foundation: Islamic Academy of Education v State of Karnataka* (2003) 6 SCC 697; *PA Inamdar v State of Maharashtra* (2005) 6 SCC 537; *Indian Medical Association v Union of India* (2011) 7 SCC 179; *Society for Unaided Private Schools of Rajasthan v Union of India* (2012) 6 SCC 1; *Pramati Educational and Cultural Trust v Union of India* (2014) 8 SCC 271.

⁵¹ *TMA Pai Foundation* ([n 50](#)) [25].

⁵² *TMA Pai Foundation* ([n 50](#)) [24].

⁵³ *TMA Pai Foundation* ([n 50](#)) [26].

⁵⁴ See Shubhankar Dam, ‘Unburdening the Constitution: What Has the Indian Constitution Got to Do With Private Universities, Modernity and Nation-States?’ (2006) 48(1) Singapore Journal of Legal Studies

108.

⁵⁵ A recent example in India underscores this point—Delhi University’s going back on its decision to create a four-year undergraduate programme. See Aditi Vatsa, Shikha Sharma, and Apurva, ‘FYUP rollback: Why Delhi University rolled back its most ambitious reform so far’ *Indian Express* (New Delhi, 29 June 2014) <<http://indianexpress.com/article/india/india-others/du-fyup-rollback/>>, accessed November 2015.

⁵⁶ *Unni Krishnan* (n 49) [204]–[205].

⁵⁸ *TMA Pai Foundation* (n 50) [53]. Indeed, the Court held that the restrictions and guidelines put in place under *Unni Krishnan* were unreasonable because they did not appear to achieve the stated objective of the *Unni Krishnan* decision (and hence were excessive), while depriving private educational institutions of their autonomy in contravention of Article 19(6). *TMA Pai Foundation* (n 50) [35]–[45].

⁵⁹ *Modern School v Union of India* (2004) 5 SCC 583 [14].

⁶⁰ *Aruna Roy v Union of India* (2002) 7 SCC 368.

⁶¹ *Prof. Yashpal v State of Chattisgarh* (2005) 4 SCC 420.

⁶² In *Pramati Educational and Cultural Trust* (n 50), a constitutional bench of five Justices held that Article 15(5) of the Constitution was valid and permitted the State to compel private unaided institutions to admit candidates from Scheduled Castes, Scheduled Tribes, or socially or economically backward classes. This appeared to contradict the Court’s holding a few years earlier in *PA Inamdar v State of Maharashtra* (n 50).

⁶³ See Datar (n 1) 336–37. In *Pramati Educational and Cultural Trust* (n 49), one can imagine that the Court might have been concerned about some kind of educational segregation (though it does not discuss this).

⁶⁴ Devesh Kapur and Madhav Khosla, ‘The Supreme Court and Private Higher Education: Litigation Patterns and Judicial Trends’ (forthcoming 2016) (on file with author).

⁶⁵ *TMA Pai Foundation* (n 50) [61]–[62].

⁶⁶ See Shoeb Khan, ‘IITians shun corporate jobs for coaching hubs’ *Times of India* (New Delhi, 22 June 2014) <<http://timesofindia.indiatimes.com/city/jaipur/IITians-shun-corporate-jobs-for-coaching-hubs/articleshow/36983849.cms>>, accessed November 2015.

⁶⁷ For a broader discussion of Indian Higher Education, see Devesh Kapur and Pratap Bhanu Mehta, ‘Indian Higher Education Reform: From Half-baked Socialism to Half-baked Capitalism’ (2004) Centre for International Development, Harvard University, Working Paper No 108; Devesh Kapur, ‘Indian Higher Education’ in Charles T Clotfelter (ed) *American Universities in a Global Market* (University of Chicago Press 2010); Shyam Sunder, ‘Higher Education Reforms in India’ (2011) Yale School of Management Working Paper <<http://ssrn.com/abstract=1975844>>, accessed November 2015.

⁶⁸ For an interesting and related discussion in the European context, see Daniel Halberstam, ‘Desperately Seeking Europe: On Comparative Methodology and the Conception of Rights’ (2007) 5 *International Journal of Constitutional Law* 166.

⁶⁹ Prior to the onset of the 1991 liberalisation, there were many cases testing the State’s ability to legislate as deeply as it did across such a broad array of areas. The judiciary’s response was to constrain the State’s power in several ways by requiring that the restrictive laws be targeted to the perceived ills of the activity, that they provide guidance to government officials when exercising their discretion, and that they give individuals subject to those laws some sense of certainty about what the laws mean and power to review decisions made by those who held their livelihood in their hands. Although some may have wanted the courts to play an even stronger role, there is little doubt that the judiciary did work as a counterbalance to the State in some measure.

⁷⁰ Moreover, around the same time national elections in India often had regional parties picking up many seats resulting in coalition governments where no single party had a majority of seats. This also likely

affected the ability of the State to interfere with rights. For brevity and expositional ease, the focus will be on how liberalisation might lead to a need to adjust the analysis under Articles 19(1)(g) and (6).

⁷¹ From a comparative perspective, scholars have argued that the substantive due process jurisprudence in the US has changed over time as the role of the State (and perceptions of economic theory) have changed and to address changes in the risks associated with rent-seeking legislation. See Sunstein ([n 3](#)); Hovenkamp ([n 3](#)).

⁷² Khan ([n 66](#)).

CHAPTER 49

SECULARISM AND RELIGIOUS FREEDOM

RONOJOY SEN

I. INTRODUCTION

It is now accepted that the Indian version of secularism differs from the American or the European model.¹ The debates in the Constituent Assembly, which drafted the Indian Constitution between 1946 and 1949, reveal that there were real differences on the direction that Indian secularism should take. Though there were attempts to insert the term ‘secular State’ in the draft constitution on the one hand and to begin the preamble by invoking God on the other, both did not succeed. Members such as HV Kamath, Govind Malaviya, and SL Saxena wanted to begin the preamble to the Indian Constitution with the phrase ‘In the name of God’.² After a heated discussion on the merits of this proposal, Kamath’s amendment was put to vote and defeated. At the other end of the spectrum, the same fate befell Brajeshwar Prasad’s proposal to begin the preamble with the following words: ‘We the people of India, having resolved to constitute India into a secular cooperative commonwealth to establish socialist order ...’³ It was only in 1976, during the Emergency, that ‘secular’ (as well as ‘socialist’) was inserted into the preamble of the Constitution through the Forty-second Amendment.

This chapter addresses the tensions in the constitutional provisions with regard to freedom of religion. I primarily examine Articles 25, 26, and 28 of the Indian Constitution and how the Supreme Court has dealt with the voluminous litigation around these Articles. The two central provisions regarding freedom of religion are Articles 25 and 26. Article 25 guarantees the right to ‘profess, practice and propagate religion’, but also permits the State to regulate ‘economic, financial, political or other secular activity associated with religious practice’, as well as provide for ‘social welfare and reform’ of Hindu religious institutions.⁴ Article 26 guarantees religious denominations, among other things, freedom to manage their religious affairs.⁵

Litigation around these two Articles has broadly centred on two issues. The

first is the distinction between the religious and secular, particularly in the case of Hinduism. The Court has dealt with this by bringing into play an ‘essential practices’ test to decide what is essential to Hinduism and used it to distinguish between the sacred and the secular. The Court’s intervention to decide what is religious and what is not in a secular, constitutional culture is hardly peculiar to India. As Pratap Bhanu Mehta points out, in most constitutional settings courts ‘have to determine whether or not a policy places a substantial burden on the free exercise of religion. This might require the court to have not just a definition of religion but also to determine whether a particular practice counts as falling under that definition.’⁶ What is unusual, however, is the Indian Supreme Court’s activism in fashioning religion in the way the State or the judges would like it to be, rather than accept religion as practised by believers. This has also prompted the Court to step into the minefield of how to define Hinduism, leading to unanticipated outcomes such as characterising Hinduism as a ‘way of life’ and legitimising the use of Hindutva (or Hinduness) in election campaigns. Secondly, there is the claim to self-identification which has been denied to religious sects and groups. Since the ‘wording of Articles 25 and 26 establishes the primacy of public interests over religious claims and provides a wide scope for governmentally sponsored reforms’,⁷ the Supreme Court has often had to adjudicate on which religious denomination or institution legally qualifies as Hindu. Thus, a whole range of religious denominations from the Satsangis to the Ramakrishna Mission have gone to court seeking the status of a separate religion and the privileges that come with it.

There have been other contentious issues, such as the right to propagate religion present in Article 25, which have come up before the Court and been controversially interpreted. This chapter also examines the Court’s position on the right to teach religion in educational institutions, permitted in specific State-funded institutions under Article 28.

II. RELIGIOUS VERSUS SECULAR AND THE ESSENTIAL PRACTICES DOCTRINE

Beginning with the Madras Hindu Religious and Charitable Endowment Act (HRCE Act) in 1951, where a new department headed by a commissioner was created to supervise temples and *maths*, several other States have followed suit.⁸ Legal challenges to these legislation have meant that the courts are frequently

asked to decide what constitutes an ‘essential part of religion’, thereby being off limits for State intervention, and what is ‘extraneous or unessential’, thereby permissible for the State to interfere. Some legal scholars have labelled the Court’s attempts to define what is fundamental to any religion the ‘essential practices’ doctrine.⁹ In effect, the essential practices doctrine has become the court’s standard method to distinguish between the religious and the secular.

The essential practices test has been used by the Court to decide a variety of cases. These can broadly be classified under a few heads. First, the Court has taken recourse to this test to decide which religious practices are eligible for constitutional protection. Secondly, the Court has used the test to adjudicate the legitimacy of legislation for managing religious institutions. Finally, the Court has employed this doctrine to judge the extent of independence that can be enjoyed by religious denominations.

The essential practices doctrine was a derivative discourse of the colonial-era doctrine of ‘justice, equity and good conscience’. After Independence, it was first articulated in *Commissioner, Hindu Religious Endowments, Madras v Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt*,¹⁰ also known as the *Shirur Mutt* case. It is important to consider this case in some detail, since it has become obligatory to cite *Shirur Mutt* in most cases related to reform of Hindu religious institutions. Not only was the meaning of religion, as protected by the Constitution, enunciated in *Shirur Mutt*, but also guidelines as to who qualified as a religious denomination were set forth.

In *Shirur Mutt*, the petitioner, the superior or *mathadhipati* (also referred to as *mahant*) of Shirur Mutt, challenged the Madras HRCE Act 1951,¹¹ on the principal ground that it infringed Article 26 of the Constitution. Before dealing with the provisions of the Act, the Court asked a central question: ‘Where is the line to be drawn between what are matters of religion and what are not?’¹² To come up with a working definition of religion, BK Mukherjea J, who wrote the judgment, drew on examples from the United States and Australia. He rejected the definition of religion offered by the US Supreme Court in *Davis v Beason*: ‘The term religion has reference to one’s views of his relation to his Creator, and to the obligations they impose of reverence for His Being and character, and of obedience to his will. It is often confounded with the cultus or form of worship of a particular sect, but is distinguishable from the latter.’¹³ The Court pointed out the inadequacy of this definition in the Indian context by noting that there are major religions like Buddhism or Jainism ‘which do not believe in God or in any Intelligent First Cause’.¹⁴

Instead, Mukherjea J drew on the *Adelaide Company v Commonwealth*

judgment in Australia, where the Court said the Constitution not only protected ‘liberty of opinion’ but also ‘acts done in pursuance of religious belief as part of religion’.¹⁵ Collapsing the belief–practise dichotomy, he observed:

A religion undoubtedly has its basis in a system of beliefs or doctrines which are regarded by those who profess that religion as conducive to their spiritual well-being, but it would not be correct to say that religion is nothing else but a doctrine or belief. A religion may not only lay down a code of ethical rules for its followers to accept, it might prescribe rituals and observances, ceremonies and modes of worship which are regarded as integral parts of religion ...¹⁶

It should be mentioned here that this definition of religion, which included rituals and ceremonies as ‘integral’, was significantly different from the definition offered by the Bombay High Court in an earlier case. In *Ratilal Panachand v State of Bombay*,¹⁷ where the constitutional validity of the Bombay Public Trusts Act of 1950 had been challenged, MC Chagla CJ observed that ‘whatever binds a man to his own conscience and whatever moral and ethical principles regulate the lives of men, that alone can constitute religion as understood in the Constitution’.¹⁸ In the same judgment, Chagla stated, ‘Essentially religion is a matter of personal faith and belief, of personal relation of an individual with what he regards as his Maker or his Creator or the higher agency which he believes regulates the existence of sentient beings and the forces of the Universe.’¹⁹ The definition from *Shirur Mutt* cited earlier shows that Mukherjea J rejected the High Court’s narrow definition of religion. Subsequently, Mukherjea J overturned the *Ratilal* judgment too when the case came up for hearing before the Supreme Court.²⁰

According to Mukherjea J, the US and Australian Constitutions did not impose any limitation on the right to freedom of religion. It was the US and Australian courts that introduced the limitations on the grounds of ‘morality, order and social protection’.²¹ Mukherjea J, however, believed that the Indian Constitution was an improvement on other Constitutions, since it clearly laid out what could be regarded as religion:

Our Constitution-makers, however, have embodied the limitations which have been evolved by judicial pronouncements in America or Australia in the Constitution itself and the language of Articles 25 and 26 is sufficiently clear to enable us to determine without the aid of foreign authorities as to what matters come within the purview of religion and what do not.²²

According to the Court, ‘what constitutes the essential part of a religion is primarily to be ascertained with reference to the doctrines of that religion itself’.²³ This ‘essential part’ of religion is protected by the Constitution: ‘Under Article 26(b), therefore, a religious denomination or organization enjoys

complete autonomy in the matter of deciding as to what rites and ceremonies are essential according to the religion they hold and no outside authority has any jurisdiction to interfere with their decision in such matters.’²⁴ However, the State can legitimately regulate religious practices when they ‘run counter to public order, health and morality’ and when they are ‘economic, commercial or political in their character though they are associated with religious practices’.²⁵

Shirur Mutt was also a landmark judgment because it validated a major portion of the Madras HRCE Act 1951, which was the first State legislation to put in place an elaborate regulatory mechanism for Hindu temples and *maths*. Several other States followed with similar legislation, which were also taken to court, but *Shirur Mutt* has remained the model for the Court. There is no need here to go into the details of the *Shirur Mutt* judgment regarding the Madras HRCE Act. It is noteworthy that the Court in large measure gave its approval to State control of Hindu temples and religious institutions.

The primary contribution of *Shirur Mutt* to the legal discourse on religion was the recognition that ‘protection under Articles 25 and 26 was not limited to matters of doctrine or belief only but extended to acts done in pursuance of religion and therefore contained guarantees for rituals, observances, ceremonies and modes of worship’.²⁶ Another important principle enunciated by Mukherjea J was the ‘complete autonomy’ granted to religious denominations to decide which religious practices were essential for them. Mukherjea reiterated this point in *Ratilal*, which was decided by the Supreme Court the same year as *Shirur Mutt*:

Religious practices or performances of acts in pursuance of religious beliefs are as much a part of religion as faith or belief in particular doctrines ... No outside authority has any right to say that these are not essential parts of religion and it is not open to the secular authority of the State to restrict or prohibit them in any manner they like under the guise of administering the trust estate.²⁷

Finally, *Shirur Mutt* is a landmark case because it contained a contradictory trend—though the judgment is celebrated for widening the definition of religion to include rituals and practices, at the same time it sanctioned an elaborate regulatory regime for religious institutions. This anomaly has been noted by PK Tripathi: ‘In the final analysis, therefore, articles 25 and 26 do not emerge from the judgment in the Swamiar case as very effective weapons of attack on social legislation affecting the management of religious institutions.’²⁸

Although a broad definition of religion was laid out in *Shirur Mutt*, the subsequent judgments of the Supreme Court would circumscribe the religious practices that were guaranteed constitutional protection. Two cases in the early 1960s would substantially reformulate the essential practices doctrine. PB

Gajendragadkar J, who later went on to become the Chief Justice of India, handed down the rulings in both these cases. The first of these cases was *Durgah Committee v Syed Hussain Ali*.²⁹ In this case, the *khadims*³⁰ of the shrine of Moinuddin Chishti in Ajmer challenged the Durgah Khwaja Saheb Act of 1955. Among other things, the *khadims* contended that the Act abridged their rights as Muslims belonging to the Sufi Chishtia order. The *khadims* maintained that their fundamental rights guaranteed by several constitutional provisions, including Articles 25 and 26, had been violated.

Gajendragadkar did not make any reference to the scriptures. Instead, he skilfully constructed a ‘secular’ history of the Ajmer shrine to ‘ascertain broadly the genesis of the shrine, its growth, the nature of the endowments made to it, the management of the properties thus endowed, the rights of the Khadims ...’³¹ After surveying the history of the shrine from the pre-Mughal to the contemporary period, the Court concluded that the administration of the shrine ‘had always been in the hands of the official appointed by the State’.³² The Court, however, conceded that the Chishtia sect could be regarded as a religious denomination. But this did not eventually have any impact on the Court’s decision, which upheld the validity of the Durgah Khwaja Saheb Act and dismissed the constitutional challenges to the Act. In doing so Gajendragadkar issued a ‘note of caution’ that would not only highlight the role of the Court in deciding what was an ‘essential and integral’ part of religion but also make a distinction for the first time between ‘superstitious beliefs’ and religious practice.

Whilst we are dealing with this point it may not be out of place incidentally to strike a note of caution and observe that in order that the practices in question should be treated as a part of religion they must be regarded by the said religion as its essential and integral part; otherwise even purely secular practices which are not an essential or an integral part of religion are apt to be clothed with a religious form and may make a claim for being treated as religious practices within the meaning of Article 26. Similarly *even practices though religious may have sprung from merely superstitious beliefs and may in that sense be extraneous and unessential accretions to religion itself*. Unless such practices are found to constitute an essential and integral part of religion their claim for the protection under Art. 26 may have to be carefully scrutinized; in other words, the protection must be confined to such religious practices as are an essential and integral part of it and no other.³³

This extraordinary statement by the Court pushed the essential practices doctrine in a new direction. The Court was not only going to play the role of the gatekeeper as to what qualified as religion, but now it was also taking up the role of sifting superstition from ‘real’ religion. This was a clear statement of the Court’s role—which had not been so overt until now—in rationalising religion and marginalising practices that did not meet the Court’s test. According to JDM

Derrett, the courts could now ‘discard as non-essentials anything which is not proved to their satisfaction—and they are not religious leaders or in any relevant fashion qualified in such matters—to be essential, with the result that it would have no constitutional protection’.³⁴

This redefinition of the essential practices test and the enhanced role of the Court in rationalising religion would be articulated by Gajendragadkar in two more landmark cases that were decided soon after *Durgah Committee*. The first was *Tilkayat Shri Govindlalji Maharaj v State of Rajasthan*,³⁵ where the Tilkayat Govindlalji, the traditional spiritual head of the Nathdwara temple in Rajasthan, challenged the constitutionality of the Nathdwara Temple Act 1959. One of the grounds for challenging the Act was infringement of Articles 25, 26(b), and 26(c) since it was claimed that the temple was a private one owned and managed by the Tilkayat as head of the Vallabha denomination. By reconstructing the doctrine of the Vallabha school and the history of the temple, the Court held that the temple was a private one and that the Tilkayat was ‘merely a custodian, manager and trustee of the temple’.³⁶ The Court endorsed the Act, laying special emphasis on a *firman* (order) issued by the ruler of Udaipur in 1934, which declared that the royal court had absolute rights to supervise the temple and its property and even depose the Tilkayat if necessary.

While the outcome of *Govindlalji* was unexceptional given the history of the Court in sanctioning State regulation of religious institutions, Gajendragadkar in his judgment pointed out why the claims of a community regarding their religious practices could not always be accepted:

In cases where conflicting evidence is produced in respect of rival contentions as to competing religious practices the Court may not be able to resolve the dispute by a blind application of the formula that the community decides which practice is an integral part of its religion, because the community may speak with more than one voice and the formula would therefore break down. The question will always have to be decided by the Court and in doing so, the Court may have to enquire whether the practice in question is religious in character and if it is, whether it can be regarded as an integral or essential part of religion, and the finding of the Court on such an issue will always depend upon the evidence adduced before it as to the conscience of the community and the tenets of its religion.³⁷

Though Gajendragadkar admitted that this approach might present some difficulties since ‘sometimes practices, religious and secular, are inextricably mixed up’, he was confident that the Court would be able to distinguish between religious and what was ‘obviously’ a secular matter.³⁸ Gajendragadkar thus rejected the argument of the senior advocate, representing the appellants, who quoted from the Australian court ruling in *Adelaide Company of Jehovah’s Witnesses v Commonwealth*: ‘What is religion to one is superstition to

another.³⁹ The Court dismissed this proposition as of ‘no relevance’:

If an obviously secular matter is claimed to be [a] matter of religion, or if an obviously secular practice is alleged to be a religious practice, the Court would be justified in rejecting the claim ... a claim made by a citizen that a purely secular matter amounts to a religious practice, or a similar claim made on behalf of the denomination that a purely secular matter is an affair in matters of religion, may have to be rejected on the ground that it is based on irrational considerations and cannot attract the provisions of Art. 25(1) and Art. 26(b).⁴⁰

The series of rulings in the early 1960s firmly established the principle that it was the Court’s task to ascertain what constituted religious doctrine and practice. The Gajendragadkar rulings went further and specified that even practices that can be accepted as religious might be classified as superstition or irrational. Dhavan and Nariman’s assessment in 1997 sums up the situation as it was after *Yagnapurushdasji v Muldas*: ‘Judges are now endowed with a three step inquiry to determine, in tandem, whether a claim was religious at all, whether it was essential for the faith and, perforce, whether, even if essential, it complied with the public interest and reformist requirements of the Constitution.’⁴¹

The role of the Court in determining what constitutes religion as well as essential religious practice has remained undiminished since the formative years of this doctrine. Subsequent rulings have built on case law but hardly ever reconsidered the doctrine of essential practices. The essential practices test was one of the major tools whereby the Supreme Court sanctioned a complex regulatory regime for Hindu temples. As has been noted earlier, in *Shirur Mutt* the Court gave its approval to the bulk of the Madras HRCE Act 1951. Soon after the Madras Act, most States in India put in place regulatory mechanisms for Hindu religious institutions. Though many of these State legislation were challenged, the Court usually approved them with minor alterations. One of the consequences of this has been the bureaucratisation of religion, with State-appointed officers taking over the running of temples at the expense of traditional authorities. The undermining of traditional heads of temples such as the Nathdwara or the Jagannath temple at Puri had already begun from the 1960s. Temple functionaries like the *archakas* (priests) and other intermediaries like *pandas* and *sevaks* (attendants) have also been severely affected. *Seshammal v State of Tamil Nadu* was one of the first cases where the hereditary principle for temple priests was held to be void.⁴²

There was a spate of litigation in the 1990s centred on major Hindu shrines like Tirupathi, Vaishno Devi, Jagannath, and Kashi Vishwanath.⁴³ K Ramaswamy J handed down the majority of the judgments, where challenges to the extensive State regulation of these temples were dismissed. This has led

Dhavan and Nariman to observe, ‘If the regulatory impetus provided by Justice BK Mukherjea in the fifties was enlarged by Justice Gajendragadkar in the sixties, the latest judgments of Justice K. Ramaswamy have enthusiastically supported the “nationalization” of some of India’s greatest shrines.’⁴⁴

Another significant effect of the essential practices doctrines has been the marked disinclination of the Court to accept the practices of religious groups of recent origin. In a case involving the Ananda Margis,⁴⁵ the Court decided that the Ananda Margis were a religious denomination. However, in *Acharya Jagdishwaranand v Commissioner of Police*,⁴⁶ the Court refused to accept the *tandava* dance as an essential practice of the Ananda Margis, reasoning that the ‘Ananda Marga as a religious order is of recent origin and *tandava* dance as a part of religious rites of that order is still more recent. It is doubtful as to whether in such circumstances *tandava* dance can be taken as an essential religious rite of the Ananda Margis.’⁴⁷ The Court had occasion again in 2004 to take up the issue and further narrowed the scope of essential practices to mean the foundational ‘core’ of a religion. AR Lakshmanan J, however, notably dissented. Harking back to *Shirur Mutt*, he said, ‘What would constitute an essential practice of religion or religious practice is to be determined with reference to the doctrine of a particular religion which includes practices which are regarded by the community as part and parcel of that religion.’⁴⁸

A shift in the Court’s dominant line of thinking can be discerned in a more recent case involving a mining project in the Niyamgiri Hills, Orissa, which was seen to be infringing on land considered sacred by the local tribals. In *Orissa Mining Corporation Ltd v Ministry of Environment and Forests*,⁴⁹ the Supreme Court deliberated on whether the religious rights of the inhabitants of Niyamgiri, such as the Dongaria Kondh, were being affected. The Court ruled that the question of whether tribal and forest dwellers had rights of worship over the Niyamgiri Hills had to be considered by local elected bodies such as the *gram sabha*.⁵⁰ Despite the occasional deviation, such as the judgment on Niyamgiri, Mehta is right in his assessment of the courts when he says they ‘tell us not only what public purposes ought to be authoritative constraints on behavior but also which interpretation of religious doctrine should be considered authoritative’.⁵¹

III. SELF-IDENTIFICATION AND THE DEFINITION OF HINDUISM

One of the landmark cases in independent India where the issue of self-

identification of religious groups came into sharp focus was *Sastri Yagnapurushdasji v Muldas Bhudardas Vaishya*,⁵² also known as the Satsangi case. The 1966 case involved the Satsangis or followers of Swaminarayan (1780–1830) who claimed that their temples did not fall under the purview of the Bombay Harijan Temple Entry Act 1948. The Act provided that every Hindu temple shall be open to Harijans or untouchables. By the time the case reached the Supreme Court via a trial court and the Bombay High Court, the Central Untouchability (Offences) Act of 1955 had already come into effect. The case made by the Satsangis was that the ‘Swaminarayan sect represents a distinct and separate religious sect unconnected with the Hindus and Hindu religion, and as such, their temples were outside the purview of the said Act’.⁵³

The Satsangis claimed separate status on four grounds. First, they argued that Swaminarayan, the founder of the sect, considered himself as Supreme God. Secondly, it was urged that the Satsangi temples could not be regarded as Hindu temples since they were used to worship Swaminarayan and not any traditional Hindu deity. Thirdly, it was pointed out that the Satsangis propagated the idea that worship of any god other than Swaminarayan was a betrayal of faith. Finally, it was contended that there was a procedure of initiation (*diksha*) into the Swaminarayan sect by which a devotee assumed a distinct and separate identity.

The Court rejected the contention of the Satsangis relying primarily on a description of their religious practices by Monier-Williams in his *Religious Thought and Life in India*. Based on its reading of Monier-Williams and reports of the Gazetteer of the Bombay Presidency, the Court concluded: ‘In our opinion, the plea raised by the appellants that the Satsangis who follow the Swaminarayan sect form a separate and distinct community different from the Hindu community and their religion is a distinct and separate religion different from Hindu religion is entirely misconceived.’⁵⁴

However, the examination of the religious practices of the Satsangis was somewhat incidental in the Court’s ruling. *Yagnapurushdasji* was far more critical for the Supreme Court’s construction of Hinduism, a construction that has since become hegemonic in judicial discourse. Writing for the Court, PB Gajendragadkar CJ—who had already authored some of the most important judgments on the question of freedom of religion—proceeded to inquire: ‘What are the distinctive features of Hindu religion?’⁵⁵ At the same time, he admitted that the question ‘appears to be somewhat inappropriate within the limits of judicial enquiry in a court of law’,⁵⁶ but he did not allow that to deter him. Drawing primarily from English language sources, the Court put forward the

view that Hinduism was ‘impossible’ to define:

When we think of the Hindu religion, we find it difficult, if not impossible, to define Hindu religion or even adequately describe it. Unlike other religions in the world, the Hindu religion does not claim any one God; it does not subscribe to any one dogma; it does not believe in one philosophic concept; it does not follow any one set of religious rites.⁵⁷

Confronted with this amorphous entity, the Court concluded, ‘It [Hinduism] does not appear to satisfy the narrow traditional features of any religion or creed. It may broadly be described as a *way of life* and nothing more.’⁵⁸

Once the civilisational or cultural view of Hinduism was posited, it was not difficult for the Court to construct an all-encompassing version of Hinduism that included a variety of creeds and sects. Hence, any reform movements, including Buddhism, Jainism, and Sikhism, were seen as merely different sects within Hinduism.

The development of Hindu religion and philosophy shows that from time to time saints and religious reformers attempted to remove from the Hindu thought elements of corruption and superstition and that led to the formation of different sects... If we study the teachings of these saints and religious reformers, we would notice an amount of divergence in their respective views: but underneath that divergence, there is a kind of subtle indescribable unity which keeps them within the sweep of the broad and progressive Hindu religion.⁵⁹

Gajendragadkar’s view is, in fact, enshrined in the Constitution, where Explanation II appended to Article 25 says that the ‘reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jain or Buddhist religion’. It is noteworthy that the Court could well have decided *Yagnapurushdasji* without going into a detailed exegesis of Hinduism. As Marc Galanter has pointed out in his analysis of *Yagnapurushdasji*, the Court could have decided the case with reference to Article 25(2)(b) of the Constitution, which empowers the State to overcome caste and denominational barriers within Hinduism.⁶⁰ In any case, in an earlier judgment the Court had said temple entry acts prevail over denominational claims to exclude outsiders.⁶¹

In *Yagnapurushdasji*, the Court used a variety of sources to define Hinduism. Robert Baird describes the Court’s reasoning thus: ‘All of the authorities to whom appeal is made stress the wide range of Hindu belief and practice. That which had been the obstacle to constructing a model of Hinduism which would fit the concrete data is turned into one of its major characteristics—it is inclusive.’⁶² Radhakrishnan, who first wrote about Hinduism being a ‘way of life’, in particular plays a crucial role in shaping the Court’s conception of Hinduism.

The importance of *Yagnapurushdasji* was that the Court was interpreting Hinduism as an inclusivist religion drawing heavily from the ideas of Sarvepalli Radhakrishnan and his intellectual predecessors. In this sort of usage, certain features of Hinduism are most important: tolerance, universality, a classical core, and a search for a fundamental unity. The Court's views on Hinduism and its inclusive nature recurred in subsequent judgments. In several important later judgments, the Supreme Court relied on the construction of Hinduism as elaborated in *Yagnapurushdasji*.⁶³ Since *Yagnapurushdasji*, claims put forward by different Hindu sects to be regarded as a separate religion have not found favour with the Court. Among the more prominent cases was the denial of the status of a separate religion status to the Arya Samaj⁶⁴ and Ramakrishna Mission,⁶⁵ the latter being accorded a 'religious minority', that is, separate religion, status, by the Calcutta High Court, only to have it changed to a religious denomination status by the Supreme Court.

Similarly, the followers of Sri Aurobindo were told that they were not members of a religious group. Ruling on the legitimacy of the Auroville⁶⁶ (Emergency Provisions Act) Act of 1980, RB Misra J, writing for the majority, wrote that 'there is no room for doubt that neither the Society nor Auroville constitutes a religious denomination and the teachings of Sri Aurobindo only represented his philosophy and not a religion'.⁶⁷ More recently, the Court dismissed the claims of Jains for minority status:

The so-called minority communities like Sikhs and Jains were not treated as national minorities at the time of framing the Constitution. Sikhs and Jains, in fact, have throughout been treated as part of the wider Hindu community which has different sects, subsects, faiths, modes of worship and religious philosophies.⁶⁸

The inclusivist reading of Hinduism had wider political effect too. In the mid-1990s the Court in the controversial 'Hindutva' ruling⁶⁹ conflated the inclusivist discourse on Hinduism, outlined in *Yagnapurushdasji*, with the exclusivist version of Hinduism propounded by Hindu nationalists.⁷⁰ In discussing Hindutva, JS Verma J first went over the definition of Hinduism presented in *Yagnapurushdasji*. Basing his opinion on his reading of the inclusivist Hinduism of *Yagnapurushdasji* and on another later decision,⁷¹ Verma proceeded to conflate Hindutva with Hinduism by arguing that Hindutva was a 'way of life' and could not be equated with 'narrow fundamentalist Hindu religious bigotry'.⁷²

Thus, it cannot be doubted, particularly in view of the Constitution Bench decisions of this Court that the words 'Hinduism' and 'Hindutva' are not necessarily to be understood and construed narrowly,

confined only to the strict Hindu religious practices unrelated to the culture and ethos of the people of India, depicting the *way of life* of the Indian people. Unless the context of a speech indicates a contrary meaning or use, in the abstract these terms are indicative more of a *way of life* of the Indian people and are not confined merely to describe persons practicing the Hindu religion as a faith.⁷³

While the judgment dealt with electoral speech rather than religious freedom, the way Hindutva was framed and interpreted was promptly appropriated by the Hindu nationalists.⁷⁴ The Bharatiya Janata Party (BJP) referred to the judgment in the party's 1999 election manifesto: 'Every effort to characterize Hindutva as a sectarian or exclusive idea has failed as the people of India have repeatedly rejected such a view and the Supreme Court, too, finally, endorsed the true meaning and content of Hinduism as being consistent with the true meaning and definition of secularism.' Since then it has become standard practice for the BJP and other Hindu nationalist groups to refer to the Court ruling to justify the inclusiveness of Hindutva.

IV. THE RIGHT TO PROPAGATE RELIGION

The right to propagate religion, guaranteed in Article 25, has frequently come up before the courts. This has been tied to the question of whether it is permissible to convert a person from one faith to another and the legal status of a convert. The major court rulings on conversions in independent India can be broadly classified into three categories. First, there are the cases challenging the legality of legislation to regulate conversions, which are in effect in some States of India. Secondly, there are cases involving converts, particularly to Christianity, who claim the benefits of caste-based reservation in jobs, elections, and educational institutions available to the Scheduled Castes. Thirdly, there is a category of cases where converts have 'reconverted' back to Hinduism and asked for restoration of reservation benefits.

One of the early cases where the Supreme Court had to deal with the issue of conversion was *Chatturbhuj Vithaldas Jasani v Moreswar Parashram*.⁷⁵ Here the case involved the disqualification of a candidate belonging to the Mahar caste, Gangaram Thaware, who was contesting a reserved seat for Scheduled Castes, for having converted to the Mahanubhava Panth. The Court was primarily concerned with the question whether Thaware had ceased to be a Mahar when he joined the Mahanubhava Panth. Though the Court, using the precedent of the celebrated *Abraham v Abraham* case,⁷⁶ ruled that the conversion did not mean that Thaware had lost his Scheduled Caste status, it laid

out a complex understanding of conversion:

Conversion brings many complexities in its train, for it imports a complex composite composed of many ingredients. Religious beliefs, spiritual experience and emotion and intellectual conviction mingle with more material considerations such as severance of family and social ties and the casting off or retention of old customs and observances.⁷⁷

The first real opportunity to clarify the right to propagate religion came in the landmark *Rev Stanislaus v State of Madhya Pradesh* case.⁷⁸ Here two State legislations—Madhya Pradesh Swatantra Adhinayam and the Orissa Freedom of Religion Act, aimed at regulating conversions—were being challenged. These legislations had one thing in common: they prohibited religious conversion by the use of force, allurement, or fraudulent means. Legislation meant to check conversions had a precedent in Princely States in colonial India. Some of these were the Raigarh State Conversion Act 1936, the Sarguja State Apostasy Act 1945, and the Udaipur State Anti-Conversion Act 1946. In independent India, Orissa and Madhya Pradesh were the first two States to pass such legislation in the 1960s, followed by Arunachal Pradesh in 1978. More recently, Gujarat and Chhattisgarh in 2003 and Rajasthan and Himachal Pradesh in 2006 have passed similar legislation. In Tamil Nadu, a similar law was enacted in 2002 but repealed two years later. The Rajasthan legislation was sent back by Indian President Pratibha Patil, who was then Governor of Rajasthan. These laws have made conversion a cognisable offence under Sections 295A and 298 of the Indian Penal Code. In some of the States, the punishment is doubled if a minor, a woman, or person belonging to the Scheduled Caste or Scheduled Tribe is forcibly converted. From 1954 onwards, there have also been unsuccessful attempts for a central legislation on the lines of the State Acts. In 1954, a Bill known as the Indian Converts (Regulation and Registration) Bill was tabled in the Lok Sabha, but this was rejected by the House. A Freedom of Religion Bill was again presented to the Lok Sabha in 1978, but before any discussion could take place the incumbent government fell in 1979.⁷⁹

Rev Stanislaus, a Christian priest from Madhya Pradesh, had challenged the Madhya Pradesh legislation on two grounds. One was that the State legislature did not have the authority to make the law and secondly, that the law infringed Article 25. The Madhya Pradesh High Court upheld the Act, ruling that penalising conversion by force, fraud, or allurement did not contravene Article 25. Another petitioner, Yulitha Hyde, had challenged the Orissa Act. The Orissa High Court took an opposite stance, saying that the term ‘inducement’ was too vague and could not be covered under the restrictions in Article 25. It also ruled that the State legislature had no power to enact a law related to religion.

When the case came up before a five-judge bench of the Supreme Court, it ruled that the State legislatures were within their right to pass the Acts, since they were meant to maintain public order. On the critically important question of infringement of the right to propagate guaranteed in Article 25, AN Ray CJ, who delivered the judgment, followed an odd line of reasoning:

What the Article grants is not the right to convert another person to one's own religion by an exposition of its tenets. It has to be remembered that Article 25(1) guarantees freedom of conscience to every citizen, and not merely to the followers of one particular religion, and that, in turn, postulates that there is no fundamental right to convert another person to one's own religion because if a person purposely undertakes the conversion of another person to his religion, as distinguished from his effort to transmit or spread the tenets of his religion, that would impinge on the 'freedom of conscience' guaranteed to all the citizens of the country alike.⁸⁰

Ray made a distinction between a benign propagation of religion, which was permitted, and attempts to convert people to one's religion, which the Court felt impinged on freedom of conscience. In making this distinction, Ray drew upon an earlier judgment, *Ratilal Panachand*, which said that Article 25 sanctions propagation of religion for the 'edification' of others.

The *Stanislaus* judgment has been criticised by several commentators for its peculiar understanding of propagation of religion, which precluded conversion. One of India's most respected constitutional scholars had this to say about the *Stanislaus* judgment:

The right to propagate religion gives a meaning to freedom of choice (of religion), for choice involves not only knowledge but an act of will. A person cannot choose if he does not know what choices are open to him. To propagate religion is not to impart knowledge and to spread it more widely, but to produce intellectual and moral conviction leading to action, namely, the adoption of that religion. Successful propagation of religion would result in conversion . . . Conversion does not in any way interfere with the freedom of conscience but is a fulfillment of it and gives a meaning to it. The Supreme Court judgment is clearly wrong. It is productive of the greatest public mischief and ought to be overruled.⁸¹

Over thirty years after it was delivered, the *Stanislaus* judgment has, however, not been reconsidered by a larger bench and continues to be the last word on the meaning of the right to propagate.

V. TEACHING RELIGION

How has the Supreme Court interpreted Article 28, which prohibits religious instruction in State-run educational institutions?⁸² The crucial ruling in this area

is *Aruna Roy v Union of India*,⁸³ where public interest litigation challenged the National Council of Educational Research and Training's (NCERT) National Curriculum Framework for School Education (NCFSE) on the ground that it violated the constitutional principles of secularism among other things. In the *Aruna Roy* judgment of 2002 and an earlier case, *DAV College v State of Punjab*,⁸⁴ the Supreme Court laid out what was permissible with regard to religion in school and university texts and curriculum. The Court made a critical distinction between 'religious instruction' and 'religious education', with the latter being permitted in the educational curriculum.

The *Aruna Roy* case is the latest as well as the most detailed discussion of what can be legitimately taught as religion in educational institutions. The NCFSE was formulated in 2000 when the BJP was heading a coalition government at the Centre. Among other things, the petitioners objected to some specific proposals in the NCFSE—in the section titled 'Education for Value Development', which they contended violated Article 28. One was the proposition that there had been erosion of 'essential' values and that 'value based education would help the nation fight against all kinds of fanaticism, ill will, violence, fatalism, dishonesty, avarice, corruption and drug abuse'.⁸⁵ The primary bone of contention, however, was a related proposal:

Another significant factor that merits urgent attention now is religion. Although it is not the only source of essential values, it certainly is a major source of value generation. What is required today is not religious education but education about religions, their basics, the values inherent therein and also a comparative study of the philosophy of all religions.⁸⁶

The NCFSE went on to qualify this proposal by saying that 'education about religions must be handled with extreme care ... All religions therefore have to be treated with equal respect (*Sarva Dharma Sambhav*) and there has to be no discrimination on the ground of any religion (*panthanirapekshata*).'⁸⁷

Speaking for the Court, MB Shah J rejected the contention that NCFSE infringed Article 28 on three grounds. First, it referred to several government-appointed commissions and reports, which advocated value-based education. It mentioned in particular the SB Chavan Committee, which said that religion is the 'most misused and misunderstood concept' and that 'the basics of all religions, the values therein and also a comparative study of the philosophy of all religions should begin at the middle stage in schools and continue up to the university level'.⁸⁸ The Court was in full agreement with this view and said 'religion is the foundation for value-based survival of human beings in a civilized society'. Secondly, the Court said that study of religions was in

consonance with Article 51-A of the Constitution, which among other things declares that it shall be the duty of every citizen to ‘promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities ...’ Thirdly, the Court referred to an earlier case, *DAV College v State of Punjab*, where the petitioner argued that provisions for teaching Guru Nanak’s philosophy infringed on Article 28(1). There the Court made a distinction between religious instruction and study of religions. It said, ‘To provide for academic study of life and teaching or the philosophy and culture of any great saint of India in relation to or the impact on the Indian and world civilizations cannot be considered as making provision for religious instruction.’⁸⁹

In a concurring judgment, Dharmadhikari J said, ‘The academic study of the teaching and the philosophy of any great saint such as Kabir, Guru Nanak and Mahavir was held to be not prohibited by Article 28(1) of the Constitution.’⁹⁰ He, however, admitted that there was a ‘very thin dividing line’ between imparting of religious education and study of religions. Dharmadhikari J gets around this problem by positing that the Indian concept of dharma differs from religion as understood in the West. According to him, in the concept of dharma ‘different faiths, sects and schools of thoughts merely are different ways of knowing truth which is one’.⁹¹ This allows for the teaching of religious education, which would mean ‘approaching the many religions of the world with an attitude of understanding’.⁹² He stressed that this understanding of religion is essential for a multi-religious society such as India.

The *Aruna Roy* judgment was greeted by a chorus of disapproval from sections of the media and some commentators while the BJP welcomed it. The former feared that the State was preparing the ground for religious instruction in schools and that it was a blow to secularism in India. Martha Nussbaum is scathing in her criticism of the judgment: ‘Justice Manharlal Bhikalal Shah’s majority opinion is one of the weakest pieces of legal argumentation that has recently emerged from the Supreme Court of India.’⁹³ However, this sort of reading ignored the realities of constitutional secularism in India and its many inherent contradictions. Indeed, *Aruna Roy* is one of many judgments that mirror the complexities and contradictions of the Indian secular State. In *Aruna Roy*, the Court was, however, not concerned with the propriety of religious instruction. It sought to make a distinction between religious instruction and religious education or study of religion. This distinction, the Court pointed out, could be traced back to the Constituent Assembly debates. The distinction between religious instruction and religious education is also present in reports drafted by

prominent government-appointed commissions, including the Radhakrishnan and Kothari reports.

VI. CONCLUSION

Indian secularism was originally based on the ‘equal respect’⁹⁴ theory where the State respects and tolerates all religions. This might also be called the Nehruvian formulation of secularism. This is a position that oscillates between *sarvadharmā samābhava* (goodwill towards all religions) and *dharma nirpekshata* (religious neutrality). It is no secret that Jawaharlal Nehru saw religion as a force that checked the ‘tendency to change and progress’. But he did not let his personal convictions colour his conception of the secular State. He wrote, ‘A secular state does not mean an irreligious State: it only means that we respect and honour all religions giving them freedom to function.’⁹⁵ On another occasion, Nehru defined a secular State as one where there is ‘free play for all religions, subject only to their not interfering with each other or with the basic conceptions of our state’.⁹⁶ This conception of a secular State is what Rajeev Bhargava describes as ‘principled distance’, which he believes is the primary characteristic of Indian constitutional secularism. In this interpretation, a secular State ‘neither mindlessly excludes all religions nor is merely neutral towards them’.⁹⁷ Rajeev Dhavan offers yet another description of constitutional secularism by disaggregating Indian secularism into three components: religious freedom, celebratory neutrality and reformatory justice.⁹⁸

The constitutional provisions on religion thus make Indian secularism open-ended. It also leaves ample scope for play and internal tensions. This, of course, makes the task of the Court much more difficult than in secular democracies, where the separation between religion and State is better defined. The Court has usually preferred the language of uniformity in favour of one that is more sensitive to religious and legal pluralism. The essential practices doctrine can be seen as the Court’s attempt to discipline and cleanse religion or religious practices that are seen as unruly, irrational, and backward by putting the State in charge of places of religious worship. This has not only narrowed the ‘institutional space for personal faith’⁹⁹ but also marginalised popular religion. That the Court has been able to do so is due to the structure of Hinduism, where there is no organised church or authoritative religious text. At the same time, the Court has defined Hinduism in a manner that has precluded any exit options for

sects as well as aided in a homogeneous construction of religion. Both on the tolerance and neutrality fronts, Indian secularism, as interpreted by the courts, has not entirely lived up to what the makers of the Constitution envisioned.

¹ One of the early works to note the distinctiveness of Indian secularism was Donald E Smith, *India as a Secular State* (Princeton University Press 1963). Since then there has been much written on Indian secularism. See, for instance, Rajeev Bhargava (ed) *Secularism and Its Critics* (Oxford University Press 1999) and Anuradha Dingwaney Needham and Rajeswari Sunder Rajan (eds) *The Crisis of Secularism in India* (Permanent Black 2007).

² *Constituent Assembly Debates*, vol 10 (Lok Sabha Secretariat 1986) 439, 17 October 1949.

³ *Constituent Assembly Debates*, vol 10 (Lok Sabha Secretariat 1986) 447, 17 October 1949.

⁴ Constitution of India 1950, art 25:

- (1) Subject to public order, morality and health and to other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion.
- (2) Nothing in this article shall affect the operation of any existing law or prevent the state from making any law—
 - (a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice;
 - (b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes of and sections of Hindus.

⁵ Constitution of India 1950, art 26:

Subject to public order, morality and health, every religious denomination or any section thereof shall have the right—

- (a) to establish and maintain institutions for religious and charitable purposes;
- (b) to manage its own affairs in matters of religion;
- (c) to own and acquire movable and immovable property; and
- (d) to administer such property in accordance with law.

⁶ Pratap Bhanu Mehta, 'Passion and Constraint: Courts and the Regulation of Religious Meaning' in Rajeev Bhargava (ed) *Politics and Ethics of the Indian Constitution* (Oxford University Press 2008) 319. In the United States, for instance, there has been a series of landmark cases, including *Wisconsin v Yoder* 406 US 205 (1972) and *Employment Division v Smith* 494 US 872 (1990), where the American Supreme Court has had to sit in judgment on the centrality of a belief or practice for a religious group and whether there is a 'substantial burden' on the free exercise of religion.

⁷ Marc Galanter, *Law and Society in Modern India* (Oxford University Press 1997) 247.

⁸ In 1960, the Union government appointed a Hindu Religious Endowments Commission to report on the administration of Hindu religious endowments. In its report submitted in 1962, the panel recommended enactment of legislation for State supervision of temples in States that did not already have such laws.

⁹ Rajeev Dhavan and Fali Nariman, 'The Supreme Court and Group Life: Religious Freedom, Minority Groups, and Disadvantaged Communities' in BN Kirpal and others (eds) *Supreme But Not Infallible:*

Essays in Honour of the Supreme Court of India (Oxford University Press 2000). Since the essential practices test has been used, with a few exceptions, to judge the constitutionality of Hindu practices, this chapter primarily looks at the judicial discourse on Hinduism and Hindu practices.

¹⁰ AIR 1954 SC 282.

¹¹ For a background to the HRCE Act and the State's efforts to regulate temples, see Franklin A Presler, *Religion Under Bureaucracy: Policy and Administration for Hindu Temples in India* (Cambridge University Press 1987) and Chandra Y Mudaliar, *The Secular State and Religious Institutions in India: A Study of the Administration of Hindu Public Religious Trusts in Madras* (Franz Steiner Verlag 1974).

¹² *Commissioner, Hindu Religious Endowments, Madras* ([n 10](#)) [16].

¹³ *Davis v Beason* 133 US 333 (1890). Cited in *Commissioner, Hindu Religious Endowments, Madras* ([n 10](#)) [17].

¹⁴ *Commissioner, Hindu Religious Endowments, Madras* ([n 10](#)) [17].

¹⁵ (1943) 67 CLR 116, 127.

¹⁶ *Commissioner, Hindu Religious Endowments, Madras* ([n 10](#)) [17].

¹⁷ ILR 1953 Bom 1187.

¹⁸ *Ratilal Panachand* ([n 17](#)) 1193.

¹⁹ *Ratilal Panachand* ([n 17](#)) 1213.

²⁰ *Ratilal Panachand v State of Bombay* AIR 1954 SC 388.

²¹ *Commissioner, Hindu Religious Endowments, Madras* ([n 10](#)) [23].

²² *Commissioner, Hindu Religious Endowments, Madras* ([n 10](#)) [23].

²³ *Commissioner, Hindu Religious Endowments, Madras* ([n 10](#)) [20].

²⁴ *Commissioner, Hindu Religious Endowments, Madras* ([n 10](#)) [23].

²⁵ *Commissioner, Hindu Religious Endowments, Madras* ([n 10](#)) [20].

²⁶ Mudaliar ([n 11](#)) 186.

²⁷ *Ratilal Panachand* ([n 20](#)) [13].

²⁸ PK Tripathi, 'Secularism: Constitutional Provision and Judicial Review' in GS Sharma (ed) *Secularism: Its Implications for Law and Life in India* (NM Tripathi 1966).

²⁹ AIR 1961 SC 1402.

³⁰ According to the *khadims*, they were descendants of two followers of the twelfth-century Sufi saint Khwaja Moinuddin Chishti, whose tomb at Ajmer is known as the Durgah Khwaja Saheb. The *khadims* also claimed they belonged to a religious denomination known as the Chishtia Sufis.

³¹ *Durgah Committee* ([n 29](#)) [12].

³² *Durgah Committee* ([n 29](#)) [22].

³³ *Durgah Committee* ([n 29](#)) [33] (emphasis added). The distinction between religion (*religiosus*) and superstition (*superstitiosus*) can be traced back to Cicero's writings from the first century bce. See Pratap Bhanu Mehta, 'On the Possibility of Religious Pluralism' in Tom Banchoff (ed) *Challenges of Religious Pluralism in a Global Era* (Oxford University Press 2008) 67.

³⁴ JDM Derrett, *Religion, Law and the State in Modern India* (Oxford University Press 1996) 447.

³⁵ AIR 1963 SC 1638.

³⁶ *Tilkayat Shri Govindlalji Maharaj* ([n 35](#)) [43].

³⁷ *Tilkayat Shri Govindlalji Maharaj* ([n 35](#)) [57].

³⁸ *Tilkayat Shri Govindlalji Maharaj* ([n 35](#)) [59].

³⁹ (1943) 67 CLR 116.

⁴⁰ *Tilkayat Shri Govindlalji Maharaj* ([n 35](#)) [59].

⁴¹ Dhavan and Nariman ([n 9](#)) 260.

⁴² (1972) 2 SCC 1.

⁴³ See eg, *Sri Adi Visheshwaran of Kashi Nath v State of Uttar Pradesh* (1991) 4 SCC 606; *Bhuri Nath v State of Jammu and Kashmir* (1997) 2 SCC 745; *Shri Jagannath Puri Management Committee v Chintamani Khuntia* (1997) 8 SCC 422. A more recent case involving management of the Guruvayoor temple was *MP Gopalakrishnan v State of Kerala* (2005) 11 SCC 45.

⁴⁴ Dhavan and Nariman ([n 9](#)) 263.

⁴⁵ The Ananda Marga was founded in 1955 by a Bengali, Prabhat Ranjan Sarkar, who later came to be known by his followers as Shri Anandamurti. The organisation has had a controversial history and has in the past been accused of violent acts. Here I don't look at the legitimacy of the organisation but the logic of the Court's reasoning.

⁴⁶ (1983) 4 SCC 522.

⁴⁷ *Acharya Jagdishwaranand* ([n 46](#)) [14].

⁴⁸ *Commissioner of Police v Acharya Jagadishwarananda Avadhuta* (2004) 12 SCC 808.

⁴⁹ (2013) 6 SCC 513.

⁵⁰ *Orissa Mining Corporation Ltd* ([n 49](#)). In fact, the local elected body decided against the mining project.

⁵¹ Mehta ([n 6](#)) 330.

⁵² *Sastri Yagnapurushdasji* ([n 53](#)) [29].

⁵³ *Sastri Yagnapurushdasji* ([n 53](#)) [37].

⁵⁴ *Bal Patil v Union of India* (2005) 6 SCC 690.

⁵⁵ *Ramesh Yeshwant Prabhu* ([n 69](#)) [42].

⁵⁶ AIR 1966 SC 1119. For a close reading of the case, see Galanter ([n 7](#)) ch 10.

⁵⁷ *Sastri Yagnapurushdasji v Muldas Bhudardas Vaishya* AIR 1966 SC 1119 [1].

⁵⁸ *Sastri Yagnapurushdasji* ([n 53](#)) [50].

⁵⁹ *Sastri Yagnapurushdasji* ([n 53](#)) [26].

⁶⁰ *Sastri Yagnapurushdasji* ([n 53](#)) [26].

⁶¹ *Sastri Yagnapurushdasji* ([n 53](#)) [29] (emphasis added).

⁶² Galanter ([n 7](#)) 247.

⁶³ *Sri Venkatramana Devaru v State of Mysore* AIR 1958 SC 255.

⁶⁴ Robert D Baird, 'On Defining "Hinduism" as a Religious and Legal Category' in Robert D Baird (ed) *Religion and Law in Independent India* (Manohar Publishers 1993) 50.

⁶⁵ In *Ganpat v Returning Officer* (1975) 1 SCC 589 [11] the Court said:

It is necessary to remember that Hinduism is a very broad based religion. In fact some people take the view that it is not a religion at all on the ground that there is no founder and no one sacred book for the Hindus. This, of course, is a very narrow view merely based on the comparison between Hinduism on the one side and Islam and Christianity on the other. But one knows that Hinduism through the ages has absorbed or accommodated many different practices, religious as well as secular, and also different faiths.

⁶⁶ *DAV College, Bhatinda v State of Punjab* (1971) 2 SCC 261.

⁶⁷ *Bramchari Sidheshwar Shai v State of West Bengal* (1995) 4 SCC 646.

⁶⁸ Auroville is a township in Puducherry founded by a French follower of Aurobindo, M Alfasse, who is

also known as the Mother by Aurobindo devotees.

⁶⁷ *SP Mittal v Union of India* (1983) 1 SCC 51.

⁶⁹ *Ramesh Yeshwant Prabhu v Prabhakar Kashinath Kunte* (1996) 1 SCC 130.

⁷⁰ For a reading of the inclusivist and exclusivist discourses on Hinduism and their conflation by the Supreme Court, see Ronojoy Sen, *Articles of Faith: Religion, Secularism, and the Indian Supreme Court* (Oxford University Press 2010) ch 1.

⁷¹ *Commissioner of Wealth Tax, Madras v Late R Sridharan* (1976) 4 SCC 489. Here the Court said: 'It is a matter of common knowledge that Hinduism embraces within self [sic] so many diverse forms of beliefs, faiths, practices and worship it is difficult to define the term "Hindu" with precision.'

⁷² (1996) 1 SCC 130.

⁷⁴ This judgment was heavily criticised. See eg, Barbara Cossman and Ratna Kapur, *Secularism's Last Sigh? Hindutva and the (Mis)Rule of Law* (Oxford University Press 1999).

⁷⁷ *Chatturbhuj Vithaldas Jasani* ([n 75](#)) [49].

⁸⁰ *Rev Stanislaus* ([n 78](#)) [20].

⁷⁵ AIR 1954 SC 236.

⁷⁶ [1863] 9 MIA 199. The 1863 case was a dispute over property between the widow and brother of a native Christian, Matthew Abraham. Though there were several issues involved in the case, the primary one was deciding whether the succession to property was to be decided by the Hindu law of parcenership, as Matthew's brother wanted, or English heirship laws, as Matthew's widow demanded. The case, which went up to the Privy Council, was eventually decided in favour of Matthew's brother.

⁷⁸ (1977) 1 SCC 677.

⁷⁹ As a precursor to the Madhya Pradesh Bill, the State Government in 1954 had appointed a committee headed by a former Chief Justice of the Nagpur High Court, MB Niyogi, to inquire into Christian missionary activities. In its report submitted in 1956, the committee said, 'Conversions are mainly brought about by undue influence, misrepresentation, etc. or in other words not by conviction but by various inducements offered for proselytization in various forms.' *Report of the Christian Missionary Activities Enquiry Committee* (Government Printing 1956) 131. Among its recommendations was the prohibition of conversion through 'force or fraud, or threats of illicit means'. *Report of the Christian Missionary Activities Enquiry Committee* (Government Printing 1956) 167. It also recommended an amendment to the Constitution clarifying that the right to propagation was subject to the above conditions. The Orissa Act, which preceded the Madhya Pradesh legislation by a year, made its intent very clear when it stated in its statement of objects and reasons: 'Conversion in its very process involves an act of undermining another faith.'

⁸¹ HM Seervai, *Constitutional Law of India: A Critical Commentary*, vol 2 (4th edn, Universal Law Publishing 2002) 1289.

⁸² Constitution of India 1950, art 28:

- (1) No religious instruction shall be provided in any educational institution wholly maintained out of State funds.
- (2) Nothing in clause (1) shall apply to an educational institution which is administered by the State but has been established under any endowment or trust which requires that religious instruction shall be imparted in such institution.
- (3) No person attending any educational institution recognized by the State or receiving aid out of State funds shall be required to take part in any religious instruction that may be imparted in such institution or to attend any religious worship that may be conducted in such institution or in any premises attached thereto unless such person or, if such person is a minor, his guardian has given consent thereto.

⁸³ (2002) 7 SCC 368.

⁸⁴ (1971) 2 SCC 269.

⁸⁵ *National Curriculum Framework for School Education* (National Council of Educational Research and Training 2000) 18.

⁸⁶ *National Curriculum Framework for School Education* ([n 85](#)) 19.

⁸⁷ *National Curriculum Framework for School Education* ([n 85](#)) 14.

⁸⁸ Aruna Roy ([n 83](#)) [29].

⁸⁹ (1971) 2 SCC 269 [26].

⁹⁰ Aruna Roy ([n 83](#)) [56].

⁹¹ Aruna Roy ([n 83](#)) [58].

⁹² Aruna Roy ([n 83](#)) [58].

⁹³ Martha Nussbaum, *Democracy, Religious Violence, and India's Future* (Permanent Black 2007) 273.

⁹⁴ I borrow this term from Shefali Jha, 'Secularism in the Constituent Assembly Debates: 1946–50' (2002) 37(30) *Economic and Political Weekly* 3175.

⁹⁵ *Jawaharlal Nehru's Speeches*, vol 5 (Publications Division, Ministry of Information and Broadcasting, Government of India 1983) 59.

⁹⁶ Sarvepalli Gopal, *Jawaharlal Nehru: An Anthology* (Oxford University Press 1980) 327.

⁹⁷ Rajeev Bhargava, 'India's Secular Constitution' in Zoya Hasan, E Sridharan, and R Sudarshan (eds) *India's Living Constitution: Idea, Practices, Controversies* (Permanent Black 2002) 117.

⁹⁸ Rajeev Dhavan, 'The Road to Xanadu: India's Quest for Secularism' in Gerald Larson (ed) *Religion and Personal Law in Secular India* (Indiana University Press 2001).

⁹⁹ Subrata Mitra, 'Religion, Region and Identity: Sacred Beliefs and Secular Power in a Regional State Tradition of India' in Noel O'Sullivan (ed) *Aspects of India: Essays on Indian Politics and Culture* (Ajanta Publications 1997) 91.

CHAPTER 50

PERSONAL LAWS

FLAVIA AGNES

I. INTRODUCTION

WITH its rich and diverse cultural heritage, religious beliefs, and customary practices, India provides a vast, complex, and at times contradictory field of personal laws where the traditional coexists with the modern and the scriptural intermingles with the statutory. 'Personal laws' are a unique and distinct feature of the Indian legal structure. A study of these laws necessarily entails debates spanning pre-colonial, colonial, and post-colonial periods, and involves an intersectional reading of the customary, scriptural, and statutory. It also must involve an examination of the jurisprudential negotiations between community and State and between codified laws and fluid customs, within the framework of constitutionalism and legal pluralism.

This chapter is divided into three parts. First, it traces the legal architecture within which the realm of personal laws is located; it then examines the manner in which the courts have dealt with the challenges to the constitutionality of personal laws; finally, the chapter examines post-colonial legislative reforms, re-examines Article 44, and suggests ways of breaking the present stalemate while ensuring gender justice.

II. THE LEGAL ARCHITECTURE OF PERSONAL LAWS

1. Colonial Interventions

While examining the realm of personal laws, one needs to be familiar with the legal system introduced during the early part of the colonial rule when the diverse customary traditions followed by various sects and castes were transformed into a regime of religion-based personal laws.

The term ‘personal laws’ was first introduced in the Presidencies of Calcutta, Bombay, and Madras during the late eighteenth century, when the pre-colonial, non-State arbitration forums were transformed into State-regulated adjudicative systems. The transformation was at two levels: (i) through the introduction of a legal structure modelled on English courts, which were adversarial in nature (Anglo-Saxon jurisprudence); and (ii) through principles of substantive law which were evolved and administered in these courts (Anglo-Hindu and Anglo-Mohammedan laws).

The Charter of George I in 1726 authorised the establishment of mayor’s courts (courts of the King of England) at Calcutta, Bombay, and Madras. The Warren Hastings Plan of 1772 provided for the establishment of civil and criminal courts in each district (*mofussil* courts) and explicitly saved the right of Hindus and Muslims to apply their own personal laws in civil matters.¹ Article XXIII of the Plan stipulated that the laws of the Quran would apply with respect to the Mohammedans and those of *Shastras* with respect to the *Gentoos*.² At this juncture, it became imperative to categorise the pluralistic communities along their religious beliefs in order to apply to them ‘their’ personal laws. This set in motion a gradual process of homogenising the local customs, which could be regulated through the State machinery. The religious identities of various communities became rigid in the course of litigation over property disputes.³

The practice of saving personal laws of the natives, which started at this juncture, continued through all subsequent British Regulations. But the Charters were not clear whether the ‘native laws’ of Hindus and Muslims referred to their religious laws or customary usages. When the Company officers stepped in to arbitrate in civil and criminal disputes, due to their limited understanding of local customs, they relied on Hindu pandits and Muslim *qazis* to ascertain their respective laws. This set in motion the process of Brahminisation and Islamisation of laws.

In 1774, the mayor’s court of Calcutta was converted into a Supreme Court and in 1781, it was granted original civil jurisdiction over ‘natives’. It was laid down that in matters of inheritance, succession, land rent, goods, and all matters

of contract, their respective 'personal' laws should be applied.⁴ It was believed that the source of Hindu and Muslim laws were their religious texts. Hence, a wide range of customs that had no scriptural authority met with the disapproval of the administrators. The plurality of customs often led to the pandits expressing contradictory opinions, which resulted in a distrust of their opinions. The administrators were of the view that if the 'original' texts were made available, they could adjudicate directly, without the help of partisan and corrupt pandits and *qazis*, who were referred to as the 'native officers of the court'.

Since scriptures were unequivocally accepted as the 'source' of both Hindu and Muslim laws (in the mould of the Roman Canon law), translation of scriptures became the first priority for the political scheme of English administrators. The task of translating the ancient texts was viewed as an essential precondition to good governance. The process initiated by Hastings in the eighteenth century was carried forward by Jones, Halhed, Colebrooke, and Macnaghten. These translated texts became the basis of Anglo-Hindu and Anglo-Mohammedan laws in India.

The administrators of Bengal, in their fervour to trace the correct and original sources, totally disregarded local customs. But the Bombay Presidency Regulations of the same period, especially the 1799 Regulation (under John Duncan), did not follow the legal scheme devised by Hastings in Bengal. Here, the English distinction between 'King's Law' and 'Common Law' was applied instead of the Roman categorisation of 'Canon Law' (church law) and 'Civil Law', and custom was granted due recognition as an important source of law.⁵

All disputes between Hindus and Muslims were decided by the courts under civil law by applying to them their own 'personal' laws or the laws of the defendant in case of dispute. The term 'personal law', at this stage, was broader than 'family law', and included matters concerning caste, religious institutions, land rent, contract, etc, which were decided under the category 'civil law'. However, there was no mention as to how matrimonial disputes of other communities—for example, Parsis and Jews—would be decided. Hence, sometime in 1850, when a Parsi lady sued her husband for a decree of restitution of conjugal rights before the Supreme Court at Bombay, the case was heard on the ecclesiastical side of the Supreme Court. The Privy Council overruled this decision and held that it was impossible to apply the law of the diocese of London, a Christian law, to persons professing the Zoroastrian religion and the Supreme Court, in the exercise of its ecclesiastical jurisdiction, could not entertain a suit between Parsis for restitution of conjugal rights.⁶

To clear the ambiguity, in 1862, when the High Courts of Calcutta, Bombay,

and Madras were set up, the Letters Patent were issued, which entrusted the courts with the widest of civil powers. Clause 35 of the Letters Patent awarded the High Court matrimonial jurisdiction, but this was confined to Christian marriages. The jurisdiction to adjudicate over matrimonial disputes of other communities was awarded under Clause 12—civil jurisdiction that provided the scope to adjudicate over matrimonial disputes of all communities.

After the political upheaval of 1857, the administration of India shifted from the Company to the British Crown. The legal structure underwent a major change. The Supreme Courts in the Presidency towns of Calcutta, Bombay, and Madras, which operated with relative autonomy, were replaced by integrated High Courts, with the Privy Council as the final court of appeal. The Presidencies lost their autonomy and were joined into a unified imperial rule. The scheme of administration as developed in Bengal was made the basis for the unified administration of all the three Presidencies. The Bombay Presidency's treatment of self-governing groups and its acceptance of customary law gave way to the Bengal practice of viewing all groups as part of a unified Hindu and Muslim legal entity.

The new legal structure, based on the model of the English courts, necessitated the enactment of statutes. But the realm of the 'personal' was spared from the process of codification as per the assurance given in the Queen's Proclamation. Despite this, the Hindu and Muslim family laws went through great transformation during this period. The establishment of courts based on rules and procedures of English courts, with a clear hierarchy of courts, was meant to make the arbitration forums along the model of English courts. While at the initial stage scriptural law was awarded judicial recognition, later on, the British interpretations of the ancient texts became binding legal principles. Cohn argues that the process of publishing authoritative decisions in English transformed 'Hindu law' into a form of 'English case law' and brought colonial supremacy into the Indian legal field.⁷

2. The Rights of Women

With the introduction of matrimonial statutes for Christians and Parsis⁸ and certain statutes of common application,⁹ English legal principles were introduced within Indian matrimonial jurisprudence. In addition, English principles of justice, equity, and good conscience were used as direct channels for introducing English laws and practices into areas reserved as 'personal laws'. In 1887, in *Waghela Rajsanji v Shekh Masluddin*,¹⁰ while deciding an issue of guardianship, the Privy Council held that if there was no rule of Indian law which could be applied to a particular case, then it should be 'decided by equity and good conscience ...'¹¹ 'Equity and good conscience' were interpreted to mean the rules of English law, if found applicable to Indian circumstances. Later, this principle was used as a direct conduit for introducing English legal principles into Indian laws. This principle, along with the principle of 'public morality', was relied upon while curtailing the rights of women in various situations.

While examining these developments through the prism of women's rights, the manner in which women lost out many of their customary or scriptural rights becomes evident. One important arena where women lost their rights was the realm of *stridhan* property, a traditional concept under Hindu law, recognised by both customary and scriptural law. The decisions of various High Courts as well as the Privy Council granted women limited rights over their *stridhan* property and reverted the property back to the male heirs of their husbands, in contrast to scriptural dictates, which awarded a line of succession to *stridhan* property through the female line of descendants. The British administrators, familiar with the system of denial of property rights to married women in England, could not grasp the complex system of *stridhan* property and caused great harm to women's rights.¹² To undo the harm caused by these adverse rulings of the Privy Council, in 1937, the Hindu Women's Rights to Property Act was enacted, which awarded a limited right of inheritance to Hindu widows. Around this time other important statutes which were enacted were the Muslim Personal Law (Shariat) Application Act 1937, presumably to protect the property rights of women enshrined in the Quran, the Dissolution of Muslim Marriages Act 1939, which granted Muslim women the right of statutory divorce, and the Parsi Marriage and Divorce Act 1936, a re-enactment of the earlier statute enacted in 1865 to widen the grounds of divorce.

It is interesting to observe how women negotiated their agency in matters of sexual choice, exploiting the legal loopholes and the implications of exercising this choice within the new legal structure. Bound by the stringent laws of their own religious communities, many women resorted to conversion to get away from their oppressive marriages and to contract marriages of choice. There were many instances of Hindu, Parsi, Christian, and Jewish women converting to Islam and marrying Muslim men, under the mistaken notion that conversion dissolves their earlier marriage. But applying the principle of justice, equity, and good conscience, the women were convicted for bigamy.¹³ In *Robasa Khanum v Khodadad Bomanji Irani*,¹⁴ where a Parsi wife who had converted to Islam was convicted, it was held that since there was no law which could be applied to her, the case must be decided on principles of justice and right or equity and good conscience.

Another way in which women negotiated their rights was to claim a non-*shastric* status. In order to protect their rights, several women from various Dravidian communities claimed a *shudra* status and pleaded that they were outside the pale of the Brahminical *smriti* code. In *Subbaratna Mudali v Balakrishnaswami Naidu*,¹⁵ the Madras High Court held that dancing girls were *shudras* and hence *smriti* law cannot be applied to them. As per their custom, daughters were entitled to inherit in preference to sons. The Court also recognised the right of women to adopt girls. But in several other cases decided by the Bombay and Calcutta High Courts, it was ruled that the custom of adopting daughters by dancing girls was immoral and against public policy.¹⁶ Contrary to popular perception, the process of modernisation and introduction of English legal principles into Indian law did not always benefit women.

3. Post-Independence Hindu Law Reforms

After the coming into force of the Indian Constitution in 1950, the first laws to be enacted along a religious identity were the Hindu law reforms of the 1950s. While this can be construed as violations of Articles 14 and 15 of the Constitution (equality and non-discrimination on the basis of religion), the reforms need to be viewed in the context of the pressing need for granting rights to Hindu women, who were lagging behind women of other religious groups. Hence the social reformers galvanised the campaign in the decade immediately preceding Independence and sustained the pressure until the reforms were brought about in the mid-1950s.¹⁷

The main focus of the reforms were to transform sacramental Hindu marriages into contractual obligations by introducing divorce and other matrimonial remedies along the lines of the English matrimonial laws, and to grant women equal inheritance rights. The reforms met with severe opposition from conservative nationalist leaders, who opposed the notion of divorce as well as the concept of granting property rights to women, but the reforms were pushed ahead, foregrounding the liberation of women as its primary plank.¹⁸ However, the codified laws continued to reflect patriarchal ideology and validated Hindu rituals. The reforms privileged modernisation, codification, and unification as key elements of progress and development. Hence, several pro-women customary practices were discarded for the sake of uniformity.¹⁹ The reforms did not introduce any principle which had not already existed somewhere in India. Despite this, they were projected as a vehicle for ushering in western modernity.²⁰

Since the political impediment to reform the Hindu law was grave, several balancing acts had to be performed by the State. Crucial provisions empowering women had to be constantly diluted to reach the level of minimum consensus. While projecting the reforms as pro-women, male privileges had to be protected. While introducing modernity, archaic Brahminical rituals had to be retained.²¹ While claiming uniformity, diverse customary laws had to be validated. While usurping the power exercised by religious heads, the needs of emerging capitalism had to be secured. Only by adopting such manoeuvring tactics could the State reach its goal of enacting the statutes. The Acts were neither Hindu in character nor based on modern principles of equality, but reflected the worst tendencies of both. As Menski, a leading scholar of Hindu law, argues:

In social reality, all that happened was that the official Indian law changed, while more and more of Hindu law went underground, populating the realm of the unofficial law ... The conceptual framework and ideologies underpinning multiple ways of life, and hence the entire customary social edifice of Hindu culture, remained largely immune to the powerful wonder drug of legal modernization which had been administered in measured doses before and after 1947.²²

Menski further argues that Hindu law has always been a people's law.²³ Hence, something as complex as Hindu personal law could not be reformed away and abolished by a statute, nor could its influence as a legal normative order that permeates Indian social life be legislated into oblivion. As Hunt and Wickham suggest, law is not, in contrast to typical perceptions in legal theory, a unitary phenomenon.²⁴

III. THE CONSTITUTIONALITY OF PERSONAL LAWS

The tension between plurality of legal norms and the desire to impose unity comes to the foreground when we examine the constitutional challenges to the diverse personal laws during the post-Independence period. The interface between provisions of equality and non-discrimination enshrined in the Constitution and the prevalence of gender-discriminatory personal laws has led to a contestation between individual claims to equality, and the right of religious communities as collective units of a democracy.

The validity of laws is contingent upon them meeting the criteria prescribed under Article 13(1) of the Constitution, which stipulates that all laws in force in the territory of India immediately before the commencement of the Constitution, insofar as they are inconsistent with the provisions of [Part III](#), shall, to the extent of such inconsistency, be void. As per Article 13(3)(a), 'law' includes custom or usage having the force of law. This stipulation must be read along with Article 372(1), which mandates that all laws in force immediately before the commencement of the Constitution shall continue in force until altered or repealed or amended by a competent legislature or authority. The phrase 'laws in force' is clarified in Explanation 1 to this Article and means a law made by a competent authority and has practically the same meaning as the expression 'existing law', as defined in Article 366(10) of the Constitution. As per this formulation, any law that is in conflict with fundamental rights can be declared as void. Hence, if any law or legal provision violates the mandate of equality (Article 14), non-discrimination (Article 15), or the right to life and personal liberty (Article 21), courts have the power to strike it down.

However, this straitjacket formula does not take into account the complex phenomenon of personal laws, which exist within the realm of pluralistic traditions and a multicultural ethos, where the people's law coexists alongside the written Constitution and becomes a source of law. [Part III](#) of the Constitution itself validates these pluralistic traditions, safeguards diversity, and protects minority cultures (Articles 25–30). Group rights are awarded equal legitimacy and recognition as individual rights. This renders the task of judicial review extremely daunting and warrants a cautious approach. While grappling with this complexity, Indian courts have adopted various approaches. Initially, courts adopted an approach of non-interference, holding that personal laws are not amenable to the test of [Part III](#) of the Constitution and hence cannot be tested against the grain of fundamental rights. There appears to have been an apprehension that the judicial verdict might encroach upon legislative prerogatives or impinge upon group rights. Conversely, in later years, a newer trend has evolved, and courts have tested personal laws on the touchstone of fundamental rights and have attempted to reconcile them, by reading them down or interpreting them so as to render them consistent with fundamental rights, or have struck down the offending provisions as violative of fundamental rights. These distinct approaches are examined below.

1. The Non-Interventionist Approach

The fountainhead for the judicial premise that personal laws are not ‘laws in force’ and that they cannot be tested against the touchstone of fundamental rights is a judgment of the Bombay High Court delivered in 1952, by an illustrious bench of Chagla CJ and Gajendragadkar J, in *State of Bombay v Narasu Appa Mali*.²⁵

This judgment was of the pre-Hindu law reform period. The petitioner had challenged the norm of monogamy brought about by the Bombay Prohibition of Bigamous Marriages Act 1946, which prohibited bigamy among Hindus while permitting the same among Muslims, and pleaded that it violated the provisions of equality and non-discrimination under the newly enacted Constitution. While upholding the validity of this social legislation, the Bombay High Court ruled that personal laws are not ‘laws in force’ under Article 13 of the Constitution as they are based on religious precepts, hence the principles enshrined in [Part III](#) of the Constitution cannot be applied to them.

The judgment made no distinction between statutory and non-statutory personal laws and took a categorical position that all ‘personal laws’ are not ‘laws’ within the scope of Article 13. Though this ruling is of a High Court, and not of the Supreme Court, which would be binding on all lower courts, it seems to have dominated all subsequent judicial discourse on the constitutional validity of personal laws, either to concur or to distinguish from it. For several decades, it became a stumbling block to test the constitutionality of personal laws, as several courts followed the principle laid down by this ruling, even while examining discriminatory provisions in statutory personal laws. Several legal scholars have been critical of this judgment, arguing that the Bombay High Court shirked from its responsibility of examining the discriminatory provisions of personal laws against the touchstone of the newly enacted Constitution.²⁶

In a departure from this ruling, Krishna Iyer J provided clarity on the question of constitutionality in *Assan Rawther v Ammu Umma*,²⁷ by holding that:

Personal law ... is law by virtue of the sanction of the sovereign behind it and is, for that very reason, enforceable through court. Not Manu nor Mohammed but the monarch for the time makes ‘personal law’ enforceable ... Hindu and Mohammedan laws are applied in courts because of old regulations and Acts charging the courts with the duty to administer the personal laws and not because the ancient law-givers obligate the courts to enforce the texts.²⁸

In 1983, in an important ruling, *T Sareetha v T Venkata Subbaiah*,²⁹ the Andhra

Pradesh High Court struck down Section 9 of the Hindu Marriage Act 1955, which dealt with restitution of conjugal rights as unconstitutional. While the wording of the section did not discriminate against women, and the provision applied equally to men and women, PA Choudary J emphasised the social context of its operation and held that the provision violates the right to privacy and human dignity guaranteed under Article 21 of the Constitution. It has the impact of denying a woman her free choice whether, when, and how her body is to become the vehicle for the procreation of another human being. But in 1984, the Delhi High Court, in *Harvender Kaur v Harmander Singh Choudhry*,³⁰ upheld this provision, invoking the legal dictum that personal laws are immune to the test of [Part III](#) of the Constitution:

Introduction of constitutional law in the home is most inappropriate. It is like introducing a bull in a china shop. It will prove to be a ruthless destroyer of the marriage institution and all that it stands for. In the privacy of the home and the married life, neither Article 21 nor Article 14 have any place.³¹

Later in the same year, the Supreme Court, in *Saroj Rani v Sudarshan Kumar Chadha*,³² affirmed the ruling of the Delhi High Court and overruled the more progressive verdict of the Andhra Pradesh High Court.

Another important judgment in this realm, while not directly relating to gender justice but implicating broader questions of social justice, is *Shri Krishna Singh v Mathura Ahir*.³³ Here the Supreme Court was faced with the question of whether a *shudra* could become a *sanyasi*. Giving primacy to custom and usage over scriptural law, the Court ruled that if custom and usage permitted, he could become a *sanyasi*, but in the absence of such usage, he could not be ordained. The High Court had held that any handicap suffered by a *shudra* according to personal law would be in violation of Articles 14 and 15 of the Constitution and would amount to discrimination on the basis of caste. The Supreme Court overruled this decision with the following comments:

In our opinion, the learned judge failed to appreciate that [Part III](#) of the Constitution does not touch upon the personal laws of the parties. In applying the personal laws of the parties, he could not introduce his own concepts of modern times but should have enforced the law as derived from recognised and authoritative sources of Hindu law ... as interpreted in the judgments of various High Courts, except, where such law is altered by any usage or custom or abrogated by a statute.³⁴

In a case nearly two decades later, *Madhu Kishwar v State of Bihar*,³⁵ the constitutionality of certain provisions of the Chhota Nagpur Tenancy Act 1908, which disentitled tribal women from inheritance rights, was challenged. The Supreme Court was unwilling to declare that the custom of inheritance, which disinherited the daughter, offended Articles 14, 15, and 21 of the Constitution,

on the ground that customs differ from tribe to tribe and region to region and the tribal community may not as yet be ready for reform. However, granting limited relief, it was held that a destitute woman could assert her right of occupation against the male inheritors. While the Court refused to declare tribal customs en masse as offending fundamental rights, it kept the doors open for future challenges by holding that the issue can be examined on a case-by-case basis as and when it comes for review.³⁶ Similar reluctance was visible when the Supreme Court declined to engage the question of constitutionality upon the filing of a public interest petition by the Ahmedabad Women's Action Group.³⁷ The petitioners had challenged various discriminatory aspects of Muslim law, including polygamy and triple talaq. While dismissing it without examining its merits, the three-judge bench ruled that it was not within the jurisdiction of the courts to make laws for social change and that State policy was the function of the legislature.

2. The Scrutinising Approach

When we examine rulings of later decades, we can clearly see the influence of *Narasu Appa Mali* gradually wearing out, with courts increasingly testing personal laws against the touchstone of fundamental rights. The approach adopted has been to either ‘read down’ a statutory provision, to reinterpret it in harmony with [Part III](#) of the Constitution, or to strike down the offending section.

In *Mary Roy v State of Kerala*,^{[38](#)} the Travancore Christian Succession Act 1916 was challenged on the ground of discrimination against women. Under the Travancore Christian Succession Act 1916, the share of the daughter was limited to one-fourth share of the son or Rs 5,000, whichever was less. Adopting the harmonising approach, the Supreme Court struck down the discriminatory provisions, based on a technical ground that after Independence, the laws enacted by the erstwhile Princely States, which were not expressly saved, had been repealed.^{[39](#)}

Challenges also took place with regard to marriage and divorce. Section 10 of the Indian Divorce Act 1869 stipulated that while a husband could obtain divorce only on the ground of adultery, the wife had to prove additional grounds such as cruelty or desertion. Adultery, though a mandatory ground, was considered not to be a sufficient ground of divorce. Under other matrimonial laws, the parties could obtain divorce by pleading the sole grounds of cruelty, desertion, or adultery. Since adultery is extremely difficult to prove, and not all husbands who treat their wives with cruelty or desertion also commit adultery, Christian women faced great hardships. The discrimination was at two levels, a gender-based discrimination between men and women, and also the discrimination based on an unreasonable classification of treating Christian women as a separate category as compared with women from other communities.

One of the first instances when this discriminatory provision was challenged was in 1953, in *Dr Dwaraka Bai v Professor Nainam Mathews*.^{[40](#)} The petitioner pleaded before the Madras High Court that the stipulation violated the constitutional guarantee of equality under Article 14. However, the Court ruled that the discrimination was based on reasonable classification as it took into consideration the ability of men and women and the results of their acts of adultery, and was not merely based on sex. It held that the consequences of adultery by a husband were different from the consequences of adultery by a wife: A husband ‘does not bear a child ... and make it a legitimate child of his

wife's to be maintained by the wife ... But if the wife commits adultery, she may bear a child as a result of such adultery, and the husband will ... be liable to maintain that child ...'⁴¹

In 1995, however, in a landmark judgment, *Ammini EJ v Union of India*,⁴² the full bench of the Kerala High Court struck down the offending provisions as arbitrary and violative of Article 21 of the Constitution. The Court held:

The legal effect of the above provisions in s. 10 [of the Indian Divorce Act] ... is to compel the wife who is deserted or cruelly treated, to continue a life subject to a relationship which she hates ... [Such a life] will be a sub human life without dignity and personal liberty. It will be a humiliating and oppressed life without the freedom to remarry and enjoy life in the normal course ... such a life can legitimately be treated only as a life imposed by a tyrannical or authoritarian law on a helpless deserted or cruelly treated Christian wife quite against her will ... the impugned provisions in Section 10 in so far as it obliges ... Christian wives to prove adultery along with desertion and cruelty is violative of Art. 21 of the Constitution of India ...⁴³

Later, the Bombay,⁴⁴ Delhi,⁴⁵ and Karnataka⁴⁶ High Courts also struck down this discriminatory provision. In 2001, the archaic Act itself was amended, in keeping with contemporary developments.⁴⁷

The right of Hindu women to execute a will in respect of the property acquired or possessed by them, under section 14 of the Hindu Succession Act 1956, was at issue in *C Masilamani Mudaliar v Idol of Sri Swaminathaswami Thirukoil*.⁴⁸ Adopting a liberal-rights-based approach, the apex court ruled that the right of women to eliminate all kinds of gender-based discrimination, particularly in respect of property, is implicit in Articles 14, 15, and 21 of the Constitution. These provisions constituted 'the trinity of justice, equality, liberty and dignity'.⁴⁹ The Supreme Court further stated:

The personal laws conferring inferior status on women is anathema to equality. Personal laws are derived not from the Constitution but from the religious scriptures. The laws thus derived must be consistent with the Constitution lest they become void under Article 13 if they violate fundamental rights.⁵⁰

The stipulation under the Hindu Minority and Guardianship Act 1955 that the father is the natural guardian of the child was challenged in *Githa Hariharan v Reserve Bank of India*.⁵¹ Rather than delivering a finding of unconstitutionality, the Supreme Court used the interpretive tool of 'reading down' the law to include the mother also as the 'natural guardian' of a child.

Another significant ruling in this realm, though not within the scope of gender justice, is *John Vallamattom v Union of India*,⁵² where a three-judge bench

headed by VN Khare CJ struck down Section 118 of the Indian Succession Act 1925, a pre-constitutional personal law applicable to Christians.⁵³ The case concerned a Christian priest's personal freedom to make a bequest of a religious-charitable nature, which was curtailed by the offending section. The apex court struck down the provision as being arbitrary and discriminatory, and therefore violative of Article 14 of the Constitution. The Court also relied on the Declaration on the Right to Development, adopted by the World Conference on Human Rights, to which India is a signatory, and on Article 18 of the International Covenant on Civil and Political Rights 1966 which stipulates:

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching ... 3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

The Court proceeded to note that:

[E]ven if a provision was not unconstitutional on the day on which it was enacted or the Constitution came into force, by reason of facts emerging out thereafter, the same may be rendered unconstitutional ... The right of equality of women vis-à-vis their male counterparts is accepted worldwide. It will be immoral to discriminate a woman on the ground of sex ... It is no matter of doubt that marriage, succession and the like matters of a secular character cannot be brought within the guarantee enshrined under Articles 25 and 26 of the Constitution. Any legislation which brings succession and the like matters of secular character within the ambit of Articles 25 and 26 is a suspect legislation ...⁵⁴

A major issue of controversy within personal laws has been the rights of divorced Muslim women to claim maintenance. The constitutional validity of the Muslim Women (Protection of Rights on Divorce) Act 1986 was challenged in *Danial Latifi v Union of India*.⁵⁵ This law was passed after the controversial ruling in the *Shah Bano* case,⁵⁶ where the Supreme Court had upheld the right of a divorced Muslim woman for post-divorce maintenance under Section 125 of the Code of Criminal Procedure. Some adverse comments against Islam and the Prophet led to a backlash within the orthodox Muslim community and, under pressure, the then ruling Congress government enacted a law to exempt divorced Muslim women from the purview of the secular provision of maintenance. This move was perceived as retrograde by human rights groups, who challenged its constitutional validity. In the intervening years, several High Courts had given a positive interpretation to its provisions, to secure the rights of divorced Muslim women, against which aggrieved husbands had filed appeals in the Supreme

Court. These appeals, as well as the petitions challenging the constitutional validity of the enactment, were heard together and the apex court upheld the enactment by inscribing it with a gender-sensitive interpretation and dismissed the appeals filed by the aggrieved husbands. According to the Court, the new Act had substituted the earlier right of recurrent maintenance under Section 125 of the Code of Criminal Procedure, with a new right to claim a lump sum amount as a divorce settlement. If the husband failed to make such a settlement, a divorced Muslim wife had the right to approach the court for enforcement of the right under Section 3 of the Act. This ruling thus recognised the rights of divorced Muslim women.

Another important intervention in the realm of Muslim law has been the Supreme Court ruling in *Shamim Ara*,⁵⁷ which invalidated arbitrary divorce and laid out clear guidelines as per Quranic injunctions for pronouncing talaq, so that Muslim women are not deprived of their right of maintenance while proceedings are pending in court. This ruling outlawed the fraudulent tactics adopted by lawyers, of sending a *talaqnama* (divorce deed) along with their reply to the maintenance application, under a misconceived notion that a divorced Muslim woman is not entitled to maintenance or economic settlement. Here the Supreme Court upheld the Quranic stipulation and overruled the interpretations of various legal texts of Muslim law, as well as the rulings of colonial courts, in defence of gender justice. The judgment relied upon the much-acclaimed judgment of Krishna Iyer J in *A Yousuf Rawther v Sowramma*,⁵⁸ which had held that:

The interpretation of a legislation, obviously intended to protect a weaker section of the community, like women, must be informed by the social perspective and purpose and, within its grammatical flexibility, must further the beneficent object... The view that the Muslim husband enjoys an arbitrary, unilateral power to inflict instant divorce does not accord with Islamic injunctions ...⁵⁹

The recent Supreme Court ruling in *Vishwa Lochan Madan v Union of India*,⁶⁰ which, while not invalidating *fatwas* and rulings of *Sharia* courts, has held that their decisions are not binding even upon the persons seeking them. This is another instance of reinterpreting Muslim law to weave in gender justice by invalidating anti-women *fatwas*, while not negating the rights of the community to manage its cultural and religious affairs as per Articles 25–28 of the Constitution.

IV. THE UNIFORM CIVIL CODE DEBATE

1. Post-Independence Reforms within Personal Laws

Legislative initiatives to engage with the challenging task of reforming the existing personal laws or enacting newer ones, in consonance with [Part III](#) of the Constitution, have been few and far between. Within a multicultural and pluralistic society, legislative interventions have been initiated largely due to the demands from within the concerned communities. The major legislative reforms have been the Hindu law reforms of the 1950s, which was a long-drawn-out and extremely contentious process spanning over fifteen years, and was spearheaded by social reformers. Though the enactments codified the Hindu laws, they did not bring in equality, gender justice, or uniformity and provided a statutory recognition for the diverse customs and usages followed by various sects, communities, and regions.

For instance, under Section 5 of the Hindu Marriage Act, which stipulates conditions for contracting a Hindu marriage, and under Section 7, which prescribes the ceremonies for performing a valid Hindu marriage, customs and usages have been awarded due recognition, even while prescribing the Brahminical rituals such as *vivaha homa* (the sacrificial fire), *saptapadi* (seven steps round the fire), and *kanyadan* (offering the bride to the groom) as essential ceremonies (this ritual reinforces the notion that women are a property to be handed over from fathers to husbands).

While Section 13 of the Act provides for a judicial divorce, Section 29(2) validates customary divorces. The provision for registering a marriage under Section 8 is optional. Hence, despite the law being codified, a Hindu need not approach any State authority, either for solemnising the marriage or for dissolving it, a position not very different from that existing under the uncoded Muslim law. Only through retaining the fluidity of customs of the pluralistic Hindu society could the reforms be pushed through.

The law of inheritance also contained several discriminatory provisions. Under the Hindu Succession Act 1956, the notion of Hindu Undivided Family (HUF) property was retained due to severe opposition to its removal from conservative segments on the basis that it would result in fragmentation of landholdings. The advantage of this arrangement was to the Hindu male, as women were excluded from inheritance of ancestral property. After a sustained struggle, in 2005 the Act was finally amended granting women the status of a coparcener. While this is an important right, it is more cosmetic, as property continues to be consolidated in the hands of male relatives. The tax benefits

awarded to HUF property (a concept unique to Hindu law) have been retained, despite the privileged position it awards exclusively to Hindus.

Reforms within laws governing minority communities have been even more difficult to come by. As discussed above, the Muslim Women's Act was enacted due to the pressure from the Muslim orthodoxy, to undo the verdict in the *Shah Bano* case, despite opposition to it from progressive sections within the Muslim community. Due to this, the pro-women interpretation of this statute providing divorced Muslim women lump sum post-divorce settlements by various High Courts was overlooked, both by the media and the human rights groups. However, the final seal of approval by the Supreme Court in *Danial Latifi* upholding its constitutional validity has laid to rest this controversy.

The Christian law reforms were spearheaded by Christian women, united across various Christian denominations, which negotiated with the State as well as the religious leaders, over a span of two decades to bring about much-needed reforms within the archaic Indian Divorce Act of 1869. Finally, in 2001, the law was amended and egalitarian grounds of divorce were introduced. The Parsi law reforms, which were introduced in 1988, were spearheaded by legal scholars from the community, as well as community leaders from the Parsi *panchayat*. While the provisions of the Parsi Marriage and Divorce Act 1936 have been brought on par with the provisions of the Hindu Marriage Act, the system of a Parsi matrimonial court, where members of the community are invited to be on the jury, a system abolished in all other courts, still prevails. Some archaic provisions such as that allowing the property of an adulterous wife to be settled in favour of her children have been retained (Section 50 of the Act).

The much-needed provisions regarding women's rights to matrimonial property or division of matrimonial assets at the time of divorce, which have become part of family laws in many countries, have not been introduced in India. The only place where they exist is in the Goan Civil Code, introduced by the Portuguese.

2. The Challenges for Enacting a Uniform Civil Code

It is within this background of the difficulties encountered while bringing legislative reforms to reconcile personal laws with [Part III](#) of the Constitution that we must approach the controversy surrounding the Uniform Civil Code (UCC), incorporated in Article 44 of the Constitution as a Directive Principle of State Policy.

The genesis of the demand for a uniform family law is situated within the nationalist women's groups of the pre-Independence era, who raised this issue in the context of gender justice within the larger political debates of the Indian National Congress. At the time, the UCC was perceived to be an optional code, which could gradually replace the various personal laws. A decade later, within the Constituent Assembly debates, the focus shifted to the concerns of nation building. At this historical juncture of India's freedom, the overarching concern of the founding fathers was the formation of the new nation-state and its smooth governance. Within this paradigm, the provision of a UCC was debated primarily in the context of the authority of the State to regulate civil life and family relationships of the majority and the right of minorities to their cultural identity. Within the political turmoil surrounding the partition of the country and the bloodbath that followed, an insecure Muslim minority had to be reassured of their right to religious and cultural freedom.

What emerges is a duality of concerns for the newly evolving Indian State. At one end, it was deemed necessary that the various sects, castes, and tribes—from the erstwhile Princely States, tribal kingdoms, and the British Raj—were to be integrated by enacting a uniform set of family laws by introducing a concept of 'legal Hinduism'.⁶¹ The flip side of this objective of smooth governance was an assurance to minorities (not just Muslims, but also Christians, Parsis, Jews, and tribal communities) of their right to their separate religious and cultural identity, symbolised by the continuance of their personal laws or customary practices, by incorporating Articles 25–28 as fundamental rights. In the years immediately following Independence, the issue of enacting a UCC did not figure in any important national debate. While enacting a code for Hindus, the attempt was not to abandon ancient scriptural law or established community customs but to assimilate them within a Code along with principles of English law and, while doing so, establish the lawmaking authority of the newly independent nation, which was, until then, vested with the heads of various religious sects.⁶²

Despite this, the misconception that Hindus have forsaken their personal laws and have embraced a secular, egalitarian, and gender-just code—which must now be extended to minority communities to liberate 'their' women—persists. Adverse comments in some Supreme Court rulings have added fuel to this tension. For instance, in *Sarla Mudgal*,⁶³ while examining the issue of polygamy by Hindu men converting to Islam, the Supreme Court endorsed this view and noted that the oneness of the nation, as well as loyalty to it, would be at stake if different minority groups followed different family laws. It is a matter of debate whether a UCC will ensure national integration and communal harmony.

However, such comments are often sensationalised in the media and pose unsurmountable obstacles in the path of family law reforms from the perspective of gender justice.

Within the complex constitutional scheme, a UCC also faces other challenges. The legislative power to enact family laws is placed in the Concurrent List (Entry 5, List III of the Seventh Schedule). Therefore, both Parliament and State legislatures are vested with this power. Since the Constitution provides for a federal structure, depriving the States of this power through the enactment of one set of rigid and uniform family laws might invite concerns about the dominance of the Centre over the States. In addition, it could impact relations with the NorthEastern States, which are further protected through specific constitutional guarantees of protection of customary laws under Article 244(2) and the Sixth Schedule. A specific protection is also awarded to customary rights of tribal communities under Article 244(1) and the Fifth Schedule. In addition, Article 371 grants special status to various NorthEastern States, through which special protection is awarded to customary laws and the tribal councils, which are autonomous bodies empowered to administer civil and criminal laws, as per the customs of the tribe.

There is great diversity in the customs and practices of tribes. However, most tribal councils function from patriarchal assumptions and forbid women from participating in decision making in the public sphere, despite the relatively higher status enjoyed by women within the domestic sphere. This also applies to traditionally matrilineal tribes, such as Khasis, Garos, and Jaintias. The State policies of development have resulted in the concentration of economic power in the hands of male elites, which has led to an economic imbalance affecting the rights of women. The situation is complex, and women are staking their claim for better political participation. However, they do not view the UCC as a solution to their problems, as it will further complicate matters and render access to justice even more challenging. The choice before them is to navigate between the tribal customary laws and the formal judicial system.⁶⁴

Finally, the State of Goa, which has a UCC introduced by the erstwhile Portuguese regime, also follows a unique system of community of property, which has its own challenges but may not be amenable to the idea of a UCC enacted by the Centre.

V. CONCLUSION: THE WAY FORWARD

An incremental approach towards uniform rights appears to be the most effective strategy to break away from the communally vitiated identity politics within which the controversy over the enactment of a UCC appears to be entrapped. The Special Marriage Act 1954, which is an optional law of marriage, suffers from disuse due to its stringent procedure for registering a marriage. No effort has been made to make this law relevant to those venturing into interreligious marriages, which have now been given a communally tinted term—*love jihad*. Thus, despite the existence of this Act, conversion and hasty marriages seem to be the only option for those venturing into marriages of choice against the wishes of their parents, since within a communal atmosphere, the one-month notice period stipulated under the Act may pose a threat to life to the couple. There is consequently an urgent need to modernise and popularise this statute.

Another strategy to break the stalemate is to enact specific legislation, which will apply to women uniformly across communities. The Protection of Women from Domestic Violence Act 2005 is an example of such a law. This legislation has reframed women's rights within the family by introducing the statutory right to shelter and to a violence-free life. Women in various situations—married women, divorcees, widows, those in 'marriage-like' relationships, and in natal families—can access its provisions. The statute adopts an inclusive, rights-based approach. The Prohibition of Child Marriage Act 2006 is another statute which prescribes a uniform age of marriage. It does not invalidate marriages, but provides for their dissolution within two years of their solemnisation and protects the rights of women and children. It is a prudent measure, as it will not render the marriages of minor girls invalid, nor deprive women of their right of maintenance and legitimacy. The provisions under Section 125 of the Code of Criminal Procedure, the Domestic Violence Act and the Muslim Women's Act, have helped to secure the maintenance rights of women across communities. The outlawing of triple talaq in the *Shamim Ara* ruling has proved to be an additional armour for the protection of Muslim women's rights. With these developments there appears to be a gradual but definitive move towards uniformity of rights.

One major area of disgruntlement, as evidenced in *Narasu Appa Mali*, continues to the present, namely the perceived 'appeasement' of Muslims by privileging them with the option of bigamy/polygamy and the resulting disentitlement caused to Hindus through the imposition of monogamy.⁶⁵ This discontentment gets projected in public discourse as a concern for the pitiable plight of Muslim women, who need to be liberated from their barbaric laws through the enforcement of a UCC. However, outlawing polygamy by enacting a UCC or codifying Muslim law does not appear to be an effective solution to the problem, as evidenced by the prevalence of bigamy among Hindus. Official

reports reveal that despite the statutory restraint, incidents of bigamy are more common among Hindus (a term which includes Buddhists, Jains, Sikhs and other reform sects) than Muslims.⁶⁶ Ironically, the worst sufferers of this trend have been Hindu women, who are denied their basic right of maintenance and sustenance, when the husband pleads that the woman is his second wife.⁶⁷ In comparison, a Muslim woman in a bigamous marriage fares better than her Hindu counterpart, since she is entitled to rights of maintenance, shelter, dignity, and equal status. The Hindu second wife is not only disentitled of her rights, but is also divested from her status as 'wife' and humiliated as 'mistress', 'keep', or 'concubine' in judicial discourse. The adverse comments by Katju J in *D Velusamy* are an example of such an attitude.⁶⁸ Contrary to the feeling of perceived disentitlement, it is the Hindu husband who enjoys the privileged position of denying maintenance to a woman with whom he has cohabited, and who may even have given birth to children, merely by pleading during court proceedings that he has violated the mandate of monogamy without any criminal consequences visiting him. A Muslim husband in a polygamous relationship cannot similarly escape from his legal obligation of providing maintenance to each of his wives, since the option of pleading that he has divorced her and hence he is not obligated to maintain her has been removed through the *Danial Latifi* and *Shamim Ara* rulings.

In 2005, in *Rameshchandra Ramparatapji Daga v Rameshwari Rameshchandra Daga*,⁶⁹ the Supreme Court, while trying to grapple with this problem and awarding maintenance to a woman whose husband had challenged the validity of their marriage on the ground of a previous subsisting marriage, conceded that despite codification and introduction of monogamy, the ground reality had not significantly changed and that Hindu marriages, like Muslim marriages, continue to be bigamous. The Court further observed that though such marriages are illegal as per the provisions of the codified Hindu law, they are not 'immoral', and hence a financially dependent woman cannot be denied maintenance on this ground.⁷⁰

Recently, in *Badshah v Urmila Badshah Godse*,⁷¹ the Supreme Court upheld the right of a Hindu woman who had been duped into a bigamous marriage and thwarted the attempt of her husband to subsequently deny her maintenance. The judgment emphasised that:

While dealing with the application of a destitute wife [under Section 125 of the Code of Criminal Procedure 1973] ... the Court is dealing with the marginalised sections of the society. The purpose is to achieve 'social justice' which is the Constitutional vision, enshrined in the Preamble of the Constitution of India ... Therefore, it becomes the bounden duty of the Courts to advance the cause

of the social justice.⁷²

If Hindu women, like Muslim women, become entitled to rights, the destitution and humiliation that they suffer will be greatly reduced. This brings me to the concluding point of this chapter. The enforcement of a UCC cannot be viewed in a simplistic manner as outlawing ‘polygamy and triple talaq’ among the Muslims. The issue is far more complex and would require a detailed analysis of the gaps within existing laws of all communities, from the perspective of women’s empowerment. Women need to be empowered to negotiate the local and informal systems as well as the formal courts for enforcement of their rights. To extricate rights from informal customary practices, and locate them exclusively within the domain of courts and statutes, may not be a viable option for a hierarchical and multicultural society. The woman’s agency and autonomy to negotiate rights from multiple locations is the relevant factor. More than uniformity, what women need is an accessible and affordable justice delivery system and inclusive models of development which will help to eliminate their poverty and build an egalitarian world.

¹ Upendra Baxi, *Towards a Sociology of Indian law* (Satvahan 1986).

² *Gentoos* was the Portuguese term for Hindus. The term has its origin in the Biblical term ‘Gentiles’, meaning heathens or non-believers.

³ See *Raj Bahadur v Bishen Dayal* (1882) ILR 4 All 343; *Ma Yait v Maung Chit Maung* (1921) ILR 49 Cal 310.

⁴ ST Desai, *Mulla’s Principles of Hindu Law* (16th edn, NM Tripathi 1994).

⁵ Amrita Shodhan, *A Question of Community: Religious Groups and Colonial Law* (Samya Press 2001).

⁶ *Ardaseer Gursetjee v Perozeboye* (1856) MIA 348.

⁷ Bernard S Cohn, *Colonialism and its Form of Knowledge: The British in India* (Oxford University Press 1997) 75.

⁸ Parsi Marriage and Divorce Act 1865; Indian Succession Act 1865; Parsi Succession Act 1865; Indian Divorce Act 1869; Indian Christian Marriage Act 1872.

⁹ Special Marriage Act 1872.

¹⁰ (1887) LR 14 IA 89.

¹¹ *Waghela Rajsanji v Shekh Masluddin* (1887) LR 14 IA 89 [3].

¹² Flavia Agnes, *Family Law: Family Laws and Constitutional Claims*, vol 1 (Oxford University Press 2011).

¹³ See *Re Ram Kumari* (1891) ILR 18 Cal 264; *Budansa Rowther v Fatima Bibi* AIR 1914 Mad 192; *Emperor v Mt. Ruri* AIR 1919 Lah 389.

¹⁴ AIR 1947 Bom 272.

¹⁵ (1917) 33 MLJ 207.

¹⁶ Alladi Kuppaswami (ed) *Mayne’s Treatise on Hindu Law and Usage* (13th edn, Bharat Law House 1993) 51.

¹⁷ The four enactments which constitute the Hindu Code are: The Hindu Marriage Act 1955; the Hindu

Succession Act 1956; the Hindu Minority and Guardianship Act 1956; and the Hindu Adoption and Maintenance Act 1956.

¹⁸ Archana Parashar, *Women and Family Law Reform in India* (Sage Publications 1992).

¹⁹ J Duncan M Derrett, *Religion, Law and the State in India* (Oxford University Press 1999) 107.

²⁰ Madhu Kishwar, 'Codified Hindu Law: Myth and Reality' (1994) 29(33) *Economic and Political Weekly* 2145.

²¹ Section 7(2) of the Hindu Marriage Act 1955 specifically mentions *saptapadi*, which is a Brahminical ritual as an essential ceremony of marriage, though this ritual is not followed by lower castes and other reformist sects.

²² Werner Menski, *Hindu Law: Beyond Tradition and Modernity* (Oxford University Press 2003) 24.

²³ Menski ([n 22](#)) 25.

²⁴ Alan Hunt and Gary Wickham, *Foucault and Law: Towards a Sociology of Law as Governance* (Pluto Press 1998) 39.

²⁸ Assan Rawther ([n 27](#)) [23].

³¹ Harvender Kaur ([n 30](#)) [34].

³⁴ Shri Krishna Singh ([n 33](#)) [17].

²⁵ AIR 1952 Bom 84.

²⁶ AM Bhattacharjee, *Hindu Law and the Constitution* (2nd edn, Eastern Law House 1994).

²⁷ (1971) KLT 684.

²⁹ AIR 1983 AP 356.

³⁰ AIR 1984 Del 66.

³² (1984) 4 SCC 90.

³³ (1981) 3 SCC 689.

³⁵ (1996) 5 SCC 125.

³⁶ Madhu Kishwar ([n 35](#)) [46].

³⁷ *Ahmedabad Women Action Group (AWAG) v Union of India* (1997) 3 SCC 573.

⁴³ *Ammini EJ* ([n 42](#)) [28]–[34].

⁵⁰ *C Masilamani Mudaliar* ([n 48](#)) [15].

⁵⁴ *John Vallamattom* ([n 52](#)) [36]–[44].

⁵⁹ *A Yousuf Rawther* ([n 58](#)) [6]–[7], cited in *Shamim Ara* ([n 57](#)) [12].

³⁸ (1986) 2 SCC 209.

³⁹ Part B States (Laws) Act 1951.

⁴⁰ AIR 1953 Mad 792.

⁴¹ *Dr Dwaraka Bai* ([n 40](#)) [35].

⁴² AIR 1995 Ker 252.

⁴⁴ *Mrs Pragati Varghese v Cyril George Varghese* AIR 1997 Bom 349.

⁴⁵ *Debra Clare Seymour v Pradeep Arnold Seymour* (2002) 98 DLT 34.

⁴⁶ *Annie P Mathews v Rajimon Abraham* AIR 2002 Kar 385.

⁴⁷ Discussed in detail in Section III of this chapter.

⁴⁸ (1996) 8 SCC 525.

⁴⁹ *C Masilamani Mudaliar* ([n 48](#)) [15].

⁵¹ (1999) 2 SCC 228.

⁵² (2003) 6 SCC 611.

⁵³ S 118 deals with bequests for religious or charitable purposes and states that 'no man having a nephew

or niece or any nearer relative shall have power to bequeath any property to religious or charitable uses, except by a will executed not less than twelve months before his death, and deposited within six months from its execution in some place provided by law for the safe custody of the wills of living persons...'

⁵⁵ (2001) 7 SCC 740.

⁵⁶ *Mohd Ahmed Khan v Shah Bano Begam* (1985) 2 SCC 556.

⁵⁷ *Shamim Ara v State of Uttar Pradesh* (2002) 7 SCC 518.

⁵⁸ AIR 1971 Ker 261.

⁶⁰ (2014) 7 SCC 707.

⁶¹ S 2 of the Hindu Marriage Act 1955 states that it applies to anyone who is not a Muslim, Christian, Parsi, or Jew (or from a Scheduled Tribe). Hence Buddhists, Jains, Sikhs, Arya, Brahmo, and Prarthana Samajis, etc, persons belonging to all reform sects and religions are deemed 'Hindu' by this Act, which I refer to as 'legal Hinduism'.

⁶² Archana Parashar, *Women and Family Law Reform in India* (Sage Publications 1992).

⁶³ *Sarla Mudgal v Union of India* (1995) 3 SCC 635.

⁶⁴ Walter Fernandes, Melville Pereira, and Vizalenu Khatson, *Customary Laws in NorthEast India: Impact on Women* (National Commission for Women 2007).

⁷² *Badshah* ([n 71](#)) [13.3].

⁶⁵ S Basu, 'Unfair Advantage? Polygyny and Adultery in Indian Personal Law' in D Berti, G. Tarrabout and R Voix (eds) *Filing Religion: State, Hinduism, and Courts of Law* (Oxford University Press) (forthcoming).

⁶⁶ Government of India, *Towards Equality—The Report of the Committee on Status of Women* (1974).

⁶⁷ Flavia Agnes, 'The Concubine and Notions of Constitutional Justice' (2011) 46(24) *Economic and Political Weekly* 31.

⁶⁸ *D Velusamy v D Patchaiammal* (2010) 10 SCC 469.

⁶⁹ (2005) 2 SCC 33.

⁷⁰ *Rameshchandra Ramparatapji Daga* ([n 69](#)) [20].

⁷¹ (2014) 1 SCC 188.

CHAPTER 51

MINORITY EDUCATIONAL INSTITUTIONS

K VIVEK REDDY

I. INTRODUCTION

WHEN the Indian Constitution was drafted, there was near consensus on providing for a set of rights specifically protecting minorities, in addition to the fundamental rights available to all citizens. One such right was the right of religious and linguistic minorities to ‘establish and administer educational institutions of their choice’. Despite this historical consensus, the right of minorities to administer and establish educational institutions under Article 30(1) has become one of the most contested rights under the Constitution. Despite several constitutional bench decisions of the Supreme Court and two constitutional amendments, the scope of the right remains uncertain. This chapter focuses on India’s constitutional experience with minority educational institutions, and in particular, the three reasons why the right under Article 30(1) is a matter of such intense contestation.

The first is the Supreme Court’s error in conceptualising the rights of minority educational institutions under Article 30(1) as an exclusive right, not available to other groups. The framers of the Constitution conferred this right on minorities as a shield against any discriminatory laws passed by the majority. Instead, the Court, by a series of rulings, treated it as a sword in the hands of minority educational institutions, resulting in a special right for such institutions and not for other educational institutions. When State regulations intrusive of educational autonomy were challenged, the Court examined these laws only from the perspective of minority educational institutions, instead of examining them from the standpoint of academic freedom. This led to invasive State regulations being struck down only qua minority educational institutions and not others, creating an oasis of educational autonomy for minority educational institutions while non-minority educational institutions were deprived of this right and subjected to extensive State regulation. When the Supreme Court finally rectified this constitutional anomaly in 2001 in *TMA Pai Foundation v*

Union of India,¹ it was such a big shift that the subsequent rulings were unable to internalise it; the Court's view has oscillated and the legal position remains uncertain.

The second error was the failure of the Court to provide an appropriate constitutional framework for the protection of the right of educational institutions. For over five decades, the Supreme Court refused to recognise that educational institutions had any constitutional right to administer an educational institution. When it finally recognised such a right in 2001 in *TMA Pai*, it traced it to the right to carry on trade or business or occupation under Article 19(1)(g). This constitutional entrenchment was intended to reduce the State regulatory power and enhance autonomy in administering educational institutions. Paradoxically, *TMA Pai* enabled the State to increase its regulatory power over educational institutions because it enabled the State to impose reasonable restrictions in 'public interest'. This impacted both non-minority educational institutions and minority educational institutions, for both these institutions were placed on the same pedestal. Once the Court placed both majority and minority institutions on the same pedestal, it should have extended the protection available to minority institutions to non-minority institutions as well. Instead, it extended the restrictive regulatory framework of non-minority educational institutions to minority educational institutions. Consequently, the State acquired the power to control the admission process, the mode of entry of students, the fee structure, the teaching process, and the medium of instruction and curriculum. The extent of regulation was even more acute for aided minority educational institutions. As a result, the constitutional protection afforded to minority educational institutions has become a teasing illusion.

Finally, this chapter examines a major puzzle regarding aided minority educational institutions, namely whether such institutions have the freedom to not admit non-minority students. The Court's views on this question have oscillated between two extremes, each of which undermines either Article 29(2) or Article 30(1).

Before proceeding further, the structure and text of Article 30 requires careful examination. Article 30(1) confers a positive right on religious or linguistic minorities to 'establish and administer educational institutions of their choice', whereas Article 30(2) injuncts the State from discriminating against any of the educational institutions, while granting aid on the ground that it is under the management of a minority. Article 30(1A) introduced by the Forty-fourth Amendment requires the State to ensure the amount paid for compulsory acquisition does not restrict or abrogate the right guaranteed under Article

30(1).²

Article 30 is one of the few exceptions to the Indian Constitution's focus on individual rights.³ Article 30 is not the only right in the Constitution that deals with the rights of educational institutions. Article 26(a) recognises the right of every religious denomination to establish and maintain institutions for religious and charitable purposes. Article 29 also recognises the right of any section of citizens to conserve their distinct language, script, or culture, and the mechanism to achieve this objective is by establishing an educational institution to conserve the same.

II. AN ANTI-DISCRIMINATION PRINCIPLE OR A SPECIAL RIGHT?

The central question with regard to Article 30 is whether the right to establish and administer educational institutions is confined only to religious and linguistic minorities or also to other communities. This question has become particularly important because the right under Article 30(1) to establish and administer educational institutions extends even to secular education and not just religious education.

Since the earliest cases on this issue, the Supreme Court categorically rejected the assertion that protection under Article 30(1) is only confined to religious education. The Court held that such a view will deprive the students of minority educational institutions from receiving adequate general grounding in all fields, which would enable them to earn their living and also expose them to various thought processes. The Court gave a textual justification by asserting that unlike Articles 26 or 29(1), which also confer the right to establish an educational institution, Article 30 does not define the purpose for which educational institutions should be established. The use of the phrase 'of their choice' in Article 30(1), also demonstrates that a minority educational institution has the right to impart even secular education.⁴

Once secular education came within the ambit of Article 30(1), other non-minority educational institutions providing similar education have also claimed equal constitutional protection as minority educational institutions. While minority institutions claimed that it was a special right for minorities alone, non-minority educational institutions claimed that Article 30 was only an equality right placing minority institutions on par with other non-minority institutions.

1. Judicial Vacillation

This tension between the equal rights view and the special rights view has consistently troubled the Supreme Court, with the Court vacillating between both positions. The Court began by taking the special rights view in 1958 in *Kerala Education Bill*, partially reaffirmed in *St Xavier's*, then made a complete switch in *TMA Pai* in 2001, which was in turn reaffirmed in *PA Inamdar*.⁵ When Parliament intervened and amended the Constitution to reaffirm the exclusive right status, the Court in 2014 in *Pramati* returned to its original position without any principled justification.⁶

The contest over the exclusive right for minority educational institutions began from the very first case concerning Article 30(1). In *Re The Kerala Education Bill 1957*, the President of India sought the opinion of the Court on the constitutional validity of various provisions of a bill passed by the Legislative Assembly of the State of Kerala regulating the organisation of primary schools established by minority and non-minority groups. The Bill mandated that neither a government school nor private schools could charge tuition fee from students in primary classes. The State justified the said provision by relying on the then Article 45 of the Directive Principles, which mandated the State to provide free and compulsory education for all children until the age of 14 years.

SR Das J, speaking for the majority, declared the provision as violative of Article 30(1) as it was impossible for a minority educational institution to run without collecting any fee and in the absence of any measure by the State to make up for the loss of such income.⁷ In his dissenting opinion, Venkatrama Aiyar J adopted a reverse discrimination approach by upholding the said provision by holding that 'there is no justification for putting on Article 30(1) a construction which would put the minorities in a more favoured position than the majority communities'.⁸ He suggested that Article 30(1) aimed to prevent the State and the majority from discriminating against minorities, rather than to give minority educational institutions special concessions. He opined that the disability in the form of loss of income by minority educational institutions was equally applicable to institutions run by the majority community.⁹

The view taken by both majority and minority appears erroneous. The provision mandating that a private entity, whereby it be a majority or minority institution, is to provide free education was violative not of the right of the

minorities, but violative of Article 19(1)(g), which is available to all citizens. The Constitution does not confer power on the State to interfere with the autonomy of educational institutions and mandate how they should administer the colleges, irrespective of whether the said educational institutions are administered by minority or non-minority groups. The claim for special protection would not have arisen if the Court struck down the provision by relying on Article 19(1)(g). Again in 1971, Hidayatullah CJ, speaking for a unanimous five-judge bench, held that the special right to minority communities cannot be negated by applying the equality clause as ‘the Constitution itself classifies the minority communities into a separate entity for special protection which is denied to the majority community’.¹⁰

A nine-judge bench of the Supreme Court had to confront this issue again in *Ahmedabad St Xavier’s College Society v State of Gujarat*,¹¹ wherein minority educational institutions challenged a State legislation enabling the University to impose conditions on colleges, including minority colleges seeking affiliation. Ray CJ categorically held that rights conferred under Article 30(1) are only confined to linguistic and religious minorities and ‘no other sections of citizens of India has such a right’.¹² The exclusive nature of these rights was justified on the ground that ‘the majority who can always have their rights by having proper legislation do not pass a legislation prohibiting the minorities to establish and administer educational institutions of their choice’,¹³ and if minorities do not have such special protection they would be denied equality.¹⁴ Khanna J differed slightly. In a significant opinion, which would be relied on heavily in subsequent cases, he acknowledged that Article 30(1) was a ‘special [right] to the minorities’.¹⁵ He hedged it, however, by stating that the idea of a special right was ‘not to have a kind of a privileged or pampered section of the population but to give minorities a sense of security and a feeling of confidence’.¹⁶ Article 30(1) was a means to bring about equality by ensuring the preservation of minority institutions and ‘bring about an equilibrium’.¹⁷ He reiterated that the protection is confined only to minorities because the majority can protect its interest by the democratic process.¹⁸

The contest over the exclusive nature of the right under Article 30(1) resurfaced before a bench of eleven judges in *TMA Pai Foundation v State of Karnataka*.¹⁹ *TMA Pai* was a momentous decision, completely changing the legal landscape for educational institutions. For the first time, the Supreme Court gave a constitutional basis for a person to run an educational institution. Prior to this ruling, the Court had held that non-minorities did not have a right to

establish and administer an educational institution.²⁰ However, *TMA Pai* held that even non-minorities have the right to establish and administer educational institutions. The Court traced this right to the freedom to carry on an occupation of one's choice under Article 19(1)(g) and the right of a religious denomination to maintain an institution for charitable purposes under Article 26, by asserting that education was a charitable activity.

Once the Court provided a constitutional basis for every citizen to establish and administer an educational institution, it proceeded to deal with the rights of non-minority educational institutions *vis-à-vis* the rights of minority educational institutions. Without expressly overruling prior rulings, it placed minority and non-minority educational institutions on the same pedestal. BN Kirpal CJ, speaking for the majority, held that 'principles of equality must necessarily apply to the enjoyment of ... rights [under Article 30(1)]'.²¹ He observed that while no law can discriminate against the minority, '[A]t the same time, there also cannot be any reverse discrimination.'²² This was the first time the Court introduced the concept of reverse discrimination while discussing the rights of minority educational institutions. Relying on Khanna J's opinion in the *St Xavier's* case, Kirpal CJ declared that:

[T]he essence of Article 30(1) is to ensure equal treatment between the majority and the minority institutions. No one type of category of institution should be disfavoured or, for that matter, receive more favourable treatment than another. Laws of the land, including rules and regulations, must apply equally to the majority institutions as well as to the minority institutions.²³

The concurring opinions of Variava and Bhan JJ rejected the exclusive right theory. They held that Article 30 'was not framed to create a special or privileged class of citizens' and it was 'framed only for the purpose of ensuring that the politically powerful majority did not prevent the minority from having their educational institutions'.²⁴ No interpretation of Article 30 should create 'further divide between citizen and citizen'.²⁵ But the Court's complete revision of the constitutional landscape expectedly led to a spate of dissenting opinions. Quadri J observed that the right under Article 30(1) was an 'additional right' to establish and administer educational institutions and that the extent of rights of non-minority educational institutions under Articles 19(1)(g) and 26 was different from the right of minority educational institutions under Article 30(1).²⁶ Ruma Pal J, in her dissenting judgment, also noted that Article 30(1) creates 'special class in the field of educational institutions' and a class that is entitled to special protection in the matters of setting up educational institutions of their choice.²⁷ She asserted that the favoured treatment to minority

educational institutions did not violate the equality clause as the Constitution permits special provisions for various groups.²⁸

Once *TMA Pai* recognised the constitutional right of non-minority educational institutions and placed them on the same pedestal as minority institutions, it became a potent weapon against the expansive regulatory power of the State. The ruling enabled the educational institutions of both majority and non-minority groups to challenge various State enactments intrusive of educational autonomy.

Despite the majority ruling in *TMA Pai*, the special claim of minority educational institutions was again questioned by a bench of five judges in *Islamic Academy of Education v State of Karnataka*.²⁹ Khare CJ, speaking for the majority, held that the majority ruling in *TMA Pai* only meant that the law cannot favour majority institutions over minority institutions.³⁰ He asserted that *TMA Pai* did not mean ‘that non-minority educational institutions would have the same rights as those conferred on minority educational institutions by Article 30 ...’,³¹ and added that the special right under Article 30 does give minority educational institutions ‘certain advantages’ and, as an illustration, said that while the government may nationalise non-minority educational institutions, it cannot do so for minority educational institutions. He added that minority educational institutions have preferential rights to admit students of their own community, which is not available to a non-minority educational institution.³² Sinha J strongly dissented from this view, holding that it would be ‘constitutionally immoral’ to perpetuate inequality among the majority of people of the country in the guise of protecting the constitutional rights of minorities.³³ Article 30 was only an additional protection, he argued, to bring the minorities onto the same platform as that of non-minorities for establishing and administering educational institutions.³⁴

The issue did not die with *Islamic Academy* and came up again when *Islamic Academy* was referred to a larger bench of seven judges in *PA Inamdar v State of Maharashtra*.³⁵ In a unanimous ruling, Lahoti CJ again reasserted the equal rights view by stating that Article 30(1) was only ‘intended to instill confidence in minorities against any executive or legislative encroachment on their right to establish and administer educational [institutions] of their choice’.³⁶ He stated that ‘Article 30(1) though styled as a right, is more in the nature of protection for minorities.’³⁷ Despite this, he noted that there could be some regulatory measures that may be permissible *vis-à-vis* non-minority educational institutions but impermissible for minority educational institutions, and in his view this was

the additional protection which minority educational institutions enjoyed under Article 30(1).³⁸ He did not, however, elaborate upon what these additional protections were.

The Supreme Court in *PA Inamdar* also held that State-mandated quotas cannot be imposed in unaided educational institutions, whether minority or non-minority, and that admissions had to be made on merit.³⁹ To undo the effect of this ruling, Parliament enacted the Constitution (Ninety-third) Amendment Act 2005. This introduced Article 15(5), enabling the State to make provision for reservation for Backward Classes, Scheduled Castes, and Scheduled Tribes in government, as well as private unaided educational institutions. However, an exemption was carved out for minority educational institutions. This clearly supported the special nature of minority educational institutions, even though it was confined to reservation in admissions.

The constitutional validity of the exclusion of minority educational institution from the ambit of the regulatory power of State-prescribed quotas was considered in *Ashoka Kumar Thakur v Union of India*.⁴⁰ The response of the Supreme Court was unsatisfactory and left much to be desired. A bench comprising five judges produced four opinions, of which three judges were silent on the constitutional validity of the exclusion of minority educational institutions from Article 15(5). Without considering the majority opinion in *TMA Pai* or *Inamdar*, Balakrishnan CJ upheld the exclusion of minority educational institutions from Article 15(5) by asserting that ‘minority institutions have been given a separate treatment in view of Article 30 of the Constitution’.⁴¹

The dissenting opinion of Bhandari J was even more puzzling. He upheld the exemption for minority-aided institutions from the obligation to admit socially and educationally backward classes, but held that, since the Constitution aimed at a casteless society, the exemption for minority educational institutions furthered this objective and therefore, ‘there is no need to go out on a limb and rewrite them into the amendment’.⁴²

Article 15(5) came up for consideration yet again when the Right of Children to Free and Compulsory Education Act 2009 was challenged. The Act mandated that all unaided schools, including unaided minority schools, reserve 25 per cent of the strength of the primary school to children belonging to disadvantaged groups for free and compulsory elementary education. The validity of the provision came up for consideration before a three-judge bench of the Court in *Society for Unaided Private Schools of Rajasthan v Union of India*.⁴³ Kapadia CJ, in his majority opinion, upheld the quota for non-minority schools, but held the provision to be unconstitutional *vis-à-vis* unaided minority schools because

of Article 30(1) and asserted that the quota would ‘result in changing the character of the schools if [the] right to establish and administer such schools flows from the right to conserve the language, script or culture, which right is conferred on such unaided minority schools’.⁴⁴ In a strong dissent, Radhakrishnan J held that a compulsory mandate requiring even private schools to reserve a quota for weaker sections is a serious encroachment of the rights of all educational institutions and not just minority educational institutions.⁴⁵ He reasoned that ‘no ... difference can be drawn between unaided minority schools and unaided non-minority schools ...’ with regard to the reservation policy of the State in view of the ruling in *TMA Pai* and *Inamdar*.⁴⁶ With respect to unaided non-minority schools, the Court held that the reservation of 25 per cent is a reasonable restriction under Article 19(1)(g).⁴⁷ The majority judgment is puzzling because the right to conserve the language, script, or culture has been recognised under Article 29(1), which applies to all groups, including minority and non-minority groups.

The exemption for minority educational institutions came up again before five judges in *Pramati Educational and Cultural Trust v Union of India*.⁴⁸ Here, the Court for the first time specifically dealt with the constitutional validity of Article 15(5), which granted exemption to minority institutions from quotas prescribed by the State. Patnaik J, speaking for the Court, upheld the constitutional amendment by holding that minority educational institutions are a ‘separate class and their rights are protected under Article 30 ...’⁴⁹ The Court held that the minority character of an educational institution may be affected by admission of socially and educationally backward class citizens.

The *Pramati* ruling is erroneous for two reasons. First, the Court ignored the evolution of law on the exclusive rights of minority educational institutions. In justifying the special treatment for minority institutions, the Court ironically relied on *TMA Pai* and ignored the central dicta of the said ruling that the principles of equality must necessarily apply for the enjoyment of rights under Article 30(1), and that there cannot be any reverse discrimination between minority and non-minority educational institutions.⁵⁰ This conflict between *Inamdar* and *Pramati* has been noticed in a recent ruling and the matter has been referred to the Chief Justice.⁵¹ Secondly, even if minority educational institutions could be exempted, there was no reason for exempting minority educational institutions from the social justice obligation of admitting students from weaker and disadvantaged sections of the minority community itself.

We thus see that the constitutional position on minority educational institutions is far from clear. Should we follow the rulings of the larger bench of

the Supreme Court in *TMA Pai* and *Inamdar*, applying the equal rights view, or follow the rulings of the subsequent smaller benches holding the right of minority educational institutions as a 'special right'? After *TMA Pai*, the Court held that the Article 30(1) right cannot put minority educational institutions in a more advantageous position than non-minority educational institutions, leading to 'reverse discrimination'.⁵² Can the principle of reverse discrimination propounded by *TMA Pai* even apply to minority educational institutions? The only matter on which a clear position exists is that minority educational institutions are not bound to implement quotas carved out by the State in the course of the admission process.

2. Four Justifications

Four justifications have been advanced to assert that the right of minority educational institutions is a right exclusive to religious and linguistic minorities and not available to other communities.

a. *The Historical Justification*

The historical argument is that in lieu of the minorities giving up their claim for separate electorates and reservations of seats in the legislature, the right under Article 30(1) was exclusively conferred on minority educational institutions.⁵³ Emphasis is placed on Articles 330 to 337, providing for quotas for Scheduled Castes, Scheduled Tribes, and the Anglo-Indian community in Parliament and the State legislatures and contemplates their claims to be considered in State employment. There is a conspicuous exclusion of minorities from these provisions, in contrast with their recognition under British rule, as minorities were conferred with an absolute right to establish and administer educational institutions.

The difficulty with this justification is twofold. First, the historical evidence suggesting a trade-off between separate electorates and an unqualified right to establish and administer minority educational institutions is very thin. The Constituent Assembly debates certainly demonstrate an intense opposition to separate electorate for minorities, as well as consensus on the need to protect minorities.⁵⁴ The Objective's Resolution moved by Nehru stated that 'adequate safeguards shall be provided for minorities'.⁵⁵ But there is little evidence to show that minority rights were used as a bargaining chip for giving up the claim for separate electorates. Secondly, there is nothing to show that the founders intended to confer this right *exclusively* on minorities. On the contrary, they conceived of these rights as being available to everyone. The Sapru Committee Report, which formed the basis for the fundamental rights chapter, extensively examined the rights of minorities and held that:

[T]he fundamental rights of the new Constitution will be a standard warning to all that what the Constitution demands and expects is perfect equality among all sections in the enjoyment of civic and political rights and all applications of life.⁵⁶

The initial proposal of minority rights outlined by the Sapru Committee Report spoke of rights of ‘all inhabitants’ to establish and administer educational institutions.⁵⁷ And the only special right which minorities claimed was the obligation of the State to provide education to the children of minority communities in their mother tongue.⁵⁸ The Constitution makers conceived of Article 30(1) more as a non-discrimination clause than as an exclusive liberty for religious and linguistic minority educational institutions.

b. The Textual Justification

Article 30(1) is categorical—‘all minorities whether based on religion or language shall have the right to establish and administer educational institutions of their choice’. The Constitution clearly defines the category of people for whom the right has been conferred. The use of the phrase ‘all minorities’ has to be contrasted with other rights conferred on all citizens or persons, as in Articles 14 or 19. Yet, there are three reasons why a bare textual reading is unpersuasive in this context.

First, this reading ignores the majestic command of the equality clause in the Constitution—‘the State shall not deny to any person equality before the law or the equal protection of the laws’. Secondly, such a reading leads to some bizarre consequences. For instance, the non-religious and non-linguistic minorities would then only have a right to establish an educational institution for religious education, under Article 26 and Article 29, but would be deprived of establishing an educational institution for secular education. Surely, the Constitution cannot intend that a person has a constitutional right to religious education but not for secular education. Such a course of action would violate the free speech clause and the equality clause. Thirdly, the anti-discrimination character of the right is evident from the text of Article 30 itself. In Article 30(2), the founders rejected the primary claim of minority institutions during the framing of the Constitution—minority educational institutions should be entitled to State aid as they would not be able to survive and protect their culture in the absence of State assistance. Although this entitlement claim was rejected, it was mandated that the State should not discriminate against minority educational institutions while granting aid. This shows that the right was conceived as an anti-discrimination right rather than as a special liberty.

c. *The Anti-Majoritarian Justification*

In *St Xavier's*, Ray CJ reasoned that:

The right to establish and administer educational institutions of their choice has been conferred on religious and linguistic minorities so that the majority who can always have their rights by having proper legislation do not pass a legislation prohibiting minorities to establish and administer educational institutions of their choice.⁵⁹

There are two difficulties with this reasoning. First, this assertion assumes that it is possible to draw a clear distinction between the majority and minority. However, in a plural society like India comprising multiple communities and groups, it would be difficult for one community to lobby with the legislature for the protection of their interests. Consequently, religious and linguistic communities which receive constitutional protection have an edge over other communities who may be numerically smaller, but do not receive the same constitutional protection. For instance, if Scheduled Tribes in a particular State want to establish an educational institution for their children, there is no reason why they should be denied the same constitutional protection as is available to religious and linguistic minority communities. And nowhere is this more evident in Article 30(1) itself—the protection under Article 30(1) does not extend to all minorities, but is only confined to religious and linguistic minorities. Denying these groups constitutional protection would undermine the very rationale of Article 30(1)—that is, preventing the discrimination of minorities. Secondly, Ray CJ assumes that fundamental rights only operate in the context of majority against minority. But fundamental rights are also intended to protect the individual from the collective power of the State. If Ray CJ's premise is accepted, the Constitution should have only conferred fundamental rights on the minority on the assumption that the majority could have secured their liberties and freedom through the legislative process.

d. *The Equality Justification*

The fourth justification for the exclusive nature of the right conferred under Article 30 was asserted by Mathew J in *St Xavier's*, who invoked the equality clause to justify the special protection for minority educational institutions. He asserted that the equality clause requires differential treatment for minorities,⁶⁰

and that 'juridical equality postulates that the religious minority should have a guaranteed right to establish and administer its own educational institutions where it can impart secular education in a religious atmosphere'.⁶¹ Mathew J's assertion recognised the established principle of the equality jurisprudence that unequal persons cannot be treated equally. When it comes to religious education, or protection of any aspect or dimension which is unique to the minorities, the requirement of treating minorities differently from non-minority educational institutions may be justified, and the protection of Article 30(1) is to apply with full force and effect. However, the difficulty arises with respect to secular education. If Article 30(1) was to be treated as an exclusive right, a non-minority institution offering secular education could be denied constitutional protection purely because of its religious and linguistic identity, which creates a perverse constitutional incentive to acquire a minority identity. Any interpretation that prizes the acquisition of identity motivated by conferment of legal privileges is incompatible with the equality clause and the claims of a pluralistic society.

Interpreting Article 30(1) as a special right for minorities had deeper repercussions and entangled the judiciary in needless controversies. Since the Court held that Article 30(1) was a special right available only to minorities, different groups claimed minority status. This created two sets of issues, which was entirely avoidable. First, who is a minority? Secondly, should the determination of minority status be made at a national level or at the State level?

On the first issue, several groups that had their roots in Hinduism claimed they were a minority, in order to enjoy the right to establish and administer an educational institution. The classic example is the Ramakrishna Mission claiming that it was a minority for the purpose of Article 30(1) as it was preaching 'Ramakrishna religion' and not the Hindu religion, which was accepted by the Calcutta High Court and subsequently reversed by the Supreme Court.⁶² This was not a solitary instance and the Court on several occasions had to engage in the task of examining religious beliefs and customs to ascertain whether a particular group was a minority.⁶³ Such a situation may not have arisen if the right to establish and administer an educational institution was available to all groups and not just to minorities. On the second issue, the Court consistently held from *Kerala Educational Bill* to *TMA Pai* that the determination of who constitutes a minority has to be done at the State level and not at the national level.⁶⁴ Ruma Pal J in a strong dissent in *TMA Pai* held that minorities could either be national minorities or State minorities and any determination of minority must be done 'in relation to the source and territorial application of the particular legislation against which protection is claimed'.⁶⁵

Both issues arise as a sole consequence of treating Article 30(1) as a special right.

III. THE RIGHTS OF MINORITY EDUCATIONAL INSTITUTIONS— THE UNDOING OF *TMA PAI*

Any analysis of Article 30(1) has to begin with an answer to the larger question—where in the Constitution do we locate the rights of educational institutions? Prior to 2001, the Supreme Court in *Unni Krishnan v State of Andhra Pradesh* held that education was fundamentally a ‘charitable activity’, that the Constitution did not recognise any right to run an educational institution, and that the role of private educational institutions was only to supplement the efforts of the State in providing education to the people.⁶⁶ This position was at odds with various provisions of the Constitution. Article 26 recognised the right of every religious denomination to ‘establish and maintain institutions for religious and charitable purposes’. An educational institution would have come within the ambit of this clause since the Court itself recognised that education was a charitable activity. Similarly, Article 29(1) conferred a right on any section of citizens having a distinct language, script, and culture to conserve the same and establishing an educational institution is a recognised mechanism for conserving a language, script, and culture.

The constitutional position was rectified in 2001, when *TMA Pai* held that the right to establish and administer an educational institution was traced to the right of citizens to carry on an occupation, trade, or business under Article 19(1)(g) and the right of religious denominations to establish charitable institutions under Article 26(a).⁶⁷ For minority institutions, the right was always available under Article 30(1). The Supreme Court made this shift on the premise that ‘governmental domination of the educational process must be resisted’.⁶⁸ And for the first time, the Supreme Court recognised that the right to establish and administer an educational institution comprises the rights ‘(a) to admit students; (b) to set up a reasonable fee structure; (c) to constitute a governing body; (d) to appoint staff (teaching and non-teaching); and (e) to take action if there is dereliction of duty on the part of any employees’.⁶⁹

Although the Supreme Court’s decision, granting a constitutional foundation for the rights of an educational institution, was a move in the right direction, the Court erred by locating the right within Article 19(1)(g). First, Article 19(1)(g)

can be subjected to reasonable restrictions imposed by the State in the interests of the general public. An educational institution is not just a trade or an occupation. It is a place where ideas are conceived and developed by debate and discussion, and academic freedom requires particular autonomy. By tracing the right to administer educational institution under Article 19(1)(g), the Supreme Court placed a shopping establishment and educational institution on the same pedestal. Secondly, by placing the right of educational institutions within Article 19(1)(g), the Supreme Court exposed the said right to possible extinction. The First Amendment to the Constitution in 1951 carved out a nationalisation exception to the right to carry on a trade, business, or occupation under Article 19(1)(g). Thus, an educational institution could, like any other industry, be nationalised by the State. This defeated the very rationale of conferring constitutional protection for education institutions in *TMA Pai*.

Prior to the *TMA Pai* ruling, the Supreme Court asserted that the minority educational institutions have an absolute right to administer educational institutions in light of Article 30(1). This claim was used by minority institutions to attack various State regulations pertaining to education. The State responded to these two claims by asserting that the Article 30(1) right was not absolute and did not deprive the State of its legitimate regulatory power. To resolve these competing claims, the Supreme Court crafted a standard to reconcile Article 30(1) with State regulatory power over the educational institutions. A dual test was conceived, whereby it held that every State regulation must be reasonable and must be conducive in making the institution an effective vehicle of education. The Court held that the constitutional right to administer given to minority educational institutions did not include the right to ‘maladminister’.⁷⁰ The Supreme Court consciously avoided the test of public interest as it would enlarge the power of the State, and observed that Article 30(1), unlike Article 19(1)(g), does not enable reasonable restrictions in public interest.

Applying this standard, the Court held that while the State can impose standards, it cannot take steps to implement the standards or oversee the operations of minority institutions. The application of this standard becomes difficult when minority educational institutions seek merely affiliation, and not aid, from the University. What conditions can legitimately be imposed by the State? In *St Xavier’s*, the Supreme Court held that any affiliation should be in terms of the affiliation imposed by the State and should not be in abridgement or derogation of the rights of minorities under Article 30(1). Mathew J, relying on the doctrine of unconstitutional conditions familiar in American public law, held that the condition of affiliation imposed by the University may be invalidated on the ground that denying the benefit because of the exercise of a right in effect

penalises its exercise.^{[71](#)}

The constitutional landscape changed after *TMA Pai*. Even though *TMA Pai* sought to reduce the governmental role in the educational process, it actually ended up increasing it and in the process diminishing the freedom of minority educational institutions. This is because once the Court located the rights of non-minority educational institutions in the right to carry on trade or occupation under Article 19(1)(g), it had an adverse impact even on the rights of minority educational institutions. The Court held that restrictions applicable to non-minority institutions were equally applicable to minority institutions. As demonstrated below, instead of curtailing State regulatory power, as *TMA Pai* intended, State regulatory power over the educational process has only increased, leading to abridgement of the rights of minority educational institutions.

1. Medium of Instruction

The right of minority educational institutions to choose the medium of instruction has been consistently recognised as part of the right to administer. This issue came up immediately after the commencement of the Constitution, when various State Governments took actions to promote the local culture and language, and insisted that education must be in the local vernacular language or mother tongue. The State Governments were encroaching upon the right of minorities to administer their own educational institutions. In almost every case the actions of the State Government were struck down not just for the minorities, but also for the entire population by relying on the minorities' right under Article 30(1).

In 1953, the State of Bombay issued a circular mandating that admission to English-medium schools should be confined to children belonging to the Anglo-Indian community. The State argued that education should be in the mother tongue. A five-judge bench of the Supreme Court in *State of Bombay v Bombay Education Society*⁷² held that it was 'implicit' under Article 30(1) 'to impart instruction in their own institutions to the children of their own community in their own language'.⁷³ This ruling was reaffirmed in numerous cases to strike down regulations restricting the medium of instruction.⁷⁴

After *TMA Pai*, this position should only have been strengthened as the mode of teaching had been left to the institution. However, this position was weakened when the Court in *Usha Mehta v State of Maharashtra*⁷⁵ held that the right of minority institutions under Article 30 cannot be read to include a 'negative right to exclude the learning of regional language'.⁷⁶ The Court justified this complete reversal by holding that Article 30(1) is subject to the same reasonable restrictions as are applicable to non-minority colleges.⁷⁷ The Court held that the decision of the government was 'conducive to the needs and larger interest of the State'.⁷⁸ This was a clear departure from the pre-*TMA Pai* constitutional framework, which mandated that any regulations affecting minority institutions must be in the interest of the institution and State interest cannot be used as a yardstick. The situation was redeemed in the recent constitutional bench ruling in *State of Karnataka v Associated Management of English Medium Primary & Secondary Schools*, which held that even if teaching in a mother tongue is helpful to children, the State cannot impose that decision upon minority schools and private unaided schools, as that would be violative of Articles 30(1) and

19(1)(g).⁷⁹

2. Minority Educational Institutions that Seek Neither Aid nor Recognition

Consistently since 1958, the Supreme Court held that minority educational institutions could be classified into three categories—‘(1) those which do not seek either aid or recognition from the State, (2) those which want aid, and (3) those which want only recognition, but not aid’.⁸⁰ The applicability of State regulatory power can only arise for institutions that seek either aid or State recognition. But with respect to the first category, the Court has always taken the view that they are outside State regulatory power and can exercise their rights to their ‘heart’s content’, since they are seeking neither aid nor recognition.⁸¹ These are institutions where knowledge is being disseminated for the sake of knowledge and not for any State certification. These institutions could range from evening music courses to skill development classes or pure religious institutions conducted entirely outside the purview of the State. The only restrictions these institutions were subject to were the normal ‘laws of the land’, which are applicable to any other establishment.⁸²

Although *Inamdar* acknowledged that these institutions can exercise their rights according to their ‘heart’s content unhampered by any restrictions’, it expanded the scope of regulatory power by holding that the State can regulate such institutions on grounds of ‘national interest based on considerations such as public safety, national security and national integrity or are aimed at preventing exploitation of students or the teaching community’.⁸³ While sounding innocuous, this imprecise phrase facilitated the expansion of State regulatory power.

3. The Admission Process

TMA Pai recognised that every educational institution has the right to admit students of its choice. Based on this principle, the Court held that admissions to unaided minority educational institutions like schools and undergraduate colleges cannot be regulated by the State as the scope of merit-based selection is practically nil.⁸⁴ The role of the State was confined to prescribing qualifications and minimum eligibility conditions in the interest of academic standards.⁸⁵ However, for professional colleges, it was emphasised that admission should be based only on merit.

Once the Court recognised merit as a norm, it held that there cannot be any State involvement in the said process. Consequently, *TMA Pai* and subsequently *Inamdar* held that the State cannot impose quotas in unaided educational institutions (whether majority or minority) to implement the State's policy of reservation. The Court held that such an imposition amounts to a 'serious encroachment on the right and autonomy of private professional educational institutions' and '[cannot] be held to be a regulatory measure in the interest of the minority within the meaning of Article 30(1) or a reasonable restriction within the meaning of Article 19(6) of the Constitution'.⁸⁶ However, both rulings insisted that the admission process should be 'fair, transparent, non-exploitative and based on merit'.⁸⁷ This was a radical departure and is consistent with the Court's overall approach that educational institutions that do not receive any aid from the State cannot be subject to the State's regulatory power in the admission process. However, the prescription of merit as a norm by the Court raises a few concerns.

First, the Court has substituted the norms of the State (quota for reserved category students) with its own norm—that is, admission on merit. The Court did not justify the basis on which this norm was imposed on unaided educational institutions. It may have been permissible if this norm was imposed on public institutions that are funded by the State on the plausible reasoning that the requirement of admission on merit flows from the mandate of the equality clause. This issue particularly acquires significance in the context of private unaided minority professional colleges. One of the anomalies of the *TMA Pai* ruling was that unaided minority professional colleges ended up in a worse position than aided minority professional colleges. While aided minority professional colleges were entitled to admit students from its own community to the extent prescribed by the State, unaided professional educational colleges had

to admit students only on the basis of merit. This was clarified in *Islamic Academy*, wherein the majority held that the State can fix the limit for admission of minority community students from that State. However, in *Inamdar*, the Court emphasised that admissions in unaided professional educational institutions (whether minority or non-minority) can be done only on the basis of merit. Consequently, the legal position on whether unaided professional minority colleges can admit students of their own community is unclear. There is no reason why an unaided professional educational institution cannot take students exclusively from its own community, since it is not receiving any aid from the State. At best, the State can regulate the minimum eligibility standards that every student must satisfy to be qualified to avail of professional education.

Secondly, the Court in *TMA Pai* and *Inamdar* did not give sufficient clarity as to how it was defining merit. Is the requirement of merit satisfied when a person has satisfied the minimum standards or did merit have to be decided in a competitive manner? In *Inamdar*, after emphasising on numerous occasions that merit must form the basis for professional education, the Court held that every institution can provide a quota up to 15 per cent for non-resident Indians (NRI) students.⁸⁸ Although the Court attempted to justify the same by saying that the fees collected from such students can be used to cross-subsidise economically weaker sections, the creation of such a separate category is a departure from the norm of merit prescribed by it.

Thirdly, even assuming that merit can be prescribed as a norm for admission into professional colleges, how does the Court acquire the power to prescribe such norms? Once the Court has located the right of educational institutions under Articles 19(1)(g) and 30(1), any restriction on the right of admission needs legislative authorisation. At best, *TMA Pai* and *Inamdar* could have held that the State by way of law can fix merit as a criterion for admission by passing a law. Instead, the Court took on the legislative role by prescribing norms by which the unaided professional colleges should conduct their admission process. This is prima facie violative of Article 19 (1)(g) and the principle of separation of powers.

There is a second way in which the freedom relating to admissions has been curtailed. As mentioned, prior to *TMA Pai*, a minority educational institution had the freedom to determine how it would admit students. While *TMA Pai* extended this autonomy over the admission process to both minority and non-minority educational institutions, *Islamic Academy* and *Inamdar* held that the mode of admission by educational institutions will be supervised by State committees. Minority institutions that used to administer their own entrance examinations had to now seek permission of a State committee and if the committee refused

approval, they had no option but to adopt the admission mechanism prescribed by the State. Consequently, minority and non-minority institutions have had to virtually give up their right to devise their own admission mechanism. When the Union government prescribed the common admission test for admission to professional colleges, the Supreme Court held in *Christian Medical College, Vellore v Union of India*⁸⁹ that the freedom to run private educational institutions includes the right to conduct examinations for admitting students. The Court held that depriving minority educational institutions of their right to conduct their own entrance examinations is violative of Article 30. But the majority opinion was silent as to how the said right can be reconciled with the committees mandated in *Islamic Academy* and *Inamdar*.⁹⁰

4. The Admission of Non-minority Students

Kerala Education Bill held that a minority educational institution can admit students who do not belong to the same community. This was justified textually as Article 30(1) does not state that the right should be exercised only for the purpose of the said minority community.⁹¹ However, after *TMA Pai*, the Court in *Inamdar* held that unaided minority educational institutions cannot admit students of non-minority communities or students of minority communities from other States beyond a prescribed limit and if they fail to do so, they would lose their status as a minority educational institution and the protection of Article 30(1).⁹² Such a restriction may be justified for aided institutions as was done by *TMA Pai* for aided linguistic minority educational institutions,⁹³ but there is no constitutional rationale for placing limits on the admission process of unaided minority educational institutions. This was incompatible with the premise of *TMA Pai* of resisting governmental domination over the educational process.

5. Fee and Profit

Prior to *TMA Pai*, the Supreme Court had prescribed an elaborate scheme stipulating the fee that may be charged by a professional educational institution.⁹⁴ However, *TMA Pai* reversed this position by recognising that every educational institution has the right to set up a reasonable fee structure. The Court held that an educational institution cannot charge a capitation fee, but it can generate a ‘reasonable revenue surplus’ for the purpose of development for education and expansion of the institution.⁹⁵ This was a right that was applicable to both minority and non-minority educational institutions. This was a major and welcome departure with respect to the rights of educational institutions.

However, this change was immediately scuttled by *Islamic Academy*, which stipulated the establishment of committees to supervise the fee structure of an educational institution. Every institution, including minority educational institutions, had to place its proposed fee structure along with relevant books of accounts before committees constituted by the State for approval. This completely reversed the freedom of an educational institution to determine its fee structure. It enabled the State to intervene on fee structure even before any finding that the fee charged by the institution was in the nature of profiteering or capitation fee. It also established homogeneity in fee structures as the committees were applying the same yardstick for evaluating costs that go into the running of an educational institution. This was a partial nationalisation of the educational process. Even with respect to pricing of essential goods, there is no stipulation that the price had to receive prior approval of the State.

The freedom recognised in *TMA Pai* to determine a fee structure was further diluted in *Modern School v Union of India*,⁹⁶ where the Court held that the fee structure also has to satisfy the requirement of transparency and accountability in addition to being reasonable. The Court asserted that the autonomy of an educational institution cannot lead to ‘commercialisation of education’.⁹⁷ Relying on the said principle, the Court upheld a Delhi statute, which mandated unaided schools to maintain accounts and use their money for a specific purpose. The Court also upheld the regulation that prohibited the management from diverting the fees to establish a new school. The Supreme Court did not stop there, but went further and directed the form in which accounts had to be maintained by schools, including minority schools. It also held that management of unaided schools can ‘charge [a] development fee not exceeding 15% of the

total annual total tuition fee’.⁹⁸ The Court did not make any distinction between minority and non-minority schools by relying on the *TMA Pai* logic that the right under Article 30(1) is subject to reasonable regulations which can be framed having regard to ‘public interest and national interest’.⁹⁹

IV. STATE REGULATION OF AIDED MINORITY EDUCATIONAL INSTITUTIONS

Are minority educational institutions that receive aid from the State bound to admit non-minority students? This issue arises in view of the apparent conflict between Articles 29(2) and 30(1). Article 29(2) mandates that citizens shall not be denied admission into any educational institutions receiving aid out of State funds on the grounds of religion, race, caste, language, or any of these. Article 29(2) represents the cardinal tenets of secularism—State funds cannot be applied which differentiate on the basis of religion. The question that arises is whether minority educational institutions receiving State aid are bound by Article 29(2), and consequently are precluded from the power to admit only students belonging to the minority community.

Aided minority educational institutions have asserted that the constitutional injunction under Article 29(2) cannot deprive them of the special right conferred upon them under Article 30(1) to establish and administer educational institutions of their choice. On the other hand, it is argued that the Constitution did not carve out an exception for aided minority institutions under Article 29(2). A specific reference has been made to Article 337, which entitles the Anglo-Indian community to aid from the State in respect of education and further stipulates that no educational institution shall be entitled to receive aid unless 40 per cent of the admissions are made available to persons other than the Anglo-Indian community. Article 28(1) of the Constitution prohibits educational institutions that are wholly maintained out of State funds from providing religious instruction. Similarly, Article 28(3) also prevents an educational institution recognised or receiving aid from the State from requiring a person to take part in religious instruction or attending any religious worship without his consent. Similarly, the right under Article 30(1) is not completely immune from State regulatory power. In the absence of a similar provision under Article 29(2), aided minority educational institutions cannot be differentiated on the basis of religion in the course of the admission process.

The question of whether Article 29(2) is subject to Article 30(1) or *vice versa*

has troubled and continues to trouble the Supreme Court since its inception. The question arose for the first time in 1950, when a number of Christian minority educational institutions received State aid. SR Das CJ, speaking for the majority in *Kerala Education Bill*, resolved this issue in favour of minority educational institutions by asserting that depriving minority institutions of their right to admit students after receiving State aid would mean ‘minority institutions will not, as minority institutions, be entitled to any aid’.¹⁰⁰ He said that the purpose of Article 29(2) could not have been to ‘deprive minority educational institutions of the aid they receive from the State’.¹⁰¹ However, he reconciled the conflict between Articles 29(2) and 30(1) by holding that the minority institution has to admit a ‘sprinkling of outsiders’ into the institution.¹⁰² He asserted that a minority institution admitting non-minority students ‘does not shed its character and cease to be a minority institution’. On the contrary, ‘the object of conservation of the distinct language, script and culture of a minority may be better served by propagating the same amongst non-members of the particular minority community’.¹⁰³

This question resurfaced in 1991 when the admission programmes of St Stephen’s College and Allahabad Agricultural University were challenged for giving preference to Christians and church-sponsored students despite receiving aid from the State. An issue which was disposed of as a ‘minor point’ in 1958 became a central one and the Court was deeply conflicted. Jagannatha Shetty J, speaking for the majority, held that a group right under Article 30(1) conferred on minority educational institutions has to be made functional and at the same time the individual right not to discriminate under Article 29(2) has to be affirmed.¹⁰⁴ Shetty held that identical treatment for minorities and non-minorities would violate the equality clause and sought to resolve the conflict by holding that aided minority educational institutions are entitled to prefer students from their community subject to a ceiling of 50 per cent and the remaining shall be made from other communities on the basis of merit.¹⁰⁵ The issue of ‘sprinkling of outsiders’ in the 1958 ruling had now evolved into a 50 per cent quota for non-minority communities, though there appears no constitutional basis for this.

The ruling in *St Stephen’s* was attacked by several minority educational institutions and came up for reconsideration before an eleven-judge bench in *TMA Pai*. Kirpal CJ again acknowledged the conflict between Articles 29(2) and 30(1). He chose to reaffirm the balance struck in *St Stephen’s* between the right of citizens not to be deprived in aided institutions under Article 29(2) and the right of minority educational institutions in Article 30(1), but disagreed with the

50 per cent formula. Instead, he mandated that the State should prescribe the ceiling on the quota for other community members having regard to the nature of education, population, and the educational needs of the area in which the institution is located.¹⁰⁶

Quadri J, in a strong dissent, held that the right of minority institutions to admit individuals of minority communities is not in any way affected by the receipt of State aid. He reasoned that unlike other fundamental rights such as Articles 19, 25, or 26, no such limitations have been incorporated in Article 30(1). Consequently, the injunction in Article 29(2) cannot be made applicable to minority educational institutions under Article 30(1).¹⁰⁷ Placing emphasis on the use of the word ‘only’ in Article 29(2), Quadri J asserted that if the denial of admission to non-minority members is based on protecting the rights of the minority institutions, it would not be in violation of Article 29(2), since it is based on the need to protect rights of minorities under Article 30(1).¹⁰⁸ The constitutional requirements of equality and secularism recognise the rights of minority institutions to admit students of their choice, as well as the right of minority community students to seek admission in such institutions over others.¹⁰⁹ He also emphasised that unlike Article 337 there is no intention in Article 30 to suggest that the receipt of grant-in-aid would result in making available the percentage of seats in the minority institutions to non-minority students.¹¹⁰ Any other view would convert the right in Article 30(1) into a ‘promise of unreality’.¹¹¹ Ruma Pal J also delivered an important dissenting judgment, holding that a minority institution does not waive its right by seeking aid, and the absence of any restriction in Article 30 demonstrates the same. If Article 29 applied to minority institutions under Article 30(1), it would largely ‘wipe out’ the right and there would be no difference between minority educational institutions and other educational institutions.¹¹² She, however, carved out an exception that Article 29 would apply if a minority institution is admitting students of other communities, and in such a scenario it will have to admit students without discrimination.¹¹³

The regulation of aided institutions again arose when the validity of the Right of Children to Free and Compulsory Education Act 2009, which mandates aided institutions to reserve 25 per cent of the seats to children belonging to weaker sections of disadvantaged groups, came up for consideration. In *Society for Unaided Private Schools of Rajasthan v Union of India*,¹¹⁴ while the majority and the minority differed with respect to constitutional validity *vis-à-vis* unaided minority schools, they concurred that the provision is valid for aided minority

schools.¹¹⁵ While the majority and the minority relied on Article 29(2) and *TMA Pai*, the minority opinion held that the State is entitled to put fetters on the freedom of administration once the school receives aid from the government or any state agency.¹¹⁶ Similarly, on appointing faculty, the Supreme Court in *Sindhi Educational Society v Chief Secretary, Government of NCT of Delhi*¹¹⁷ held that the aided minority educational institution should not be compelled to appoint teachers from Scheduled Castes and Scheduled Tribes.¹¹⁸ The Court held that a minority educational institution, by taking aid, does not give up its ‘inbuilt right to appoint persons, which in its opinion are better culturally and linguistically compatible to the institution’.¹¹⁹ The Court reiterated that the power to grant should not be used to ‘destroy, impair or even dilute the very character of ... linguistic minority institutions’.¹²⁰

The Supreme Court’s views have oscillated between two extremes. On the one hand is the current position of law, as articulated by Kirpal J. If a minority educational institution receives aid, the State will determine the quota for other community members. This position does not allow the institution to privilege its own minority, thereby upholding the secular principle that a State-aided institution be indifferent to religion, but seems at odds with the whole point of a minority educational institution—that is, liberation from State regulation. On the other hand is the alternative position, which views aided and non-aided minority educational institutions identically. While the former view undervalues Article 30(1), the latter renders Article 29(2) meaningless. Both extremes seem unpersuasive, and perhaps a more promising path might lie through some compromise, where in the case of aided minority educational institutions there is some degree of State regulation up to a threshold. The key question, of course, will be the extent of this threshold and the factors on which it should be determined. Interestingly enough, the one issue that has never been tested in any of the Supreme Court rulings on aided minority institutions is the relationship between State aid and the extent of control exercised by the State.

V. CONCLUSION

Few areas have been the subject of more vexed constitutional litigation in India than the rights of minority educational institutions. This chapter has tried to show the extent of confusion, even chaos, which defines this area, and the varied ways in which the constitutional promise of Article 30(1) is yet to be fully

understood and fulfilled.

¹ (2002) 8 SCC 481.

² In *Society of St Joseph's College v Union of India* (2002) 1 SCC 273 [278], the Supreme Court held that this provision requires:

a specific provision in the law to provide for the compulsory acquisition of the property of minority educational institutions, the provisions of which law should ensure that the amount payable to the educational institution for the acquisition of its property will not be such as will in any manner impair the functioning of the educational institution.

³ The other constitutional provisions that recognise group rights in the Constitution are Articles 17, 23, 26, and 29.

⁴ See *Ahmedabad St Xavier's College Society v State of Gujarat* (1974) 1 SCC 717 [12] (hereinafter *St Xavier's*); *Re The Kerala Education Bill 1957* AIR 1958 SC 956 (hereinafter *Kerala Education Bill*); *Rev Father W Proost v State of Bihar* AIR 1969 SC 465. Despite the expansive interpretation of art 30(1), it does leave open the question as to whether the minority education institution can set up a police academy or a military school.

⁵ *PA Inamdar v State of Maharashtra* (2005) 6 SCC 537.

⁶ *Pramati Educational and Cultural Trust v Union of India* (2014) 8 SCC 1.

⁷ *Kerala Education Bill* ([n 4](#)) [33]–[34].

⁸ *Kerala Education Bill* ([n 4](#)) [36].

⁹ *Kerala Education Bill* ([n 4](#)) [36].

¹⁰ *State of Kerala v Very Rev Mother Provincial* (1970) 2 SCC 417 [7]. The Court did not go into the issue, since the State asserted that it would not enforce the law if it was struck down *vis-à-vis* minority institutions.

¹¹ *St Xavier's* ([n 4](#)).

¹² *St Xavier's* ([n 4](#)) [7].

¹³ *St Xavier's* ([n 4](#)) [8].

¹⁴ *St Xavier's* ([n 4](#)) [9].

¹⁵ *St Xavier's* ([n 4](#)) [77].

¹⁶ *St Xavier's* ([n 4](#)) [77].

¹⁷ *St Xavier's* ([n 4](#)) [77].

¹⁸ *St Xavier's* ([n 4](#)) [77].

¹⁹ (2002) 8 SCC 481.

²⁰ *Unni Krishnan v State of Andhra Pradesh* (1993) 1 SCC 645.

²¹ *TMA Pai* ([n 1](#)) [138].

²² *TMA Pai* ([n 1](#)) [138].

²³ *TMA Pai* ([n 1](#)) [138].

²⁴ *TMA Pai* ([n 1](#)) [425].

²⁵ *TMA Pai* ([n 1](#)) [425].

²⁶ *TMA Pai* ([n 1](#)) [248].

²⁷ *TMA Pai* ([n 1](#)) [349].

²⁸ *TMA Pai* ([n 1](#)) [345]–[346].

²⁹ (2003) 6 SCC 697.

³⁰ *Islamic Academy of Education* ([n 29](#)) [9].

³¹ *Islamic Academy of Education* ([n 29](#)) [9].

³² *Islamic Academy of Education* ([n 29](#)) [9].

³³ *Islamic Academy of Education* ([n 29](#)) [118].

³⁴ *Islamic Academy of Education* ([n 29](#)) [105].

³⁵ *PA Inamdar* ([n 5](#)).

³⁶ *PA Inamdar* ([n 5](#)) [91].

³⁷ *PA Inamdar* ([n 5](#)) [91].

³⁸ *PA Inamdar* ([n 5](#)) [92].

³⁹ *PA Inamdar* ([n 5](#)) [137].

⁴⁰ (2008) 6 SCC 1. The primary attack in the said case was a constitutional challenge to the Central Educational Institutions (Reservation and Admission) Act 2006, which stipulated reservation for Schedule Castes, Schedule Tribes, and Other Backward Classes in central educational institutions. The central education institution was defined to include those institutions that are receiving aid and are affiliated to universities established by the Union government. However, minority educational institutions under art 30(1) were excluded from the said reservation.

⁴¹ *Ashoka Kumar Thakur* ([n 40](#)) [127].

⁴² *Ashoka Kumar Thakur* ([n 40](#)) [622]. Unlike Balakrishnan CJ, Bhandari J did consider *TMA Pai* and *Islamic Academy* on the issue of special treatment for minorities, but curiously made no reference to *Inamdar*, which overruled *Islamic Academy* on the question of special treatment to minority educational institutions.

⁴³ (2012) 6 SCC 1.

⁴⁴ *Society for Unaided Private Schools of Rajasthan* ([n 43](#)) [62].

⁴⁵ *Society for Unaided Private Schools of Rajasthan* ([n 43](#)) [263].

⁴⁶ *Society for Unaided Private Schools of Rajasthan* ([n 43](#)) [246].

⁴⁷ *Society for Unaided Private Schools of Rajasthan* ([n 43](#)) [33].

⁴⁸ *Pramati Educational and Cultural Trust* ([n 6](#)).

⁴⁹ *Pramati Educational and Cultural Trust* ([n 6](#)) [34].

⁵⁰ In *Pramati Educational and Cultural Trust* ([n 6](#)) [34], the Court also erroneously placed reliance on the opinion of Balakrishnan CJ in *Ashoka Kumar Thakur* holding minority educational institutions as a ‘separate class’ on the assumption that it represented in the opinion of the Court.

⁵¹ *Ashwini Thanappan v Directorate of Education* (2014) 8 SCC 272.

⁵² *Kanya Junior High School v UP Basic Shiksha Parishad* (2006) 11 SCC 92 [57], wherein it was held that the minorities cannot claim ‘higher rights’ than non-minority educational institutions as they have been ‘conferred additional protection’.

⁵³ This argument finds some resonance in the opinion of Shelat and Grover JJ in *Kesavananda Bharati v State of Kerala* (1973) 4 SCC 225 [535A], where they observed that minority rights were incorporated in the Constitution in lieu of separate representation of minorities. See also Sardar Patel’s speech, 27 February 1947, in B Shiva Rao (ed) *The Framing of India’s Constitution: Select Documents*, vol 2 (NM Tripathi 1967) 66; *St Xavier’s* ([n 4](#)) [75].

⁵⁴ Granville Austin, *The Indian Constitution: Cornerstone of a Nation* (Oxford University Press 1966) 66.

⁵⁵ *Constituent Assembly Debates*, vol 1 (Lok Sabha Secretariat 1986) 59, 13 December 1946.

⁵⁶ See Tej Bahadur Sapru, *Constitutional Proposals of the Sapru Committee* (Padma Publications 1945) 260. See also Austin ([n 54](#)) 57.

⁵⁷ Sapru ([n 56](#)) 240.

⁵⁸ Sapru ([n 56](#)) 241.

⁵⁹ *St Xavier's* ([n 4](#)) [8].

⁶⁰ *St Xavier's* ([n 4](#)) [133].

⁶¹ *St Xavier's* ([n 4](#)) [144].

⁶² *Bramchari Sidheswar Shai v State of West Bengal* (1995) 4 SCC 646.

⁶³ See *DAV College v State of Punjab* (1971) 2 SCC 269, where the Court, after examining the religious beliefs of the Arya Samaj, held that it was a religious minority; *Kanya Junior High School* ([n 52](#)) where the Court held that Jains were a minority.

⁶⁴ *TMA Pai* ([n 1](#)) [74]–[81].

⁶⁵ *TMA Pai* ([n 1](#)) [325].

⁶⁶ *Unni Krishnan* ([n 20](#)) [204].

⁶⁷ *TMA Pai* ([n 1](#)) [25]–[26].

⁶⁸ *TMA Pai* ([n 1](#)) [52].

⁶⁹ *TMA Pai* ([n 1](#)) [50].

⁷⁰ *Rev Sidhrajibhai Sabbai v State of Gujarat* AIR 1963 SC 540 [14].

⁷¹ *St Xavier's* ([n 4](#)) [167]. Relying on the US Supreme Court Ruling in *Sherbert v Verner* 374 US 398, 404–5, the Court held that to avoid invalidation the dual test prescribed in *Sidhrajibhai* has to be followed.

⁷² AIR 1954 SC 561.

⁷³ *Bombay Education Society* ([n 72](#)) [17].

⁷⁴ *DAV College v State of Punjab* (1971) 2 SCC 261; *English Medium Students Parents Assn v State of Karnataka* (1994) 1 SCC 550 [25].

⁷⁵ (2004) 6 SCC 264.

⁷⁶ *Usha Mehta* ([n 75](#)) [11].

⁷⁷ *Usha Mehta* ([n 75](#)) [10].

⁷⁸ *Usha Mehta* ([n 75](#)) [10].

⁷⁹ (2014) 9 SCC 485 [59]

⁸⁰ *Kerala Education Bill* ([n 4](#)) [23].

⁸¹ *Kerala Education Bill* ([n 4](#)) [24].

⁸² *All Bihar Christian Schools Association v State of Bihar* (1988) 1 SCC 206 [9].

⁸³ *PA Inamdar* ([n 5](#)) [119].

⁸⁴ The ruling is not entirely clear as to whether merit plays a role at all in admission to schools and undergraduate colleges. While the *TMA Pai* ruling held that ‘scope for merit based selection is practically nil’, it also held in the same ruling that the State may not regulate the right of an unaided educational institution to admit students ‘so long as the admission to the unaided educational institutions is on a transparent basis and the merit is adequately taken care of’. *TMA Pai* ([n 1](#)) [161]. In *PA Inamdar* ([n 5](#)) [104], the Court clarified by stating that ‘the need for merit and excellence therein is not of the degree as is called for in the context of professional education’.

- ⁸⁵ *TMA Pai* ([n 1](#)) [161].
- ⁸⁶ *PA Inamdar* ([n 5](#)) [125]; *TMA Pai* ([n 1](#)) [65].
- ⁸⁷ *PA Inamdar* ([n 5](#)) [125]; *TMA Pai* ([n 1](#)) [161].
- ⁸⁸ *PA Inamdar* ([n 5](#)) [131].
- ⁸⁹ (2014) 2 SCC 305.
- ⁹⁰ This judgment has become extremely controversial and a review petition has been filed against it.
- ⁹¹ *Kerala Education Bill* ([n 4](#)) [22].
- ⁹² *PA Inamdar* ([n 5](#)) [132].
- ⁹³ *TMA Pai* ([n 1](#)) [153].
- ⁹⁴ *Unni Krishnan* ([n 20](#)) [206]–[210].
- ⁹⁵ *TMA Pai* ([n 1](#)) [50], [57].
- ⁹⁶ (2004) 5 SCC 583.
- ⁹⁷ *Modern School* ([n 96](#)) [14].
- ⁹⁸ *Modern School* ([n 96](#)) [25].
- ⁹⁹ *Modern School* ([n 96](#)) [15].
- ¹⁰⁰ *Kerala Education Bill* ([n 4](#)) [22].
- ¹⁰¹ *Kerala Education Bill* ([n 4](#)) [22].
- ¹⁰² *Kerala Education Bill* ([n 4](#)) [22].
- ¹⁰³ *Kerala Education Bill* ([n 4](#)) [22].
- ¹⁰⁴ *St Stephen's College v University of Delhi* (1992) 1 SCC 558 (hereinafter *St Stephen's*).
- ¹⁰⁵ *St Stephen's* ([n 104](#)) [102]. In a strong dissent, Kasliwal J pointed out that the Constituent Assembly debates make it amply clear that once an institution receives a grant, it has to open its doors for all communities.
- ¹⁰⁶ *TMA Pai* ([n 1](#)) [151].
- ¹⁰⁷ *TMA Pai* ([n 1](#)) [265]–[268].
- ¹⁰⁸ *TMA Pai* ([n 1](#)) [293].
- ¹⁰⁹ *TMA Pai* ([n 1](#)) [293]–[306].
- ¹¹⁰ *TMA Pai* ([n 1](#)) [292].
- ¹¹¹ *TMA Pai* ([n 1](#)) [316].
- ¹¹² *TMA Pai* ([n 1](#)) [376].
- ¹¹³ *TMA Pai* ([n 1](#)) [376]–[378].
- ¹¹⁴ (2012) 6 SCC 1.
- ¹¹⁵ *Society for Unaided Private Schools of Rajasthan* ([n 43](#)) [63].
- ¹¹⁶ *Society for Unaided Private Schools of Rajasthan* ([n 43](#)) [265]–[268].
- ¹¹⁷ (2010) 8 SCC 49.
- ¹¹⁸ *Sindhi Educational Society* ([n 117](#)) [114], [120].
- ¹¹⁹ *Sindhi Educational Society* ([n 117](#)) [114].
- ¹²⁰ *Sindhi Educational Society* ([n 117](#)) [103].

CHAPTER 52

PROPERTY

NAMITA WAHI^{*}

I. INTRODUCTION: THE PROPERTY PARADOX

THE fundamental right to property enjoys the unique distinction of not only being the second most contentious provision in the drafting of the Constitution,¹ but also the most amended provision, and the only fundamental right to be ultimately abolished in 1978. Unlike other rights of life, liberty, and equality that can at least theoretically be conceived as applying equally to all, the especially contentious nature of the right to property arises because the protection of property rights inevitably results in entrenching unequal distributions of existing property entitlements.

In line with the tenets of democratic socialism, the Constituent Assembly sought to transition to a liberal democratic legal order, which guaranteed rights of liberty, equality, and property, while simultaneously endeavouring to achieve social and economic transformation premised on land reform and redistribution of resources. However, the inherent contradiction between conserving existing property rights and ushering in a more egalitarian society through redistribution of land led to intense debate within the Constituent Assembly, ending in an uneasy compromise between competing interests. As ultimately adopted, Article 19(1)(f) of the Constitution guaranteed to all citizens the fundamental right to ‘acquire, hold and dispose of property’.² This right was, however, subject to reasonable restrictions by the Union and State legislatures in the public interest, stipulated in Article 19(6). Moreover, Article 31 of the Constitution provided that any State acquisition of property must only be upon enactment of a valid law, for a public purpose, and upon payment of compensation. Certain laws were exempted from these requirements.

The paradox implicit in guaranteeing a fundamental right to property, while simultaneously embarking on a developmental project of land reform and State-planned industrial growth, predictably resulted in tensions between the legislature and the executive on the one hand, which sought to implement this development agenda, and the judiciary on the other, which enforced the

fundamental right to property of those affected. In the decades that followed, judicial enforcement of the property clause resulted in the invalidation of several laws seeking to bring about social and economic reform including land reform legislation, provoking several parliamentary amendments to the Constitution. These include the First (1951), Fourth (1955), Seventh (1956), Seventeenth (1964), Twenty-fourth (1971), Twenty-fifth (1972), Twenty-sixth (1972), Twenty-ninth (1972), Thirty-fourth (1974), and Thirty-ninth (1975) Constitutional Amendments.³ Of these, the First (1951), Fourth (1955), Seventeenth (1956), and Twenty-fifth (1972) were the most significant Constitutional Amendments and are discussed in this chapter. The Forty-fourth Constitutional Amendment 1978, deleted Articles 19(1)(f) and 31 from [Part III](#), the chapter on fundamental rights in the Constitution. Instead, it inserted Article 300A in a new Chapter IV of Part XII of the Constitution, thereby depriving the ‘right to property’ of its ‘fundamental right’ status.

II. THE FUNDAMENTAL RIGHT TO PROPERTY IN THE CONSTITUTION 1950 AND SECTION 299 OF THE GOVERNMENT OF INDIA ACT 1935: SHIFTS AND CONTINUITIES

The controversy surrounding the guarantee of a fundamental right to property had centred chiefly on the wording of Article 31. Surprisingly, the wording of Article 19(1)(f) and (5) attracted little debate, even though no such provision had existed in the Government of India Act. ‘Acquisition and requisitioning of property’ was included as a subject in the Concurrent List enabling both Parliament and the State legislatures to enact laws on the subject.⁴

Article 31 was taken almost verbatim from section 299 of the Government of India Act 1935,⁵ but with certain key differences that greatly strengthened the protection of certain kinds of property rights in post-Independence India and weakened those of others. Section 299 in turn gave ‘constitutional’ or ‘entrenched’ status to restrictions on the State’s power of compulsory takeover of land that had been enshrined in a series of colonial legislation starting from the Bengal Regulation I 1824 and culminating in the Land Acquisition Act 1894.⁶

Section 299 of the Government of India Act had provided in relevant part: (1): No person shall be deprived of his property in British India save by authority of law. (2): Neither the federal nor a provincial legislature shall have the power to make any law authorising the compulsory acquisition

for public purposes of any land, or any commercial or industrial undertaking, unless the law provides for the payment of compensation for the property acquired and either fixes the amount of the compensation, or specifies the principles on which, and the manner, in which it is to be determined. (3): No bill or amendment making provision for the transference to public ownership of any land or for the extinguishment or modification of rights therein, including rights or privileges in respect of land revenue, shall be introduced or moved in either chamber of the Federal Legislature without the previous sanction of the Governor General in his discretion, or in a chamber of a Provincial Legislature without the previous sanction of the Governor in his discretion ...

Clause (1) embodied the fundamental principle of the common law that the executive may not extinguish property rights without the authority of the legislature. Clause (2) was intended to apply only to the compulsory acquisition of land and undertakings.⁷ This was done ostensibly so as not to compromise laws relating to taxation.⁸ Clause (3) safeguarded certain vested interests, including *zamindari*⁹ and grants of land or tenure of land free of land revenue or subject to remissions of land revenue like *talukdaris*, *inamdaris*, and *jagirdaris*. As to these ‘particular classes of property’, there was a requirement that the Governor General (or the Governor of a province) give his previous sanction for any legislation that would transfer such property to public ownership or extinguish or modify the rights of individuals in it. It was precisely this colonial legacy that the Constituent Assembly tried to reverse in the drafting of Article 31.

The Constituent Assembly debate on the drafting of Article 31 had centred on the following aspects of the provision.

1. How do we balance the individual right to property with social and economic reform?
2. Should the meaning of ‘public purpose’ be restricted to government purpose or could it also include within its ambit broader social purposes?
3. What constitutes an ‘acquisition’ or ‘deprivation’ of property that would justify payment of compensation?
4. What do we mean by ‘compensation’ and ‘fair’, ‘equitable’ and ‘just’?
5. Who would be the ultimate arbiter of the quantum of compensation and the form in which it would be paid?

As finally adopted, Article 31 provided as follows:

- (1) No person shall be deprived of his property save by authority of law.
- (2) No property, movable or immovable, including any interest in, or any company owning, any commercial or industrial undertaking, shall be taken possession of or acquired for public purposes under any law authorising the taking such possession or such acquisition, unless the law provides for compensation for the property taken possession of or acquired and either fixes the amount of

compensation, or specifies the principles on which, and the manner in which, the compensation is to be determined and given.

(3) No such law as is referred to in clause (2), made by the legislature of a State shall have effect, unless such law, having been reserved for the consideration of the President, receives his assent.

(4) If any Bill pending at the commencement of this Constitution in the Legislature of a State has, after it has been passed by such Legislature, been reserved for the consideration of the President and received his assent, then, notwithstanding anything in this Constitution, the law so assented to shall not be called into question in any court on the ground that it contravenes the provisions of clause (2).

(5) Nothing in clause (2) shall affect

a. The provisions of any existing law other than a law to which the provisions of clause (6) apply

b. The provisions of any law which the State will hereafter make

i. For the purpose of imposing or levying any tax or penalty, or

ii. For the promotion of public health or the prevention of danger to life or property, or

iii. In pursuance of any agreement entered into between the Government of the Dominion of India or the Government of India or the Government of India and that of any other country, or otherwise, with respect to property declared by law as evacuee property.

(6) Any law of the State enacted not more than 18 months before the commencement of the Constitution may within 3 months of such commencement be submitted to the President for his certification; and thereupon, if the President by public notification so certifies, it shall not be called in question in any court on the ground that it contravenes the provision of clause (2) of this article or that it has contravened the provisions of clause (2) of section 299 of the Government of India Act, 1935.

Clauses (1) and (2) of Article 31 were taken almost verbatim from section 299(1) and (2) of the Government of India Act 1935 with two differences. First, section 299 was restricted to cases of 'compulsory acquisition of property' but under Article 31, the protection for property also extended to 'taking possession' of property for public purposes. Thus, Article 31 mandated the payment of compensation even in cases where there was no transfer of title to the government. Secondly, Article 31(2) implicitly allowed legislatures to provide for compensation in some form (eg, in bonds) other than monetary 'payment' as required under section 299(2) of the Government of India Act.

Clauses (4) and (6) were specially designed to protect land reform legislation. They created exceptions to the protection for property rights guaranteed in clauses (1) and (2) but these exceptions were not substantive, insofar as they did not define the property rights or interests that were exempted from the protections of Article 31. Instead they referred to periods of time, laws enacted during which would be exempt from the requirements of Article 31(2). Thus, clause 4 exempted laws enacted from bills that were pending at the time that the Constitution went into effect. Clause (6) exempted laws that were enacted eighteen months before that date. Laws of both types needed the assent of the

President, in effect that of the Union executive.

Within the Constituent Assembly, there was a consensus on treating major land reform programmes on a different footing from other kinds of State acquisition of property.¹⁰ There was, however, no consensus on the exact terms on which such land reform should be carried out. *Zamindari* and other intermediary tenures were to be abolished upon the payment of ‘some’ compensation, though not ‘just’ or ‘market value’ compensation.¹¹ Cases of ‘individual’ acquisitions were justiciable even though many believed that the legislators who represented the interests of the people should be the ultimate arbiters.¹² When it came to actual drafting, however, the only enactments protected from judicial review were those covered by the express provisions of Article 31(4) and (6). Ultimately, these clauses proved to be inadequate for the purpose of protecting land reforms throughout India, in part because the enactment and execution of all the State land reform laws took much longer than was perhaps anticipated. This in turn created the need for further amendments to the Constitution at a later date.

There were two other important differences between section 299 and Article 31. First, Article 31(5)(b)(ii), for which there was no corresponding provision in the Government of India Act 1935, enabled the State to make laws for the protection of public health or the prevention of danger to life or property and stipulated that such laws, even if they ‘acquired’ or ‘took possession’ of property within the meaning of clause (2), would be exempt from the requirement of compensation contained in that clause. Zoning laws that limit construction on an individual owner’s land or property, or laws requiring the destruction of dangerous structures are examples of laws that would be saved by clause (5)(b)(ii).

Secondly, the inclusion of Article 19(1)(f) in the Constitution, for which there was no corresponding provision in the 1935 Act, meant that not only must any deprivation of property take place after a validly enacted law, but the law must satisfy the requirements of Article 19(5) insofar as it affected the property of a citizen.

From the very outset, there was considerable litigation with respect to the constitutional property clause. Significantly, almost all of the cases where laws were challenged on grounds of violation of property rights also involved a challenge on the basis of the Article 14 guarantee of the right to equality. In the following sections, I review the most important Supreme Court and High Court cases that outlined the doctrinal framework for interpretation of the property clause, at least until such time as this framework was superseded by subsequent

constitutional amendments.

III. AGRARIAN REFORM AND THE FIRST, FOURTH, AND SEVENTEENTH AMENDMENTS [ARTICLE 31(4) AND (6), ARTICLES 31A AND 31B]

Even before the Constitution was adopted in January 1950, *zamindars* challenged the constitutional validity of the Bihar, Madhya Pradesh, and United Provinces¹³ *zamindari* abolition laws as violating the property and equality guarantees of the Constitution. These challenges were made even though the drafters had sought specifically, though not expressly, to protect these laws through the adoption of clauses (4) and (6) in Article 31.

In each of these cases, the petitioners claimed that the impugned acquisition law served no ‘public purpose’, did not adequately compensate them within the meaning of Article 31(2) of the Constitution, and impermissibly discriminated against certain landlords in violation of Article 14 of the Constitution.

While the Allahabad¹⁴ and Bhopal¹⁵ High Courts upheld the constitutional validity of the UP and MP laws, the Patna High Court invalidated the Bihar law for violating the right to equality.¹⁶ The Patna High Court held that Article 31(4) only protected laws against judicial review under the compensation provisions of Article 31(2), but not under the provisions of other fundamental rights contained in the Constitution.

All three decisions were appealed before the Supreme Court, but before the Court could give its decision, the Constitution was amended to nullify the effect of the Patna High Court decision in the *Kameshwar Singh* case. The Constitution (First Amendment) Act 1951 enacted Articles 31A¹⁷ and 31B and also introduced the Ninth Schedule in the Constitution. Through the adoption of these provisions, the amenders sought to do what had not been attempted in the original Article 31, namely to define the kinds of interests that should be placed beyond the protection of the compensation requirement in clause (2) of Article 31 and also of the other fundamental rights contained in Articles 14 and 19. Article 31A (1) provided that ‘no law providing for the acquisition by the State of any estate or of any rights therein or for the extinguishment or modification of any such rights’ would be deemed void on grounds of inconsistency with the fundamental rights contained in [Part III](#). Clause (2) defined the expression ‘estate’. Clause (2)(a) defined ‘estate’ to have the ‘same meaning as that

expression or its local equivalent has in the existing law relating to land tenures in force in that area’ and stated that it ‘shall also include any *jagir*, *inam* or *muafi* or other similar grant’. Clause (2)(b) defined ‘rights, in relation to an estate’, to include ‘any rights vesting in a proprietor, sub-proprietor, under-proprietor, tenure-holder, or other intermediary and any rights or privileges in respect of land revenue’.

The First Amendment also introduced Article 31B and the Ninth Schedule into the Constitution. Article 31B stipulated that no provision of any law in the Ninth Schedule ‘shall be deemed to be void, or ever to have become void, on the ground that [it] ... is inconsistent with, or takes away or abridges any of the rights conferred by, any provisions of this Part’— that is, the fundamental rights. In other words, Article 13(1), which provided that any law inconsistent with the fundamental rights was invalid to the extent of that inconsistency, was in effect repealed so far as laws listed in the Ninth Schedule were concerned. Thirteen laws were listed in the Ninth Schedule, including the Bihar Land Reform Act.

The *zamindars* of Bihar then attacked the validity of the First Amendment in *Shankari Prasad Deo v Union of India*, but the Supreme Court upheld it.¹⁸ The Court then went on to decide the appeals from the Patna, Allahabad, and Bhopal High Courts.

In *State of Bihar v Kameshwar Singh* (hereinafter *Kameshwar Singh*),¹⁹ the Supreme Court upheld the constitutional validity of the Bihar Land Reforms Act 1950, but by a majority of 3:2, found two provisions of the Act to be unconstitutional. Barred from considering the law against the requirements of fundamental rights in [Part III](#), in a clear stretch on judicial reasoning, the Court found that these provisions offended against (a) an inherent need in eminent domain that an acquisition be for a ‘public purpose’; and (b) against Entry 42 in the Concurrent List, which mentioned ‘principles on which compensation for property acquired or requisitioned ... is to be given’.

For almost a decade after the First Amendment, the High Courts and the Supreme Court were involved in the resolution of cases involving *zamindari* abolition. Yet despite its controversial pronouncement in the *Kameshwar Singh* case, in all subsequent cases, the Supreme Court upheld *zamindari* abolition laws in their entirety. While the Court emphasised that payment of compensation for acquisition of property was a fundamental right under Article 31(2) of the Constitution, it recognised that judicial review of laws infringing this fundamental right was excluded in the case of *zamindari* abolition laws in accordance with the Provisional Parliament’s intent as expressed through the enactment of the First Amendment to the Constitution.

But although the question of *zamindari* abolition was fairly settled, the question of what else was covered by the definition of ‘estate’ in the First Amendment was not, when Parliament enacted the Constitution (Fourth Amendment) Act 1955. Described in greater detail in Section IV, the Fourth Amendment made many changes to Article 31 and inserted Article 31(2A). Significantly, the Fourth Amendment also substituted clause (1) of Article 31A,²⁰ and amended Article 31A(2)(b) to add the terms ‘*raiya*ts’ and ‘*under raiya*ts’ to the list of those whose ‘rights’ in an estate were removed from the protection of Articles 14, 19(1)(f), and 31.

Apart from facilitating the abolition of intermediary tenures in the non-*zamindari* areas, the *jagirdari*, *mahalwari*, *ryotwari*, and other miscellaneous land tenures, the Fourth Amendment also sought to facilitate the next stage of land reform involving imposition of land ceilings and redistribution of holdings. Again, it fell to the courts to delineate what kinds of land revenue arrangements constituted ‘estates’ and ‘rights in relation to an estate’ within the meaning of the amended Article 31A(2)(a).

From 1955 to 1964, the Supreme Court interpreted this term expansively to uphold the constitutional validity of laws involving the abolition of intermediary rights in non-*zamindari* areas, including intermediary rights in *jagirdari* tenures in Rajasthan,²¹ alienated and unalienated lands in the State of Bombay,²² and *mahalwari* tenures in Punjab.²³ In *Atma Ram v State of Punjab*,²⁴ the Court interpreted the expression ‘rights’ in relation to an estate to have an all-inclusive meaning comprising both horizontal and vertical divisions of the estate. Thus, the expression included not just the interests of proprietors or sub-proprietors, but also lower grade tenants, like *ryots* or *under ryots*.

Nevertheless, by fashioning the ‘agrarian reforms’ test in *KK Kochuni v State of Madras* (hereinafter *Kochuni*),²⁵ the Supreme Court made it clear that the ouster of judicial review on questions of compensation was limited only to cases where the proposed acquisition of land had a connection with a scheme of agrarian or land reform. In all other cases, compensation payable under Article 31(2) should be market value compensation.

Moreover, in *Karimbil Kunhikoman v State of Kerala* (hereinafter *Kunhikoman*),²⁶ the Supreme Court held that lands held under *ryotwari*²⁷ tenure in the State were not estates within the meaning of Article 31A(2)(b). Wanchoo J, speaking for the Court, held that a *ryot* was not really a ‘proprietor’ but a ‘tenant’. This was because a *ryot* could sell, mortgage, pass on to his heirs, or give away his holding, and he could not be evicted from the land except in case of his failure to pay the land revenue. But in theory—and for Wanchoo J this

was the deciding point—the *ryot* could relinquish or abandon his land in favour of the government.²⁸ As a result, even though the Kerala Agrarian Relations Act 1960 was a law of agrarian reform, the petitioners' lands were not 'estates' within the meaning of Article 31A and therefore in its application to the petitioners' estates, the Act was subject to be tested on the anvil of fundamental rights. Here, like the Patna High Court's decision in the *Kameshwar Singh* case, the Supreme Court struck down the law for violating the petitioners' fundamental right to equality and not their fundamental right to property because of the graduated scale of compensation payable for lands acquired over the ceiling. Wanchoo J's highly conceptualistic approach to the question of whether *ryotwari* lands were 'estates' within the meaning of Article 31A(2)(a) and consequent conclusion that a *ryot* was merely a tenant, and not the owner of the land, and therefore *ryotwari* lands were not covered by Article 31A, appears rather unconvincing in light of the actual practice of *ryotwari* tenures.

By indicating that *ryotwari* lands did not fall within the meaning of Article 31A, an interpretation that receives some support from the parliamentary debates on the First Amendment,²⁹ the Court's pronouncement in *Kunhikoman* threatened land ceiling laws and agrarian reform in much of southern India.

The *Kochuni* and *Kunhikoman* decisions led Parliament to amend the constitutional property clause for a third time by the Constitution (Seventeenth Amendment) Act 1964. The Seventeenth Amendment made three important changes to the constitutional property clause. First, it inserted a proviso in Article 31A(1) which enabled the State to acquire land over and above the prescribed land ceilings in each State at less than market value compensation. Secondly, it amended the definition of 'estate' in Article 31A(2)(a) to specifically include lands under *ryotwari* settlement. Moreover, the term 'estate' now also included all lands 'held or let for purposes of agriculture or for purposes ancillary thereto, including waste land, forest land, land for pasture or sites of buildings and other structures occupied by cultivators of land, agricultural labourers and village artisans'. Finally, the amendment added forty-four laws to the Ninth Schedule, thereby shielding them from judicial review on grounds of Articles 14, 19, and 31.

Once it became clear that land reform statutes could not be challenged on the basis of Articles 14 and 19(1)(f), the questions of controversy shifted to the interpretation of the terms of Article 31(2) that had also been contentious before the Constituent Assembly. These included the meaning of the words 'compensation', 'acquisition', and 'taking possession'.

IV. EMINENT DOMAIN AND POLICE POWERS: THE RELATIONSHIP BETWEEN ARTICLES 19 AND 31 AND THE FOURTH AMENDMENT (1955)

In any social system that recognises private property, the State restricts property rights in the exercise of powers inherent in the State's sovereignty. In countries that have a written Constitution, these restrictions are often expressly embodied in the constitutional text. Broadly, these powers are classified as *police powers*, *eminent domain*, and *taxation*. Distinguishing between these powers becomes important because even though State action in the pursuance of each of them may involve restrictions on existing property rights, the obligations on the part of the State in each instance are different.

Police power has been defined as the power of promoting the public welfare by restraining and regulating the use of liberty and property.³⁰ In this chapter, we will confine our discussion of police powers insofar as they restrain or regulate the use of property. The power of *eminent domain*, in the broadest sense, may be understood simply as the power of the sovereign to take property for public welfare, without the owner's consent.³¹

When the State acquires property in the exercise of its *eminent domain* powers, the economic loss inflicted on the private owner is accompanied by a corresponding economic gain to the State or to someone nominated by the State.³² Here, the State does not attempt to regulate the use of the owner, but, on the contrary, replaces him and deals with the property as if the State itself were the owner of the property.³³ Where the State regulates property in exercise of its *police powers*, the State does not make any economic gain to itself or its nominee, although, as a consequence of the regulation, an economic loss is inflicted on the owner. The State deals with the property not as the owner, but as a sovereign having power over the owner and his property, directing the owner to observe the State's instructions in the use and enjoyment of his property.³⁴

In India, the key concepts used in Articles 19 and 31(1) and (2) were 'restriction', 'deprivation', and 'acquisition', respectively. The Supreme Court's interpretation of these terms involved two main questions. The first question concerned the interpretation of the terms 'deprivation' in clause (1) and 'acquisition' in clause (2) of Article 31 to determine whether they concerned the same or two different exercises of State power. The second question concerned the interplay of Article 31 with Article 19(1)(f).

1. Article 31(1) and (2): Police Powers and Eminent Domain

In the Supreme Court's early decisions,³⁵ SR Das J put forth an interpretation of Article 31 whereby Article 31(1) related to the *police powers* of the State and 31(2) related to *eminent domain*. When the State compulsorily acquired property in the exercise of its *eminent domain* powers under Article 31(2), such acquisition could only be pursuant to a valid law, for a public purpose and upon provision of compensation. However, when it deprived a person of his property for the purposes of the State like 'razing a building in the path of fire', such deprivation occurred in the exercise of the *police powers* of the State under Article 31(1).³⁶ Here the only requirement was that such deprivation must be pursuant to a validly enacted law.

However, another interpretation championed by Sastry CJ was that Article 31, clauses (1) and (2) should be read together as stating three requirements for acquisitions pursuant to the exercise of the State's powers of *eminent domain*. Article 31(1) stated the general principle that there shall be no taking or deprivation of property without a valid law, whereas Article 31(2) elaborated upon this principle by stipulating the requirements of a valid law, including the existence of a public purpose and the provision of compensation.³⁷

The adoption of one or the other interpretation would differentially impact the extent of protection of private property under the Constitution. Adopting the first interpretation meant the State could take actions short of acquisition or taking possession of the property that substantially deprived the owner of the benefits of ownership without the requirements of public purpose and just compensation stipulated in Article 31(2). Under Article 31(1), the law authorising such deprivation was also not required to be 'reasonable' as contained in the requirement for 'reasonable' restrictions under Article 19(1)(f).

Curiously, none of the judges found a basis for the exercise of the State's police powers in Article 31(5)(2)(b)(ii), even though it was the most likely encapsulation of the same, and Article 31(5)(2)(b)(i) expressly spoke of the State's power of taxation.

2. Article 19(1)(f): 'Capacity' v 'Concrete Property Entitlements'

On the second question, that of the interpretation of the relationship between Articles 19 and 31, the issue was whether the right guaranteed to citizens 'to acquire, hold and dispose of property' and its companion guarantee of a 'right to

carry on any occupation, trade or business' under Article 19(1)(f) and (g) simply concerned the *capacity* of all citizens or protected their *concrete interests* in a particular piece of property or business enterprise. Put differently, where there was an actual deprivation of a concrete property entitlement, did only Article 31 apply? Here, Sastry CJ took the view that Articles 19 and 31 were mutually exclusive. Article 19 merely referred to a citizen's *capacity* to own property. This provision had no reference to the property that was already owned by him, which was dealt with in Article 31. In other words, Article 19 forbade the State from denying particular individuals or classes the right to own property or to carry on business, but did not protect a citizen's interest in a particular piece of property from State interference. Sastry CJ noted that since Article 31, which was headed by the caption 'right to property', already protected property rights of citizens as well as non-citizens, whereas Article 19(1)(f) only protected the rights of citizens, any other interpretation would make Article 19(1)(f) redundant.³⁸ But if Articles 19(1)(f) and (5) were understood as dealing only with the capacity to acquire, hold, and dispose of property in general, this distinction made sense. In that case, it would be justifiable to exclude aliens from such capacity, as had been done in several countries for the benefit of nationals, particularly with respect to rights in land. This interpretation finds some support from the Constituent Assembly debates, particularly the statement of TT Krishnamachari, later Finance Minister. But even on Krishnamachari's statement, the right did not merely protect the capacity to acquire, hold, and dispose of property, but some concrete though basic property entitlements.³⁹

In contrast, other judges on the Court, including SR Das and Jagannadhadas JJ, took the view that Article 19(1)(f) applied both to abstract and concrete property rights. Jagannadhadas J noted that to:

[C]onstrue Article 19(1) (f) and (5) as not having reference to concrete property rights and restrictions on them would enable the legislature to impose unreasonable restrictions on the enjoyment of concrete property (except where such restrictions can be brought within the scope of article 31(2) by some process of construction).⁴⁰

3. The Relationship Between Articles 19(1)(f) and 31: 'Restriction' v 'Deprivation'

In subsequent cases,⁴¹ Sastry CJ's interpretation of the relationship between Article 31(1) and (2), and Das J's interpretation of the relationship between Article 19 and Article 31, both of which accorded stronger protection to property

entitlements, became the established reasoning of the Court. According to this reasoning, Article 19(1)(f) and (g) not only protected citizens' capacity to hold property or conduct a business, but were also available to protect concrete property entitlements of citizens. These rights were subject to 'reasonable' State restrictions in the interest of the general public under Article 19(6). A restriction so substantial as to amount to a 'deprivation' of property or of the ability to carry on business would implicate the provisions of Article 31. In the case of a deprivation, which may or may not involve an acquisition of property, Article 31(1) and (2) read together prescribed three requirements that must be met—a legislative enactment, public purpose, and compensation. On this interpretation, it became possible for an aggrieved citizen to challenge State interference with his property rights simultaneously as a deprivation of his property without compensation under Article 31 and also as an unreasonable restriction of his right to hold property or to carry on a trade or business under Article 19(1)(f) and (g), respectively. Initially, the Supreme Court tended towards the conclusion that if a 'restriction' on the exercise of a property right or the conduct of a trade or business was so severe as to be 'total', and therefore a 'deprivation' within the meaning of Article 31, Article 19 would not apply. This approach derived from the Court's approach to the interpretation of the right to life under Article 21 and personal liberty under Article 19(1)(d) in *AK Gopalan v State of Madras*.⁴² There, a majority of the Court (4:1) had held that the rights conferred by Article 19(1)(a) to (g) could be enjoyed only so long as the citizen was free and had the liberty of his person. But the moment he was lawfully deprived of his liberty pursuant to Article 21,⁴³ he ceased to have the rights guaranteed under Article 19.

4. The Relationship Between Articles 19 and 31 Following the Fourth Amendment

In 1955, the Constitution was amended to adopt Das J's interpretation of the relationship between Article 31(1) and (2). This was unsurprising because this interpretation gave greater scope for State acquisitions without compensation, which the government claimed was necessary for its economic development and social redistribution agenda. The Fourth Amendment introduced a new clause 2A into Article 31, which provided as follows:

Where a law does not provide for the transfer of the ownership or right to possession of any property

to the state or to a corporation owned or controlled by the state, it shall not be deemed to provide for the compulsory acquisition or requisitioning of property, notwithstanding that it deprives any person of his property.

As a result of the amendment, Article 31(2), with its requirements of public purpose and compensation, was to apply only when the State formally took title or possession of the property. If it otherwise ‘deprived’ a person of his property, the only safeguard under Article 31(1) was that such deprivation must be pursuant to a law.

Following the Fourth Amendment’s comprehensive evisceration of the guarantees under Article 31, Article 19 assumed greater importance. The question in cases following the Fourth Amendment was whether a regulation or ‘restriction’ of property within the meaning of Article 19(1)(f) and (g), no longer assailable under Article 31, may still be attacked under Article 19. Two approaches were possible on this question. According to the first conceptualistic approach adopted in *AK Gopalan*, the notion of ‘restriction’ implied something to be restricted. However, the deprivation or total restriction of something meant that there was nothing to restrict.⁴⁴ The second approach sought to assess the intent of the drafters in including both Articles 19 and 31 in the Constitution. According to this approach, if the State were to be barred from unreasonable ‘restrictions’ on the rights to hold property or carry on business, could the Constitution drafters have intended that unreasonable deprivations of property be unchallengeable? Prior to the Fourth Amendment, the Supreme Court had adopted the first approach in a few cases.⁴⁵ However, given the danger to property rights posed by the Fourth Amendment, the Supreme Court adopted the second approach in subsequent cases,⁴⁶ holding that the law authorising the deprivation of property under Article 31(1) must be consistent with other fundamental rights, including Article 19. Every deprivation was also a restriction on the right to property, whose reasonableness must be assessed by the courts.

V. ‘PUBLIC PURPOSE’ AND ‘COMPENSATION’

The laws that fell clearly within the scope of Article 31(2) needed to satisfy the requirements of public purpose and compensation.

1. Public Purpose

In all the agrarian reform cases, the Supreme Court had adopted a highly deferential approach to the requirement of public purpose. While this approach was especially evident in the *zamindari* abolition cases, the Court largely deferred to the government's articulation of public purpose even in cases involving acquisition of urban land for resettlement of refugees,⁴⁷ temporary takeover of a textile mill,⁴⁸ and nationalisation of road transport.⁴⁹ In successive cases, the Court held that the expression 'public purpose' was 'elastic and could only be developed through a process of judicial inclusion and exclusion in keeping with the changes in time, the state of society and its needs'.⁵⁰ The Court also clarified that acquisitions that benefited particular individuals or entities could satisfy the requirement of public purpose so long as they were in furtherance of a particular scheme of public benefit or utility.⁵¹ Over time, the list of public purposes has been continually expanded to include acquisitions for private industry,⁵² cooperative housing societies,⁵³ and residential development,⁵⁴ all of which have been upheld by the Supreme Court.

2. Compensation

One crucial difference between section 299 of the Government of India Act 1935 and Article 31(2) of the Constitution was the omission of the word ‘just’ before the term ‘compensation’. This was done to prevent courts from requiring payment of market value compensation, particularly in, but not limited to, cases of *zamindari* abolition.⁵⁵

a. *Zamindari Abolition Cases and the First Amendment*

From section 3 it is clear that, except for and following the *Kameshwar Singh* case, while the Supreme Court emphasised that payment of compensation for acquisition of property was a fundamental right under Article 31(2) of the Constitution, it recognised that judicial review of laws infringing this fundamental right was excluded in the case of land reform laws, including abolition of *zamindari* and other intermediary laws. This was in accordance with the Provisional Parliament’s intent as expressed through the enactment of the First Amendment to the Constitution. In all other cases, however, the Court insisted upon the payment of compensation that was the ‘just equivalent’ of the property acquired. Thus, for instance, in *State of West Bengal v Bela Banerjee*,⁵⁶ the Court invalidated a law that enabled acquisition of land by the State for resettlement of refugees following the Partition of India, because the compensation was fixed at an anterior date to the acquisition without regard to changes in market value of the property following that date. Here the Court held that while the legislature could prescribe the principles on which compensation must be calculated, such compensation must be a ‘just equivalent’⁵⁷ of the deprivation caused to the owner.

The Fourth Amendment was passed shortly after the decision in the *Bela Banerjee* case to oust judicial review of the adequacy of compensation.⁵⁸ Over the next decade, the Supreme Court gave a series of inconsistent decisions. In *Kunhikoman*, the Court held that the ‘just compensation’ standard would not apply to cases that were filed post the Fourth Amendment. But in *Vajravelu Mudaliar v Special Deputy Collector* (hereinafter *Vajravelu*),⁵⁹ the Court made a distinction between the following cases: (a) just equivalent; (b) just equivalent but inadequate; (c) not illusory compensation, but not adequate; and (d) illusory

compensation, which was a colourable exercise of power. The Court held that while it would not intervene in the first three cases, it was obligated under the Constitution even after the Fourth Amendment to intervene in the last case.⁶⁰ The Court noted that ‘compensation’ must ‘compensate’ and therefore could not be an illusory sum. The decision in this case was followed by a series of inconsistent rulings. While the Court applied the *Vajravelu* test in *Union of India v Metal Corporation of India Ltd*,⁶¹ in several other cases⁶² the Court showed greater deference to Parliament on the question of compensation payable in case of State acquisitions of property. The *Metal Corporation* case was later overruled in *State of Gujarat v Shantilal Mangaldass*,⁶³ which was in turn overruled in the *Bank Nationalisation* case,⁶⁴ which restored the Court’s powers of judicial review in cases where the compensation was illusory.

In 1972, the Constitution (Twenty-fifth Amendment) Act was passed specifically to overturn the ruling in the *Bank Nationalisation* case. This amendment replaced the word ‘compensation’ in Article 31(2) with the word ‘amount’ and expressly ousted judicial review of the adequacy of compensation. Nevertheless, in *Kesavananda Bharati v State of Kerala* (hereinafter *Kesavananda*),⁶⁵ a majority of the judges of the Court emphasised that although the right to property was not part of the ‘basic structure’ of the Constitution, even after the Twenty-fifth Amendment, the Court must inquire whether what is given as compensation is completely illusory or arbitrary. In *State of Karnataka v Ranganatha Reddy*,⁶⁶ the Court held that following the Twenty-fifth Amendment, the *Vajravelu* and *Bank Nationalisation* cases were no longer valid law and that the Court could not review the adequacy of compensation, but reiterated the *Kesavananda* ruling that compensation could not be completely arbitrary or illusory. But the Court did not clarify the test of ‘illusory compensation’, implying that this must be determined on a case-by-case basis.

VI. THE FUNDAMENTAL RIGHT TO PROPERTY ABOLISHED: FORTY-FOURTH CONSTITUTIONAL AMENDMENT

The Constitution (Forty-fourth Amendment) Act 1978 abolished Articles 19(1) (f) and 31 and inserted Article 300A into a new Chapter IV of Part XII of the Constitution, thereby depriving it of its ‘fundamental right’ status. Article 300A provides, ‘No person shall be deprived of his property save by authority of law.’ Following the Forty-fourth Amendment, there is no express provision requiring

the State to pay compensation to an expropriated owner except as provided in Article 30(1A) and the second proviso to Article 31A(1). Article 30(1A) provides for the payment of compensation when the property of a minority institution has been acquired. The second proviso to Article 31A(1) mandates the payment of market value compensation in the case of acquisition of estates where personal cultivation is being carried on. This has created an anomalous situation, whereby, in all other cases of acquisition, there is no express constitutional requirement for the State to pay market value compensation.

In the immediate aftermath of the Forty-fourth Amendment, some scholars opined that the amendment would have little effect because the requirements of ‘public purpose’ and ‘compensation’ would be read into Article 300A.⁶⁷ On the contrary, during the 1980s and 1990s, we see an almost complete abdication of judicial review on these questions. As described in Section V, judicial scrutiny on the question of ‘public purpose’, always lenient, was almost perfunctory during this period, resulting in continuous expansion of the purposes for which government could acquire property without payment of market value compensation. In *Jilubhai Khachar v State of Gujarat*,⁶⁸ the Supreme Court reiterated that following the Forty-fourth Amendment, it could not go into the adequacy of compensation awarded under an acquisition law. All it could do was to determine that the principles on which the compensation was decided were relevant and the compensation awarded was not illusory. The Court also rejected attempts to read the right to property into the right to life guarantee under Article 21.⁶⁹

VII. REINSTATING THE FUNDAMENTAL RIGHT TO PROPERTY IN THE INDIAN CONSTITUTION

Since the 2000s, widespread acquisition of land by the State for dams, infrastructure, and private industry has received significant public attention owing to massive dispossession of poor peasants and traditional communities such as forest dwellers, cattle grazers, fishermen, and indigenous tribal groups. In 2009, a public interest petition was filed before the Supreme Court, in *Sanjiv Agarwal v Union of India*,⁷⁰ seeking invalidation of the Forty-fourth Constitutional Amendment and reinstatement of the fundamental right to property. The petitioner cited the large-scale displacements caused by the creation of special economic zones and by projects such as the Narmada dams

and the land conflicts in Singur and Nandigram as motivating his demand. The petitioner argued that following the decision in *IR Coelho v Union of India*,⁷¹ fundamental rights could not be excluded from the purview of the 'basic structure' as articulated by the Supreme Court in *Kesavananda*. Since the right to property enshrined in Articles 19(1)(f) and 31 was a fundamental right at the time *Kesavananda* was decided, its subsequent abolition by the Forty-fourth Amendment violated the 'basic structure' of the Constitution, and was therefore unconstitutional. In 2010, the Supreme Court dismissed the petition without reaching the merits on the grounds that the petitioner was a public interest litigant, not directly affected by the abolition of the fundamental right to property, and that entertaining the petition would lead them to reopening settled constitutional case law on property.

Nevertheless, in recent years, the Supreme Court has reinstated the requirements of 'public purpose' and 'compensation' within Article 300A. In *KT Plantation Private Ltd v State of Karnataka*,⁷² the Supreme Court held that the 'rule of law' prevailed in India and the Court was not 'powerless' in a situation 'where a person was deprived of his property ... for a private purpose with or without providing compensation',⁷³ as a result of which any State acquisition of property must satisfy the requirements of 'public purpose' and 'compensation' under Article 300A.⁷⁴ In *Super Cassettes Industries Ltd v Music Broadcast Private Ltd*,⁷⁵ the Court reiterated these requirements in the context of intellectual property.⁷⁶ Noting that copyright was 'property' within the meaning of Article 300A, Chelameshwar in a concurring opinion emphasised that the compulsory licensing provisions contained in section 31 of the Copyright Act 1957 must satisfy the requirements stipulated therein, including that such deprivation must happen pursuant to a valid law and must satisfy a public purpose.⁷⁷

In September 2013, Parliament enacted the controversial Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act 2013⁷⁸ (hereinafter LARR Act). The Act enhances the compensation payable in cases of forcible acquisition of land,⁷⁹ and also provides for rehabilitation and resettlement awards in cases of displacement.⁸⁰ The Act also seeks to restrict the definition of 'public purpose' by providing a much more detailed listing of public purposes.⁸¹ Consequently, the LARR Act has legislatively strengthened the requirements of public purpose and compensation that were weakened by the dilution of the right to property in the Constitution.

While the LARR Act empowered the government to acquire land for the enumerated public purposes for public–private partnerships as well as for private companies,⁸² in a significant departure, the Act mandates that the consent of 70 per cent of project-affected families be obtained for public–private partnerships and 80 per cent in the case of land being acquired by companies.⁸³ However, no consent is necessary if the government acquires land directly for its own use, hold, and control.⁸⁴ Moreover, every such acquisition would be subject to an elaborate social impact assessment (SIA) process stipulated in the LARR Act.⁸⁵

The LARR Act came into force on 1 January 2014. But land acquisition done under thirteen sector-specific land acquisition laws was exempted from its provisions for a period of one year from the Act's coming into force.⁸⁶ On 31 December 2014, the President promulgated the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement (Amendment) Ordinance 2014 ('LARR Amendment Ordinance'). This Ordinance brought the thirteen exempted laws within the purview of the compensation and rehabilitation provisions of the LARR Act.⁸⁷ Simultaneously, however, it exempted several categories of projects from the consent and SIA requirements stipulated in the LARR Act. The LARR Amendment Ordinance proved to be even more controversial than the LARR Act. Due to lack of social and political consensus, a Bill slated to replace the Ordinance ('LARR Amendment Bill') could not be passed into law. The President repromulgated the Ordinance in April, and the government was forced to refer the LARR Amendment Bill to a joint parliamentary committee in May 2015. Simultaneously, in April 2015, three Delhi-based NGOs and a farmers' organisation impugned the constitutional validity of the LARR Amendment Ordinance before the Supreme Court.⁸⁸ Thus, all institutions of government, the executive, the legislature, and the judiciary, were preoccupied with the content of the right to property as altered by the LARR Act and the LARR Ordinance,⁸⁹ contributed to continued political and legal uncertainty surrounding the right to property.⁹⁰ The controversy around the implementation of the LARR Act 2013 and its attempted amendment by the LARR Amendment Bill 2015 also centred on narratives of economic development and social redistribution of resources from the agrarian classes to industry.⁹¹

As this chapter goes to print, the political and legal uncertainty continues. On 31 August 2015 the LARR Amendment Bill lapsed. Subsequently, the government's decision not to repromulgate the Ordinance a third time has left the Supreme Court challenge to its constitutional validity infructuous. While

news reports suggest that the government is still trying to build consensus in Parliament to pass the LARR Amendment Bill,⁹² recent regional electoral losses make such passage unlikely. Instead, the Union government has encouraged the States to amend the LARR Act, which they are empowered to do under Article 254(2) of the Constitution as the Act is in a Concurrent List subject, so long as the President ratifies such amendments. The State of Tamil Nadu has already done so,⁹³ and at least three other states are following suit.⁹⁴

VIII. CONCLUSION

The fundamental right to property in India has come full circle. It started as a legal right against arbitrary State action insofar as it limited the colonial State's power to take away an individual's property except when this was done pursuant to a valid law, for a public purpose, and for just compensation. This right was enshrined in a series of colonial legislation starting with the Bengal Regulation I 1824 and culminating in the Land Acquisition Act 1894. The right was later elevated to the status of an 'entrenched' or 'constitutional' right by section 299 of the Government of India Act 1935. When the Constitution was adopted in 1950, the right to property was elevated to the status of a 'fundamental right', which ensured that the State could not legislatively remove the limitations imposed upon its power to acquire property and made the right judicially reviewable. However, through a series of constitutional amendments, exceptions were carved out of the fundamental right to property, as a result of which some of the limitations on the State's power to acquire property, specifically the requirement to pay market value compensation, did not apply in particular cases. The Forty-fourth Constitutional Amendment in 1978 deprived the right to property of its 'fundamental right' status, thereby making the limitations on the State's power to acquire property non-justiciable. However, in the past five years, there have been attempts made judicially to restore the right to its fundamental right status, as it existed before the Forty-fourth Amendment. Simultaneously, the requirements of 'public purpose' and 'compensation' have been strengthened legislatively through the repeal and replacement of the Land Acquisition Act 1894 by the LARR 2013. The LARR Act's amendment by the thrice promulgated LARR Amendment Ordinance within a year of its enactment, and yet the inability of the government to garner parliamentary support to pass the LARR Amendment Bill 2015 into law testifies to the intense social and political contestation around the contours of the right to property, both as a legal

and constitutional right.

Importantly, however, the trajectory of the right to property in the Constitution, as seen from the drafting of the original constitutional property clause, and its evolution through judicial interpretation, legislation, and constitutional amendment, demonstrates the Indian State's continual attempts to reshape property relations in society to achieve its goals of economic development and social redistribution. Each version of the property clause favoured property rights of certain groups and weakened those of others and was the product of intense contestation between competing groups that used both the legislature and the judiciary to further their interests.

Concomitantly, lurking behind the development of the Supreme Court's doctrinal jurisprudence is the Court's fear of arbitrariness of State action. Almost all of the property cases also involved a challenge on grounds of the equality guarantee in Article 14, and in a majority of these cases, the impugned law was invalidated for violating the right to equality and not the right to property. This is not only evident in the agrarian reform cases that led to the First, Fourth, and Seventeenth Amendments to the Constitution but is also a recurring theme in recent cases that have sought to judicially reinstate the fundamental right to property following its abolition by the Forty-fourth Amendment, as well as the debates on the enactment of the LARR Act and the LARR Amendment Bill.

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¹ The debate over property rights took place over two and a half years and the controversy was more prolonged and acute than that over any subject except the choice of official languages. Granville Austin, *The Indian Constitution: Cornerstone of a Nation* (Oxford University Press 2000).

² Constitution of India 1950, art 19(1)(f).

³ In India, constitutional amendments do not add numbered addenda to the text; rather, they add Articles to the Constitution.

⁴ Constitution of India 1950, Entry 42, List III, Schedule VII.

⁵ The Government of India Act 1935 was the last of the constitutional changes enacted by the British Parliament to respond to the increasing demands for greater autonomy since the late nineteenth century.

⁶ For a review of colonial legislation regulating compulsory acquisition of land, see SG Velinker, *The Law of Compulsory Land Acquisition and Compensation* (Bombay 1926) iii; Om Prakash Aggarwala, *Compulsory Acquisition of Land in India*, vol 2 (University Book Agency 1974); HM Jain, *Right to Property under the Indian Constitution* (Chaitanya Publishing House 1968) 12.

⁷ Tom Allen, *The Right to Property in Commonwealth Constitutions* (Cambridge University Press 2000) 45.

⁸ Allen ([n 7](#)) 45.

⁹ The *zamindari* system was a land tenure system prevalent in the Punjab, Sindh, the Northwest Frontier

Provinces, the United Provinces, Bengal, and Madras. *Zamindars* were usually, but not always, hereditary aristocrats who held enormous tracts of land and ruled over the peasants who lived on it.

¹⁰ B Shiva Rao, *The Framing of India's Constitution: Select Documents*, ed Subhash C Kashyap, vol 1 (2nd edn, Universal Law Publishing 2004) 286–91. There is disagreement amongst scholars as to the exact nature of the compromise embodied in the constitutional property clause, but they all agree on this point. For differing views on other aspects of the compromise, see HCL Merillat, *Land and the Constitution in India* (Columbia University Press 1970), 45; TS Rama Rao, 'The Problem of Compensation and its Justiciability in Indian Law' (1962) 4 *Journal of the Indian Law Institute* 481, 484–86.

¹¹ Shiva Rao ([n 10](#)) 291.

¹² Shiva Rao ([n 10](#)) 291.

¹³ The United Provinces were later renamed as Uttar Pradesh.

¹⁴ *Raja Suryapal Singh v State of Uttar Pradesh* AIR 1951 All 674.

¹⁵ *Raj Rajendra Malojirao Shitole v State of Madhya Bharat* AIR 1952 MP 97.

¹⁶ *Kameshwar Singh v State of Bihar* AIR 1951 Pat 91.

¹⁷ Constitution of India 1950, art 31A: *Savings of Laws Providing for Acquisition of Estates etc.*

(1) Notwithstanding anything in the foregoing provisions of this Part [[Part III](#), containing Fundamental Rights] no law providing for the acquisition by the State of any estate or of any rights therein or for the extinguishment or modification of any such rights shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by, any provisions of this Part.

Provided that where such law is a law made by the Legislature of a State, the provisions of this article shall not apply thereto unless such law, having been reserved for the consideration of the President has received his assent.

(2) In this article,

(a) the expression 'estate' shall, in relation to any local area, have the same meaning as that expression or its local equivalent has in the existing law relating to land tenures in force in that area and shall also include any *jagir*, *inam* or *muafi* or other similar grant;

(b) the expression, 'rights', in relation to an estate, shall include any rights vesting in a proprietor, sub-proprietor, under-proprietor, tenure-holder, or other intermediary and any rights or privileges in respect of land revenue.

¹⁸ AIR 1951 SC 458.

¹⁹ AIR 1952 SC 252.

²⁰ Constitution of India, art 31A: *Savings of Laws Providing for Acquisition of Estates etc.* [Following the Fourth Amendment]

(1) [Substituted by the Fourth Amendment]: Notwithstanding anything contained in Article 13, no law providing for—

(a) The acquisition by the state of any estate or of any rights therein or any extinguishment or modification of any such rights, or

(b) The taking over of the management of any property by the State for a limited period of time either in the public interest or in order to secure the public management of the property, or

(c) The amalgamation of two or more corporations either in the public interest or in order to secure the proper management of any of the corporations, or

(d) The extinguishment or modification of any rights of managing agents, secretaries

and treasurers, managing directors, directors or managers of corporations, or of any voting rights of shareholders thereof, or

(e) The extinguishment or modification of any rights accruing by virtue of any agreement, lease or licence for the purpose of searching for, or winning, any mineral or mineral oil, or the premature termination or cancellation of any such agreement, lease or licence shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by Article 14, article 19 or article 31.

Provided that where such law is a law made by the Legislature of a State, the provisions of this article shall not apply thereto unless such law, having been reserved for the consideration of the President has received his assent.

Provided further that where any law makes any provision for the acquisition by the State of any estate and where any land comprised therein is held by a person under his personal cultivation, it shall not be lawful for the State to acquire any portion of such land as is within the ceiling limit applicable to him under any law for the time being in force or any building or structure standing thereon or appurtenant thereto, unless the law relating to the acquisition of such land, building or structure, provides for payment of compensation at a rate which shall not be less than the market value thereof

(2) In this article—

(a) the expression ‘estate’ shall, in relation to any local area, have the same meaning as that expression or its local equivalent has in the existing law relating to land tenures in force in that area and shall also include any *jagir*, *inam* or *muafi* or other similar grant;

(b) the expression ‘rights’, in relation to an estate, shall include any rights vesting in a proprietor, sub-proprietor, under-proprietor, tenure-holder, [*raiyat*, *under raiyat*] or other intermediary and any rights or privileges in respect of land revenue.

²¹ *Thakur Amar Singhji v State of Rajasthan* AIR 1955 SC 504.

²² *Ram Narain Medhi v State of Bombay* AIR 1959 SC 459.

²³ *Atma Ram v State of Punjab* AIR 1959 SC 519.

²⁴ *Atma Ram* ([n 23](#)).

²⁵ AIR 1960 SC 1080.

²⁶ AIR 1962 SC 723.

²⁷ Under the *ryotwari* system obtaining in Madras, Bombay, and central India, the government dealt directly with the *ryots* or peasants, whose land revenue was settled for a period of years—typically a long term, but not in perpetuity. Each *ryot* was recognised as individually responsible for paying his land revenue.

²⁸ *Kunhikoman* ([n 26](#)) [14].

²⁹ *Parliamentary Assembly Debates on the Constitution (First Amendment) Bill 1951*, Provisional Parliament Debates, vols 12–13, cc 9913.

³⁰ Ernst Freund, *The Police Power, Public Policy and Constitutional Rights* (Callahan and Company 1904) 3.

³¹ Julius L Sackman, *Nichols’ Law of Eminent Domain*, § 1.11 (revised 3rd edn, Matthew Bender and Co 1983), cited from William McNulty, ‘Eminent Domain in Continental Europe’ (1912) 21(7) *Yale Law Journal* 555.

³² PK Tripathi, *Some Insights into Fundamental Rights* (University of Bombay Press 1972) 224.

³³ Tripathi ([n 32](#)) 224.

³⁴ Tripathi ([n 32](#)) 224–25.

³⁵ *Chiranjit Lal Chowdhuri v Union of India* AIR 1951 SC 41; *State of West Bengal v Subodh Gopal Bose* AIR 1954 SC 92.

³⁶ HCL Merillat, 'Chief Justice S.R. Das: A Decade of Decisions on Right to Property' (1960) 2 Journal of the Indian Law Institute 183, 190–91.

³⁷ *Subodh Gopal Bose* ([n 35](#)) [9].

⁴⁰ *Subodh Gopal Bose* ([n 35](#)) [66].

³⁸ In support of his argument, he referred to ss 111 and 298 of the Government of India Act 1935, which had similar provisions. *Subodh Gopal Bose* ([n 35](#)) [6].

³⁹ Krishnamachari stated that the clause did not embody '... a particular right to private property as such, no more than what any person in an absolutely socialistic regime will desire, that what he possesses, what are absolutely necessary for his life, the house in which he lives, the movables that he has to possess, the things which he has to buy, are secured to him ...' Shiva Rao ([n 10](#)) 291.

⁴¹ *Dwarkadas Srinivas v Sholapur Spinning and Weaving Company* AIR 1954 SC 119; *Express Newspapers v Union of India* AIR 1958 SC 578; *Bombay Dyeing and Manufacturing Company v State of Bombay* AIR 1958 SC 328; *Diwan Sugar and General Mills v Union of India* AIR 1959 SC 626.

⁴² AIR 1950 SC 27.

⁴³ Constitution of India 1950, art 21: Protection of life and personal liberty: 'No person shall be deprived of his life or personal liberty except according to procedure established by law.'

⁴⁴ *AK Gopalan* ([n 42](#)); *State of Bombay v Bhanji Munji* AIR 1955 SC 41.

⁴⁵ *AK Gopalan* ([n 42](#)); *Bhanji Munji* ([n 44](#)).

⁴⁶ *Narendra Kumar v Union of India* AIR 1960 SC 430; *Kochuni* ([n 25](#)).

⁴⁷ *State of West Bengal v Bela Banerjee* AIR 1954 SC 170.

⁴⁸ *Dwarkadas Srinivas* ([n 41](#)).

⁴⁹ *Saghir Ahmad v State of Uttar Pradesh* AIR 1954 SC 728.

⁵⁰ *Surya Pal Singh v State of Uttar Pradesh* [1952] 1 SCR 1056, 1073; *State of Bombay v RS Nanji* AIR 1956 SC 294 [12].

⁵¹ *RS Nanji* ([n 50](#)) [12]; *Bhagwat Dayal v Union of India* AIR 1959 P&H 544.

⁵² *Sarmukh Singh Grewal v State of Uttar Pradesh* (1995) Supp (4) SCC 489 (acquisition for setting up a paper mill); *P Narayanappa v State of Karnataka* (2006) 7 SCC 578 (private industrial development, which may include technology parks, tourism and trade centres, and townships); *Hindustan Petroleum Corporation Ltd v Darius Shapur Chennai* (2005) 7 SCC 627 (acquisition for a government corporation).

⁵³ *Kanaka Gruha Nirmana Sahakara Sangha v Narayanamma* (2003) 1 SCC 228.

⁵⁴ *Venkataswamappa v Special Deputy Commissioner (Revenue)* (1997) 9 SCC 128 (house sites to a cooperative society).

⁵⁵ Shiva Rao ([n 10](#)) 291; Granville Austin, *Working a Democratic Constitution: The Indian Experience* (Oxford University Press 1999) 76.

⁵⁶ *Bela Banerjee* ([n 47](#)).

⁵⁷ *Bela Banerjee* ([n 47](#)) [6].

⁵⁸ The Fourth Amendment amended Article 31(2) to provide: No property shall be compulsorily acquired or requisitioned save for a public purpose and save by authority of a law which provides for compensation for the property so acquired or requisitioned and either fixes the amount of the compensation or specifies the principles on which, and the manner in which, the compensation is to be determined and given; *and no such law shall be called in question in any court on the ground that the compensation provided by that law is not adequate* (emphasis added).

⁵⁹ AIR 1965 SC 1017.

⁶⁰ *Vajravelu* (n 59) [16].

⁶¹ AIR 1967 SC 637.

⁶² *Udai Ram Sharma v Union of India* AIR 1968 SC 1138; *Maneklal Chhotelal v MG Makwana* AIR 1967 SC 1373; *KL Gupte v Municipal Corporation of Greater Bombay* AIR 1968 SC 303; *State of Gujarat v Shantilal Mangaldass* AIR 1969 SC 634.

⁶³ *Shantilal Mangaldass* (n 62).

⁶⁴ *Rustom Cavasjee Cooper v Union of India* AIR 1970 SC 564.

⁶⁵ (1973) 4 SCC 225, [405], [407], [409]–[412] (Sikri CJ), [588] (Shelat and Grover JJ), [1165] (Reddy J), [690]–[697] (Hegde and Mukherjea JJ).

⁶⁶ (1977) 4 SCC 471.

⁶⁷ PK Tripathi, ‘Right to Property after the 44th Amendment: Better Protected than Ever Before’ AIR 1980 SC (J) 49; SP Sathe, ‘Right to Property after the 44th Amendment’ AIR 1980 SC (J) 97.

⁶⁸ (1995) Supp (1) SCC 596.

⁶⁹ *State of Maharashtra v Basantibai Mohanlal Khetan* (1986) 2 SCC 516 (Article 21 essentially deals with personal liberty and has little to do with the right to property); *Jilubhai Nanbhai Khachar v State of Gujarat* (1995) Supp (1) SCC 596 [58].

⁷⁰ *Sanjiv Agarwal v Union of India*, WP 2009 (Supreme Court of India) (on file with author).

⁷¹ (2007) 2 SCC 1 [90]–[92].

⁷² (2011) 9 SCC 1.

⁷³ *KT Plantation* (n 72) [202].

⁷⁴ *KT Plantation* (n 72) [189].

⁷⁵ (2012) 5 SCC 488.

⁷⁶ See also *Entertainment Network (India) Ltd v Super Cassette Industries Ltd* (2008) 13 SCC 30 [121].

⁷⁷ *Super Cassettes* (n 75) [81].

⁷⁸ For the evolution and details of the changes made by this law to the 1894 Act, see Namita Wahi, ‘Equity of land acquisition’ *The New Indian Express* (29 November 2011) <www.newindianexpress.com/opinion/article250235.ece?service=print>, accessed November 2015; Namita Wahi, ‘Land acquisition, development and the constitution’ *Seminar Magazine* (February 2012) http://india-seminar.com/2013/642/642_namita_wahi.htm, accessed November 2015; Namita Wahi, ‘Compromise over land takeover’ *The New Indian Express* (11 September 2013) <<http://www.newindianexpress.com/opinion/Compromise-over-land-takeover/2013/09/11/article1778031.ece?service=print>>, accessed November 2015.

⁷⁹ Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act 2013, ss 27–30 read with First Schedule (Land Acquisition Act).

⁸⁰ Land Acquisition Act, ss 31–33.

⁸¹ Land Acquisition Act, s 2(1) read with s 3(za).

⁸² Land Acquisition Act, s 2(2).

⁸³ Land Acquisition Act, s 2(2).

⁸⁴ Jairam Ramesh and Muhammad Ali Khan, *Legislating for Justice: The Making of the 2013 Land Acquisition Law* (Oxford University Press 2015) 4.

⁸⁵ Land Acquisition Act, ss 4–6.

⁸⁶ Land Acquisition Act, s 105(1) read with the Fourth Schedule.

⁸⁷ LARR Amendment Ordinance, s 12.

⁸⁸ Dhananjay Mahapatra, ‘Land ordinance: Supreme Court seeks Centre’s reply in four weeks’ *The Times of India* (New Delhi, 14 April 2015) <<http://timesofindia.indiatimes.com/india/Land-ordinance->

[SupremeCourt-wants-Centres-replyin-4-weeks/articleshow/46914332.cms](#)>, accessed November 2015.

⁸⁹ Namita Wahi, 'The story of Jairam Rajya' (*India Today*, 11 June 2015) <<http://indiatoday.intoday.in/story/jairam-ramesh-land-acquisition-law-book/1/443924.html>>, accessed November 2015.

⁹⁰ Namita Wahi, 'Lay of the land' *The Indian Express* (New Delhi, 18 March 2015) <<http://indianexpress.com/article/opinion/columns/lay-of-the-land/>>, accessed November 2015.

⁹¹ Wahi (n 90).

⁹² See PTI, 'Arun Jaitley: Consensus may emerge on land acquisition bill' *The Financial Express* (5 November 2015) <http://www.financialexpress.com/article/economy/arun-jaitley-consensus-may-emerge-on-land-acquisition-bill/161360/>, accessed November 2015.

⁹³ See Tamil Nadu Government Gazette Extraordinary (5 January 2015) <http://niti.gov.in/mgov_file/LandAcquistion-TAMILNADU.pdf>, accessed November 2015.

⁹⁴ See Shruti Shrivastava, 'Land Acquisition legislation: Amid central logjam, states move forward' *The Indian Express* (10 November 2015) <<http://indianexpress.com/article/india/india-news-india/land-acquisition-legislation-amid-central-logjam-states-move-forward/>>, accessed November 2015.

PART VIII

**THE GOVERNMENT'S LEGAL
PERSONALITY**

CHAPTER 53

GOVERNMENT CONTRACTS

UMAKANTH VAROTTIL*

I. INTRODUCTION

THE modern State has expanded beyond the realm of customary sovereign functions such as governance. It is now a key player in the commercial arena and engages in myriad activities such as trade and commerce (either as a procurer or supplier of goods and services). It also adopts a larger societal role in the guardianship and distribution of public goods such as natural resources. In doing so, the government is required to enter into contracts of various kinds with individuals and businesses.

This raises the obvious question of whether the government as a contracting party ought to be treated differently from any private contracting party. The dichotomous position that emerges suggests that for contract law purposes the government is akin to any private contracting party, but since the contracting role of the government could potentially put public resources at stake, the Constitution of India carefully circumscribes its exercise of contracting power. Although matters of government contracting might at first blush appear somewhat procedural and formalistic, they have stoked a great deal of controversy lately due to frenetic judicial activity in the field.

The objective of this chapter is to provide an overview of the constitutional position relating to both the formation of contracts and to substantive elements of government contracting. This chapter highlights and discusses the key issues and controversies in these areas, and concludes with some critical analysis and normative observations.

The discussion is divided into parts. Section II relates to the contracting power of the government, which the Constitution vests in it without the necessity of underlying legislation. Section III deals with the formation of contracts to which the government is a party. Being somewhat formalistic in nature, this section considers the circumstances when the government can validly enter into a contract so as to constitute its binding contractual obligation. Section IV deals with substantive aspects as to the manner in which the government arrives at a decision to enter into (or award) a contract with (or to) a specific individual or

business. This discussion gives rise to the more contentious issue regarding the nature and extent of judicial review of government contracting. Section V concludes.

II. THE GOVERNMENT'S POWER OF CONTRACTING

A threshold question from the purview of contract jurisprudence relates to the capacity of persons to enter into a contract. This encompasses not only natural persons, but also juristic persons such as corporations, and even the government. The core capacity or power of the State to enter into a contract can be traced to Article 298 of the Constitution.¹ Viewed from the paradigm of the separation of powers within the State, the contracting function would fall quite naturally within the purview of the executive rather than the legislature (or the judiciary).² While this ought to be a relatively straightforward matter, the constitutional provision was subject to significant debate within the first few years of its functioning.

A controversy arose under the previous version of the Article as to whether the power of the executive can be exercised without owing its existence to underlying legislation.³ In an early decision,⁴ the Supreme Court (hereinafter also referred to as 'the Court') asserted that certain executive actions (in this case the nationalisation of an industry) could not be undertaken unless they were supported by appropriate legislation. This position, however, did not receive support in *Ram Jawaya Kapoor v State of Punjab*,⁵ where the Court held that executive action need not always be supported by legislation. It necessitated an amendment to the Constitution that introduced the current version of Article 298.⁶ This position provides a flexible and pragmatic approach, as it allows the executive to enter into contracts from time to time without awaiting legislative intervention, and is in tune with the ground realities pertaining to government contracting (that need to be carried out in a timely and efficient manner).

Although no prior legislative basis is necessary for the executive to enter into contracts, such powers are subject to applicable legislation. The scheme under the proviso to Article 298 stipulates that where the subject matter of the contract falls within the legislative competence of any State, the contracting power of the Union executive is subject to such legislation. Similarly, the contracting power of any State's executive is subject to legislation of Parliament on matters where it has the competence to legislate. This scheme provides the requisite balance

between Parliament and State legislatures in enabling them to moderate the contracting functions of either the Union or State executives. However, what Article 298 does not expressly cover is the relation of the executive and legislative powers of the States with one another.⁷

Barring the initial debate surrounding the separation of powers between the executive and the legislature, which has since been settled, the essence of the contracting power of the government under the Constitution has been fairly clear. Greater judicial attention has been focused on the manner in which various officers of the government can enter into contracts on its behalf so as to bind it, a matter to which this chapter now turns.

III. THE FORMATION OF GOVERNMENT CONTRACTS

Juristic persons such as the State (or a corporation) must necessarily act through natural persons. In terms of contract formation, the crucial question arises as to when a contract entered into by a natural person such as an officer of the government with a third party can bind the government to such contract so as to create contractual rights and obligations between the government and the third party. That would essentially depend upon whether the government official is properly authorised to enter into the contract and bind the government. In this background, the Constitution (in Article 299) prescribes a set of formalities to be complied with for government contracts so as to ensure that the government is not saddled with liabilities for unauthorised contracts.⁸ While this is somewhat akin to the principles of agency that arise under contract law (or corporate law for officers binding the company), there are important differences as well in the constitutional scheme pertaining to government contracts. This is essentially because in the case of government contracts there are also matters of public policy intended for the protection of the general public.⁹ Given the larger purpose behind it, the somewhat formalistic and procedural requirements of contract formation have attracted significant judicial attention. This section addresses a number of issues that have confronted the Court on contract formation.

1. Scope and Ambit of Article 299

At the outset, Article 299 applies to ‘contracts made in the exercise of the executive power of the Union or of a State’.¹⁰ It goes without saying that the formalities of these provisions are applicable to contracts entered into by the executive arm of the government. Statutory contracts are therefore outside the purview of Article 299 and would be governed by the terms of the statute under which they are executed.¹¹

In order to ensure compliance with Article 299, government contracts must satisfy three broad conditions:

- (i) they must be expressed to be made by the President, or by the Governor of the State, as the case may be;
- (ii) they must be executed; and
- (iii) such execution must be on behalf of the President or the Governor by such persons and in the manner as they may direct.¹²

Whether (and how) Article 299 has been complied with in a given case is a mixed question of law and fact.¹³ On the one hand, the Court has rendered a strict interpretation of the provision. For example, it is not possible for the government to enter into oral contracts or implied contracts.¹⁴ The fact that they must be reduced to writing introduces greater transparency in contracting decisions, and adds to the public policy goal emanating from this provision. It also introduces an element of objectivity in contract execution on behalf of the government by minimising any scope for uncertainties in the government’s contractual obligations. If the government is permitted to enter into oral or implied contracts, then the government could be bound by obligations it did not authorise, which would render the express provisions of Article 299 nugatory.

At the same time, the Court has also sought to temper the rigidity of the constitutional provision by taking into account practical realities, without in any event diluting the public policy goal behind the formalities of government contracting. For instance, a question has arisen as to whether an authorised official can bind the government only through the execution of a formal contract. In *Union of India v AL Ralia Ram*,¹⁵ the Supreme Court held that the constitutional provision does not require a formal document to be executed by the government with another contracting party. A valid contract may emanate from correspondence exchanged between parties, which would conform to the requirements of Article 299.¹⁶

In sum, while the courts had initially observed strict adherence to the formalities in Article 299, they have also introduced the necessary flexibility by adopting a more pragmatic approach. For example, it has been observed, ‘In

effect, it may be true to say that judicial view has oscillated between the liberal and the rigid interpretation of Art. 299.¹⁷ Since the matter of compliance with Article 299 is a mixed question of fact, it is suggested that courts must be guided by the policy imperative behind the constitutional provision in examining the issue in a given case, and adopt a purposive interpretation rather than a technical one, keeping in mind the ground realities as well.

2. Mandatory Nature of Article 299

It is a rather settled position of the law that Article 299 is a mandatory provision, and not a directory one. This has been confirmed in a number of judgments of the Supreme Court,^{[18](#)} and more specifically elucidated in *State of West Bengal v BK Mondal & Sons*.^{[19](#)}

Consequently, non-compliance with the provision would result in invalidation of the contract entered into by the government.^{[20](#)} Moreover, given the nature of the provision and the interest sought to be protected, it is not possible to seek or obtain waiver of compliance.^{[21](#)} A waiver would render the provision, which is considered mandatory, to be inconsequential.

3. Consequences of Non-compliance

Ordinarily, a contract entered into in violation of a legal provision (either in the Constitution or a statute) would be rendered void, or at least voidable. Although this position may seem somewhat obvious, the interpretation of Article 299 underwent a chequered history before a judicial compromise was finally reached.

The difficulty arose due to one of the earliest decisions of the Supreme Court under Article 299. In *Chatturbhuj Vithaldas Jasani v Moreshwar Parashram*,²² the election of Jasani was challenged on the ground that he was disqualified under the Representation of the People Act 1951 as he was interested in a contract for the supply of goods to the government. Although the Supreme Court held that the contract did not comply with Article 299, it refused to hold that the contract would be void. Hence, the Court upheld Jasani's disqualification. This decision has come under some amount of criticism.²³ Moreover, its applicability has been called into question because in that case the Court was concerned with the question of disqualification under the Representation of the People Act wherein the finding of the Court that the contract was not void related to a collateral purpose.

This incongruity was subsequently put to rest by a constitutional bench of the Court in *BK Mondal*.²⁴ In that case, it was clarified that in *Chatturbhuj* the Court was merely considering a narrow question as to the effect of a government contract for the purposes of considering the disqualification of a candidate under the Representation of the People Act.²⁵ More importantly, the Court explicitly stated that the observations or decision in *Chatturbhuj* ought not to be treated as 'supporting the proposition that notwithstanding the failure of the parties to comply with Art. 299(1) the contract would not be invalid'.²⁶ Following this course correction, there is considerable support for the proposition that a contract entered into without complying with the procedures set forth in Article 299 would be void.²⁷ Hence, the government cannot be held liable for damages for breach of such a contract.²⁸ This is consistent with the public policy surrounding Article 299, which is to prevent the government from being saddled with liability for unauthorised contracts.

Despite the invalidation of a government contract, it is possible for a contracting party to seek to impose obligations on the government using other legal principles. These include the ratification of any irregularity and promissory

estoppel. These principles allow an affected third party to assert its rights for lack of compliance with proper governmental procedures, but at the same time they have the effect of expanding the government's contractual obligations.

a. Ratification

Beginning with ratification, under general principles of contract law, it is possible for a person on whose behalf an agent has acted without authority to adopt that act so as to confer authority *ex-post facto*.²⁹ In such a case, it would be deemed as if the agent had been clothed with authority by the principal at the time the act was performed. In this context, it is necessary to explore whether these contractual principles apply equally to government contracts whose formation is required to be in accordance with Article 299 of the Constitution.

The initial signals from the Supreme Court in *Chatturbhuj* indicated that there was nothing to prevent ratification of the contract by the government, especially if such ratification were for its benefit.³⁰ However, as discussed earlier, *Chatturbhuj* was decided in the context of collateral matters relating to disqualification in elections, and is therefore arguably confined to its facts.³¹ If ratification were permitted, that would go against the grain of the public policy perspective and protection of public funds inherent in Article 299.

An ambiguous position regarding ratification ensued until 1968, when the Supreme Court in *Mulamchand* categorically stipulated that ratification of a contract entered into without complying with Article 299 was just not possible.³² The Court observed: 'If the plea ... regarding ... ratification is admitted that would mean in effect the repeal of an important constitutional provision intended for the protection of the general public.'³³ The present position does not permit ratification in any manner, which is consistent with Article 299 being a mandatory provision whose non-compliance results in a void contract. As a practical matter, in case of non-compliance, the parties have no option but to re-execute the contract by following the requisite procedures. It is not open for the government to simply adopt an existing non-compliant contract merely through ratification.

The impermissibility of ratification altogether is arguably too rigid a dispensation. One possibility could be to look at the manner of ratification of the contracts: if the contract was ratified so as to ensure compliance with Article 299, then it should bind the government. The underlying policy concern is

addressed because authority is conferred in the manner required by the Constitution, albeit on an *ex-post facto* basis.

b. *Promissory Estoppel*

In case of an invalid contract, it may be possible for a contracting party to assert a right in equity against the government using the principle of promissory estoppel. A right under estoppel would usually be triggered if the government makes some representations to a third party who then acts in reliance upon such representations so as to alter its position.³⁴ In such a case, the doctrine would impose liability upon the government. In several cases involving non-compliance with Article 299, contracting parties have sought to invoke estoppel. However, the Court has been rather hesitant to recognise estoppel for government contracts.³⁵ Similar to ratification, any recognition of estoppel against the government in case of non-compliance with Article 299 would render the constitutional protection under that provision redundant. Given that this is a mandatory provision that results in invalidation of a non-compliant contract, the position seems to shun the operation of promissory estoppel (or similar equitable principles) in government contracting due to the special protective regime designed in the Constitution.

All of these suggest that non-compliance with Article 299 can be fatal to contract formation, and neither the contractual principle of ratification nor the equitable doctrine of promissory estoppel would come to the rescue of a contracting party that has transacted with the government. In that sense, the public policy preference for protection of public funds trumps any contractual or quasi-contractual protection sought by a third party transacting with the government.

4. Remedies to Parties

Thus far, it has been seen that the provisions of Article 299 are interpreted strictly by the Court that not only renders contracts void for non-compliance with those, but it disentitles contracting parties from invoking other principles such as ratification and promissory estoppel to impose liability on the government. While this adequately protects the government and the broader public interest, it leaves the contracting parties vulnerable due to the lack of any recourse for the time and effort put in to transact business with the government. In order to alleviate some of the severities faced by the contracting parties, the law makes available certain remedial measures to such parties, which restitutes their position. This operates as a balancing factor that enables contracting parties to possess sufficient incentives to transact with the government, but at the same time protects government's liability from unauthorised contracts.

In the case of contracts that are not in compliance with Article 299 of the Constitution, contracting parties may rely upon sections 65³⁶ and 70³⁷ of the Indian Contract Act 1872 to recover any benefits that the government may have enjoyed due to the performance of the contracting parties under the non-compliant contract (which is resultantly void). While these provisions of the Contract Act permit contracting parties to recover compensation from the government, the legal principle, which forms the basis of such recovery, is different from the contractual and equitable principles such as ratification and promissory estoppel that were discussed earlier. The restitution principles in the Contract Act operate on the assumption that the underlying contract has not validly come into existence and intervenes to provide recourse to the affected party who has innocently acted in reliance upon such contract. On the other hand, the principles of ratification and promissory estoppel operate on the basis of contractual (or quasi-contractual) obligations that have arisen between the parties where the government's liabilities arise out of performance of such contractual obligations rather than by way of restitution. While the law surrounding Article 299 seems to favour the protection of contracting parties through restitution, it denies contractual or quasi-contractual performance remedies. With this conceptual background, it would be appropriate to consider the manner in which the Court has interpreted this interplay between Indian constitutional law and contract law.

In *BK Mondal*,³⁸ the Supreme Court considered the applicability of section 70 of the Contract Act to a contract that was invalid due to non-compliance with

Article 299 of the Constitution. In order to invoke section 70, the following conditions had to be satisfied:

- (i) that a contracting party must lawfully do something or deliver something;
- (ii) that, in doing so, the party must not be acting gratuitously; and
- (iii) that the beneficiary of the act or beneficiary enjoy the benefit thereof.³⁹

The Court held that upon satisfaction of these conditions, the liability of the government to compensate or make good the contracting party arises. The larger question confronting the Court was whether the remedy under section 70 dilutes the mandatory nature of Article 299. The Court clarified clearly and explicitly that the restitution claim is an alternative one and that it does not relate to a breach of contract. It also noted:

The fields covered by the two provisions are separate and distinct, s. 175(3) deals with contracts and provides how they should be made. Section 70 deals with cases where there is no valid contract and provides for compensation to be paid in a case where the three requisite conditions prescribed by it are satisfied. We are therefore satisfied that there is no conflict between the two provisions.⁴⁰

In concluding this section on contract formation, it is clear that through several judicial pronouncements the Court has arrived at a delicate balance largely to protect public interest from unauthorised government contracts, but at the same time to provide some minimal level of protection to contracting parties. Given the larger goals of the Constitution, it is unsurprising that the law leans heavily in favour of protecting the government rather than the contracting party.

Barring some initial complications emerging from the early decision of the Supreme Court in *Chatturbhuj*, the law relating to government contract formation has enjoyed a fair amount of certainty and clarity, with the legal regime aimed at achieving a nuanced position that takes into account all affected interests. The same cannot be said about the ability of the courts to review government contracts, which is an area of the law that has witnessed significant upheavals, to which this chapter now turns.

IV. JUDICIAL REVIEW OF GOVERNMENT CONTRACTS

In the case of private contracting, parties with the requisite legal capacity are free to enter into contracts, and courts seldom question the wisdom or motivation behind the decision to enter into the contracts. Matters are, however, not as simple in the case of government contracts, primarily due to the public interest

element involved therein. Establishment of contractual relationships may not only put public funds at risk, but the manner in which the relationships are established may be subject to public scrutiny given that multiple parties may be vying for the same contract with the government. In such a scenario, the process through which the contracting party is chosen may itself have larger implications. Since contracts are entered into by the executive arm of the government, the obvious question is whether they are subject to judicial review and, if so, to what extent.

The scope of judicial review of government contracting gives rise to fundamental conceptual issues that distinguish it from private contracting. It brings to the fore the tension between freedom of contract and public interest. Freedom of contract (which is generally enjoyed by private parties) is necessary to enable the contracting party to exercise full discretion to strike the bargain that it deems most suitable to its interests. Contrast this with government contracting where such discretion is subject to review by the courts, thereby curtailing contractual freedom. This situation is justified due to the public implications of government contracting, and the varied interests that may be affected thereby. In a competitive scenario, this restrains the flexibility of the government in striking contractual bargains, while private parties are subject to no such limitations. This also raises the broader issue of whether the judiciary is best equipped to turn out a finding on the executive's decision making on government contracts, which are not only complex but require technical and commercial judgments to be made.

Given this varied set of factors at play, it is not surprising that the scope and extent of judicial review of government contracts has captured significant attention of the Supreme Court over the past few decades. This is because the scope of judicial review has been moulded by the courts on an ongoing basis and, as this chapter demonstrates, stretched in different directions. The Court's opinion has oscillated between displaying utmost judicial restraint in government contracts and, on some occasions, exercising significant judicial intervention in the government's contract decision making. Between these two extremes, there appears to be a rational mid-range. The remainder of this chapter surveys the leading judgments of the Supreme Court along this spectrum, and seeks to distil the broad principles that are likely to guide the Court going forward.

Given the elusiveness of a consistent approach on the question of judicial review of government contracts, it is proposed to embark upon a chronological sojourn of the Court's thought process by categorising the developments under three different phases.⁴¹ Within each of these phases, the varying opinions of the

Court will be weighed so as to derive the more prominent outcome.

1. Phase 1: The Emergence of Judicial Review of Government Contracts (1950–79)

During the initial decades of the Constitution, the concept of judicial review of government contracts was non-existent. Governments enjoyed substantial discretion and flexibility in entering into contractual relationships. In the early case of *CK Achuthan v State of Kerala*,⁴² the Supreme Court noted that the government had the freedom to choose a contracting party to fulfil contracts, and that an aggrieved party who was not chosen cannot claim discrimination and therefore the protection of Article 14.⁴³ In that sense, the government's position was similar to that of any private contracting party. This position ensued for a number of years with no apparent concern.

It was only in 1975 that the need to view the government's contracting powers through a different lens emerged, albeit somewhat mildly. In *Erusian Equipment & Chemicals Ltd v State of West Bengal*,⁴⁴ the Supreme Court clarified that the executive powers of the State under Article 298 (including to enter into public contracts) is subject to the principle of equality of opportunity under Article 14 of the Constitution.⁴⁵ However, it was in *Ramana Dayaram Shetty v International Airport Authority of India* that the Supreme Court expounded on the judicial review of government contracting.⁴⁶ Applying principles of administrative law given the expansion of the State's functions, the Court took upon itself the role of stepping in 'to structure and restrict the power of the executive Government so as to prevent its arbitrary application or exercise'.⁴⁷ This was extended to the contracting power of the government as well, in view of the fact that the government could wield the significant power of granting and withholding contracts and licences in a manner that would have considerable impact on the lives of individuals and businesses.⁴⁸ In stark contrast to its earlier approach,⁴⁹ the Court carved out a significant distinction between government contracts and private contracts. It clarified that the government does not enjoy the freedom and discretion of a private party in entering into contracts and that it cannot act arbitrarily, 'but its action must be in conformity with standard or norms which is not arbitrary, irrational or irrelevant'.⁵⁰

The end of Phase 1 marks the culmination of a period when the pendulum swung from almost no judicial review of government contracts to the clear and

categorical institution of judicial review to the extent of preventing the government from acting arbitrarily, unreasonably, or in a discriminatory fashion. It is upon the edifice laid in *Ramana Dayaram Shetty* that the Supreme Court further constructed a more nuanced position on judicial review of government contracts in the phase to follow.

2. Phase 2: The Era of Measured Judicial Intervention (1980–2011)

While the 1980s were relatively uneventful in terms of judicial activity in reviewing government contracts, the 1990s turned out to be a prominent decade in chiselling the contours of judicial review. While there was no turning back on the need for judicial review of government contracting, the issue at play was the scope and extent of the review powers. As will be elaborated below, the courts during this period largely exercised caution and intervened to overturn government contracts only when there was strong evidence of arbitrariness or *mala fides*, thereby suggesting a balanced approach between freedom of contract and public interest. Most cases during the period related to the award of tenders by the government or the grant of licences for carrying on specific business activities such as telecom licences.⁵¹

In one of the first few significant decisions during this phase,⁵² the Supreme Court took cognisance of the dichotomy between the need to confer adequate discretion on the government to enter into contracts so as to enable it to operate in a commercial manner, and at the same time to ensure that decisions are taken bona fide.⁵³ Perhaps for the first time, the Court delineated the scope and limits of judicial review in government contracting. It clarified that ‘by way of judicial review the Court is not expected to act as a court of appeal while examining an administrative decision and to record a finding whether such decision could have been taken otherwise in the facts and circumstances of the case’.⁵⁴ Moreover, while performing judicial review, the court is concerned only with the manner in which the government has made the decision to award or enter into a contract, and it cannot extend itself to a scrutiny of the detailed terms and conditions of the contract.⁵⁵ This clearly and coherently demarcates the scope of judicial review in a balanced fashion.

In a string of decisions that soon followed, the Supreme Court further clarified the scope of judicial review, and arguably attenuated it. In the significant case of

Tata Cellular v Union of India,⁵⁶ the Court stressed further on its previous line of analysis that judicial review ought to be focused more on the decisionmaking process rather than the merits of the decision.⁵⁷ More importantly, after an analysis of the relevant case law, the court set out its summary as to judicial review of government contracts:

The principles deductible from the above are:

- (1) The modern trend points to judicial restraint in administrative action.
- (2) The Court does not sit as a court of appeal but merely reviews the manner in which the decision was made.
- (3) The Court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.
- (4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.
- (5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.
- (6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.⁵⁸

This crucial decision and summary, which have been relied upon extensively by the Court, exercise sufficient caution against excessive judicial intervention in government contracting. This is especially so given the limitations of judicial review, ranging from the lack of relevant commercial expertise of the Court to the timing and cost of review to the larger adverse impact it may have on cancellation of contract awards and licences. At the same time, the Court has retained sufficient room to intervene in extreme circumstances such as arbitrariness, *mala fides*, or unreasonableness (judged by the Wednesbury principles).

The line of judicial deference to government policy was followed subsequently in *Delhi Science Forum v Union of India*.⁵⁹ In the case, which related to a 1994 policy surrounding the award of telecom licences, the Court displayed considerable empathy to the policymakers on economic policy decisions, with the desire to intervene only if there was a violation of a constitutional or statutory provision.⁶⁰ The Court also clarified the position regarding the burden of invoking judicial review, by stating that the onus of demonstrating the vitiation of a decision to enter into a contract on any of the recognised grounds vested in the person challenging the decision. Unless the

aggrieved party was able to discharge that burden, the courts would hesitate to intervene.

This phase witnessed an overwhelming number of decisions of the Supreme Court relying on the principle of judicial restraint, and intervening only in exceptional cases that attract grounds of arbitrariness, *mala fides*, or unreasonableness. While it is not necessary to discuss all of these cases,⁶¹ they display the tendency of the Court in favour of restraint rather than intervention in government contracting. This represents a nuanced position that recognises commercial realities in decision making relating to government contracts and the need for freedom, discretion, and flexibility; the element of public interest is protected through the constitutional principle of judicial review when it is called for (in exceptional circumstances).⁶²

Reviewing Phase 2, it is clear that the overarching theme followed by the Court is one of limited judicial intervention. It has restrained itself from intervening in executive decisions pertaining to government contracts unless there is strong evidence of arbitrariness, *mala fides*, or unreasonableness. Even when it has intervened, it has confined its review to the government's decisionmaking process and shied away from reopening the award of contracts on their merits. During this era, the theme of judicial restraint towards government contracts and economic policy has found a louder voice than judicial intervention. But that status quo was somewhat shattered in the phase to follow.

3. Phase 3: Judicial Activism and the Period of Upheaval (2012)

The year 2012 witnessed a flurry of activity in determining the extent of judicial review of government actions on the specific question of distribution of natural resources by the government among private parties. More specifically, the natural resource was spectrum and the question was its allocation to various private telecom service providers. The background to the judicial activity arose from investigations into corruption against the Minister for Communications, as well as certain government officials in connection with the award of 122 unified access service (UAS) licences by the Department of Telecommunications (DoT) in 2008.⁶³ The award of these licences was challenged before the Supreme Court in *Centre for Public Interest Litigation v Union of India* (the *2G Spectrum* case).⁶⁴ In a sign of judicial interventionism over executive action, the Supreme

Court ordered a cancellation of the 122 UAS licences. The reasoning that formed the basis of the Court's conclusion is wide and expansive, and goes against the grain of previous judicial thought.

The *2G Spectrum* case was concerned with a type of government contracting activity that had become quite prominent in recent decades with the privatisation of various government business activities, particularly in the natural resources sector. In this sphere, previous government monopolies gave way to private participation in the exploitation of natural resources.⁶⁵ The Court invoked the public trust doctrine, whereby the State is deemed to have proprietary interest in its natural resources (over which it acts as a guardian or trustee) and which imposes restrictions and limitations on the ability of the State to use and distribute them in any manner as it deems fit.⁶⁶ From a government contracting perspective, it was found that the public trust doctrine 'regulates the rights and obligations of the State vis-à-vis private parties seeking to acquire/use the resource and demands that the procedure adopted for distribution is just, non-arbitrary and transparent and that it does not discriminate between similarly placed private parties'.⁶⁷

Using the public trust doctrine as a springboard, the Court went on to expand the scope of judicial review in such matters. Even though it recognised the boundaries of judicial review as laid down in earlier decisions,⁶⁸ the Court held:

[W]hen it is clearly demonstrated that the policy framed by the State or its agency/instrumentality and/or its implementation is contrary to public interest or is violative of the constitutional principles, it is the duty of the Court to exercise its jurisdiction in larger public interest and reject the stock plea of the State that the scope of judicial review should not be exceeded beyond the recognised parameters.⁶⁹

This is an indication of the Court's desire to intervene on matters of government contract and economic policy if it deems necessary in the circumstances of the case, thereby stretching the contours of judicial review far beyond traditional notions.

The expansion of the Court's role in reviewing government contracts or licensing is evident from its intrusive response to government decision making. Choosing to ignore the well-established tenets of judicial review not to intervene in the merits of government decisions, the Court went on to expound as to the manner in which the government must undertake distribution of natural resources. While criticising the method of 'first-come-first-served' in the alienation of natural resources, given its potential for misuse by private participants, who possess an asymmetric informational advantage, it went on to hold that such alienation can occur only through a method of public auction in a

manner that maximises financial benefit to the State.⁷⁰ In doing so, the Court arguably trespassed into executive territory by becoming prescriptive as to the method by which distribution of natural resources is to occur.

The *2G Spectrum* case not only generated a great deal of consternation among private players in the natural resources sector who were exposed to the risks of uncertainty in judicial review, but it also invited academic critique for the judicial excess in review of government contracting and policy and also for its failure to elucidate its conclusion with rigorous reasoning.⁷¹ The outlying nature of its reasoning and conclusions and the severity of its impact on the government as well as private players gave rise to a Presidential reference under Article 143 of the Constitution that was heard before a constitutional bench of the Supreme Court.

In *Special Reference No 1 of 2012*,⁷² the Supreme Court performed the fine balancing act of undoing some of the broader ramifications of the *2G Spectrum* case without really reversing or interfering with the judgment as it was applicable to the facts of the case and the 122 UAS licences that were cancelled. What it sought to do was to clarify the ruling of the Court in the *2G Spectrum* case. At the outset, it clarified that the observations in the *2G Spectrum* case relating to auction as the optimal method for alienation of natural resources cannot be taken as a general principle and must be confined to the allocation of spectrum, and that too in respect of the licences that were in question on the facts of the case.⁷³ While attempting not to offer a complete answer on the applicability of the public trust doctrine,⁷⁴ the Court in *Special Reference* categorically stated that auction is not prescribed by virtue of Article 14 of the Constitution to be the only method of distribution of largesse by the government.⁷⁵ Moreover, ‘a constitutional principle must not be limited to a precise formula but ought to be an abstract principle applied to precise situations’.⁷⁶ The Court steadied matters by stating that courts would normally look at executive actions more broadly and would not interfere in the merits of such actions by examining the details. This approach softens the judicial interventionism embarked upon in the *2G Spectrum* case, and restores some discretion and flexibility to the executive arm of the government in entering into contracts and determining economic policy, including on matters such as distribution of natural resources.

Moreover, the Court sounded a note of caution on judicial review. In governmental action such as award of contracts, ‘a potential for abuse cannot be the basis for striking down a method as *ultra vires* the Constitution. It is the actual abuse itself that must be brought before the Court for being tested on the

anvil of constitutional provisions.’⁷⁷ Similarly, the Court warned against embarking on a comparative analysis of examining various methods available for distribution of natural resources so as to identify the most effective method.⁷⁸ That indeed is a matter for the executive, in respect of which courts must exercise restraint.

The combination of the *2G Spectrum* case and *Special Reference* suggests paradoxical outcomes during the course of the same year.⁷⁹ While this has caused an upheaval as regards the scope of judicial review of governmental action (including contracts), the end result is somewhat balanced. The effort of the Court in the *2G Spectrum* case to expand the scope of judicial review to make it more interventionist in nature has been balanced out through a more cautious approach adopted in *Special Reference*.

4. Evaluating the Legal Position

That begs the question as to what the current state of law relating to judicial review of government contracts might be.⁸⁰ Despite the derailment witnessed in the *2G Spectrum* case, the prominence of judicial restraint has returned, at least partly. The aberration experienced in the *2G Spectrum* case has been largely retraced in *Special Reference*, inasmuch as it has been argued that '[s]ubstantively, the [*Special Reference*] erases [*2G Spectrum* case] from the legal record'.⁸¹ In a series of decisions in the wake of the twin pronouncements discussed above, the Court has continued to display the attitude of judicial restraint, in a manner that adopts the previous position discussed in Phase 2 as the frame of reference.⁸² In that sense, despite the turbulent developments of 2012, calm has prevailed, with the legal position acquiring greater clarity by reverting to the pre-existing position.

Moreover, in a significant development, the Court in *Manohar Lal Sharma v The Principal Secretary* had occasion to review the position of law emanating from a combination of the *2G Spectrum* case and *Special Reference*.⁸³ Here, the Court was concerned with the allocation of coal blocks over the period 1993 to 2010. While it reiterated that there is no constitutional mandate to engage in auctions for distribution of natural resources,⁸⁴ on the facts of the case the allocation of coal blocks was found to be arbitrary and illegal.⁸⁵ In a subsequent ruling as to the consequences of this finding, the Court cancelled 214 out of 218 coal block allocations made since 1993.⁸⁶

While the resulting scenario may provide little comfort to those seeking clarity and certainty in government contracts, it also offers some valuable lessons. Given that this area of the law is built solely through case law without much constitutional or statutory clarity, the facts of individual cases are likely to play a significant role. The well-known adage of 'hard cases make bad law' cannot be truer than in this scenario.⁸⁷ For example, the *2G Spectrum* case involved some extraordinary facts and circumstances, which were coloured by the then public outrage against corruption in public office, wherein the Supreme Court took upon itself the task of addressing some issues that it felt were inadequately addressed by the other arms of the government. This is a classic example of judicial overreach. Although the position on judicial review appears temporarily settled, there is no certainty that egregious circumstances in the future may not elicit wide-ranging responses from the Court that may militate

against the broader principle of judicial restraint. Hence, while there is some immediate resolution, an equal degree of uncertainty remains for the future.

It would augur well for courts to be more definitive as to the extent of judicial review. While it is hard to argue against no judicial review at all, the intervention of the courts into matters of government contracting and economic policy must be reserved for the most extreme circumstances as exceptions, rather than as a matter of rule or ordinary practice. The conceptual chasm between government contracts and private contracts is inevitable, but the deviation of government contracts in their subjection to judicial review must be limited to circumstances where they are justified in public interest.

IV. CONCLUSION

Government contracts are distinct from private contracts as they are subject to greater scrutiny in public interest. This scrutiny takes two forms. One is more formal in nature, and considers the power of the government to enter into contracts (Article 298) and the process that has been followed to authorise the contracts and enter into the same (Article 299). The constitutional provisions on this score are amply clear and the case law surrounding them has been largely consistent in recent years. The second type of scrutiny is more substantive in nature. Undertaken entirely by the judicial arm of the government, in exercise of its broader constitutional mandate under Articles 14 and 21 of the Constitution, the power of judicial review confers substantial powers on the courts. The separation of powers under the Constitution is subject to intense testing with the judiciary seeking different approaches in reviewing executive action in contracting, which ranges from judicial restraint to wide-ranging judicial interventionism. While the Court has been predominantly adopting the approach of restraint, with limited review in case of the existence of specific grounds (such as arbitrariness, *mala fides*, or unreasonableness), it has occasionally whipped up a storm by exceeding its traditional boundaries. This has made it difficult to read the tea leaves so as to induce a greater sense of predictability. One may have to settle with some level of uncertainty given the larger public interest involving government contracts.

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¹ The operative portion of art 298 reads: ‘The executive power of the Union and of each State shall extend to ... the making of contracts for any purpose.’ The legislative history of this provision prior to the Constitution has been discussed elaborately in Vinod Agrawal, *Government Contracts: Law & Procedure*, vol 1 (Eastern Book Company 1989) 83–102.

² See *Constituent Assembly Debates*, vol 8 (Lok Sabha Secretariat 1986) 893–95, 15 June 1949.

³ The previous version of art 298 read: ‘The executive power of the Union and each State shall extend, subject to any law made by the appropriate Legislature, ... to the making of contracts.’

⁴ *Saghir Ahmad v State of Uttar Pradesh* AIR 1954 SC 728.

⁵ AIR 1955 SC 549.

⁶ The amended version of art 298 reinforces the principle laid down in *Ram Jawaya Kapoor* ([n 5](#)).

⁷ HM Seervai, *Constitutional Law of India: A Critical Commentary*, vol 1 (4th edn, Universal Law Publishing 2008) 357–58.

⁸ Art 299 replaces s 175(3) of the Government of India Act 1935, which was enacted on similar terms. It is noteworthy that several early cases of the Supreme Court were decided under s 175(3), which would also be equally applicable under art 299, as the two provisions are in *pari materia*. References to s 175(3) in some of the case extracts in this chapter may be read to mean art 299 of the Constitution.

⁹ *Mulamchand v State of Madhya Pradesh* AIR 1968 SC 1218 [5].

¹⁰ Constitution of India 1950, art 299(1).

¹¹ *State of Haryana v Lal Chand* (1984) 3 SCC 634 [10]–[12]; *Lalji Khimji v State of Gujarat* (1993) Supp (3) SCC 567 [9]; *Steel Authority of India v State of Madhya Pradesh* (1999) 4 SCC 76 [24].

¹² *State of Bihar v Karam Chand Thapar & Brothers Ltd* AIR 1962 SC 110 [2]; *Seth Bikhraj Jaipuria v Union of India* AIR 1962 SC 113 [16]–[18].

¹³ *Union of India v Surjit Singh Atwal* (1979) 1 SCC 520 [5]; *Bishandayal and Sons v State of Orissa* (2001) 1 SCC 555 [14].

¹⁴ *KP Chowdhry v State of Madhya Pradesh* AIR 1967 SC 203 [10].

¹⁵ AIR 1963 SC 1685.

¹⁶ *Union of India v AL Ralia Ram* AIR 1963 SC 1685 [11].

¹⁷ MP Jain, *Indian Constitutional Law* (6th edn, LexisNexis Butterworths Wadhwa 2010) 2200.

¹⁸ *Seth Bikhraj Jaipuria* ([n 12](#)) [17]; *AL Ralia Ram* ([n 16](#)) [13]; *KP Chowdhry* ([n 14](#)) AIR 1967 SC 203 [7]–[8], [10]; *Mulamchand* ([n 9](#)) [5]; *State of Uttar Pradesh v Murari Lal and Brothers Ltd* (1971) 2 SCC 449 [4]; *The Bihar Eastern Gangetic Fishermen Cooperative Society Ltd v Sipahi Singh* (1977) 4 SCC 145 [8]; *Sohan Lal (Dead) v Union of India* (1991) 1 SCC 438 [6]; *Lalji Khimji* ([n 11](#)) [9].

¹⁹ AIR 1962 SC 779 [6].

²⁰ The consequences of invalidation and the precise nature thereof are discussed later.

²¹ *AL Ralia Ram* ([n 16](#)) [13]; *Mulamchand* ([n 9](#)) [5]; *The Bihar Eastern Gangetic Fishermen Cooperative Society Ltd* ([n 18](#)) [8]; *State of Punjab v Om Parkash Baldev Krishan* (1988) Supp SCC 722 [13]–[14].

²² AIR 1954 SC 236.

²³ Agrawal ([n 1](#)) 136–38; HM Seervai, *Constitutional Law of India: A Critical Commentary*, vol 2 (4th edn, Universal Law Publishing 2008) 2120–21.

²⁴ *BK Mondal & Sons* ([n 19](#)).

²⁵ *BK Mondal & Sons* ([n 19](#)) [7].

²⁶ *BK Mondal & Sons* ([n 19](#)) [7].

²⁷ *Mulamchand* ([n 9](#)) [5]; *Union of India v NK (P) Ltd* (1973) 3 SCC 388 [8]; *The Bihar Eastern Gangetic Fishermen Cooperative Society Ltd* ([n 18](#)) [8]; *Sohan Lal (Dead)* ([n 18](#)) [6]–[7]; *Lalji Khimji* ([n 11](#)) [5], [9].

²⁸ *Seth Bikhraj Jaipuria* ([n 12](#)) [15].

²⁹ Indian Contract Act 1872, s 196. Ratification may be express or implied. Indian Contract Act 1872, s 197.

³⁰ *Chatturbhuj Vithaldas Jasani* ([n 22](#)) [42].

³¹ Durga Das Basu, *Commentary on the Constitution of India* (8th edn, LexisNexis Butterworths Wadhwa 2012) 9488.

³² *Mulamchand* ([n 9](#)).

³³ *Mulamchand* ([n 9](#)) [5]; See also *Murari Lal and Brothers Ltd* ([n 18](#)) [4]; *The Bihar Eastern Gangetic Fishermen Cooperative Society Ltd* ([n 18](#)) [9]; *Om Parkash Baldev Krishan* ([n 21](#)) [14].

³⁴ Arvind P Datar, *Commentary on the Constitution of India* (2nd edn, LexisNexis Butterworths Wadhwa 2010) 1639–40; Mahendra P Singh, *VN Shukla's Constitution of India* (11th edn, Eastern Book Company 2011) 829.

³⁵ *Mulamchand* ([n 9](#)) [5]; *The Bihar Eastern Gangetic Fishermen Cooperative Society Ltd* ([n 18](#)) [9], [12]–[13].

⁴⁰ *BK Mondal & Sons* ([n 19](#)) [19]. As noted earlier, the references to s 175(3) may be treated as references to art 299 of the Constitution.

³⁶ S 65 provides: ‘When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it.’

³⁷ S 70 provides: ‘Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such another person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered.’

³⁸ *BK Mondal & Sons* ([n 19](#)).

³⁹ *BK Mondal & Sons* ([n 19](#)).

⁴¹ These phrases have been constructed merely for the sake of convenience, and do not purport to carry any formal significance.

⁴² AIR 1959 SC 490.

⁴³ *CK Achuthan* ([n 42](#)) [8].

⁴⁴ (1975) 1 SCC 70. This case involved the blacklisting of a potential contracting party by the government.

⁴⁵ *Erusian Equipment & Chemicals Ltd* ([n 44](#)) [12].

⁴⁶ (1979) 3 SCC 489.

⁴⁷ *Ramana Dayaram Shetty* ([n 46](#)) [10]. Hence, it was clarified that executive action will be tested against the touchstone of arbitrariness.

⁴⁸ *Ramana Dayaram Shetty* ([n 46](#)) [11].

⁴⁹ See *CK Achuthan* ([n 42](#)). However, in *Ramana Dayaram Shetty* ([n 46](#)) [24], the Court clarified that the decision in *CK Achuthan* cannot be read to mean that the government can act arbitrarily.

⁵⁰ *Ramana Dayaram Shetty* ([n 46](#)) [12].

⁵¹ For a comprehensive analysis of the role of the judiciary in the development of telecom regulation and regulators in India, see Arun K Thiruvengadam and Piyush Joshi, ‘Judiciaries as Crucial Actors in Regulatory Systems of the Global South: The Indian Judiciary and Telecom Regulation (1991-2012)’ in

Navroz K. Dubash and Bronwen Morgan (eds) *The Rise of the Regulatory State of the South: Infrastructure Development in Emerging Economies* (Oxford University Press 2013) 137–62.

⁵² *Sterling Computers Ltd v M&N Publications Ltd* (1993) 1 SCC 445.

⁵³ *Sterling Computers Ltd* (n 52) [12].

⁵⁴ *Sterling Computers Ltd* (n 52) [17].

⁵⁵ *Sterling Computers Ltd* (n 52) [18].

⁵⁶ (1994) 6 SCC 651.

⁵⁷ *Tata Cellular* (n 56) [74].

⁵⁸ *Tata Cellular* (n 56) [94].

⁵⁹ (1996) 2 SCC 405.

⁶⁰ *Delhi Science Forum* (n 59) [7]. It was also held on the facts of the case that since the relevant telecom policy was placed before Parliament, it shall be deemed that Parliament had approved the same, which added greater sanctity to the process.

⁶¹ A few cases decided during Phase 2 that lean towards judicial restraint are worth mentioning for reference: *Raunaq International Ltd v IVR Construction Ltd* (1999) 1 SCC 492; *Centre for Public Interest Litigation v Union of India* (2000) 8 SCC 606; *BALCO Employees Union v Union of India* (2002) 2 SCC 333.

⁶² At the same time, it is to be noted that the Supreme Court has not shied away from invoking its review jurisdiction when circumstances have necessitated such an approach. See *Kumari Shrilekha Vidyarthi v State of Uttar Pradesh* (1991) 1 SCC 212.

⁶⁹ *2G Spectrum* (n 64) [99].

⁶³ For a detailed background regarding this episode, see Thiruvengadam and Joshi (n 51) 151–53.

⁶⁴ (2012) 3 SCC 1.

⁶⁵ Primary among these natural resources are spectrum (which are frequencies used for transmission of data) as well as oil and gas, although there could be other resources too.

⁶⁶ *2G Spectrum* (n 64) [74]–[84]. The Court drew inspiration from an earlier ruling in *Reliance Natural Resources Ltd v Reliance Industries Ltd* (2010) 7 SCC 1.

⁶⁷ *2G Spectrum* (n 64) [85].

⁶⁸ *2G Spectrum* (n 64) [92]. The Court expressly referred to the plea for judicial restraint as laid down in *Delhi Science Forum* (n 59).

⁷⁰ *2G Spectrum* (n 64) [96].

⁷¹ See eg, Sudhir Krishnaswamy, ‘The Supreme Court on 2G: Signal and Noise’, Seminar 642 (February 2013) <http://india-seminar.com/2013/642/642_sudhir_krishnaswamy.htm>, accessed November 2015; Shubhankar Dam, ‘Public Resources and Public Law in India’ (2013) 129 LQR 34.

⁷² (2012) 10 SCC 1.

⁷³ *Special Reference No 1 of 2012* (n 72) [81]–[83].

⁷⁴ *Special Reference No 1 of 2012* (n 72) [85]–[93]; Krishnaswamy (n 71) 9–10.

⁷⁵ *Special Reference No 1 of 2012* (n 72) [120].

⁷⁶ *Special Reference No 1 of 2012* (n 72) [112].

⁷⁷ *Special Reference No 1 of 2012* (n 72) [135].

⁷⁸ *Special Reference No 1 of 2012* (n 72) [146].

⁷⁹ Thiruvengadam and Joshi (n 51) 155.

⁸⁰ Unlike above, it is rather arduous (and perhaps much less accurate) to attempt a summary of the legal position for the law relating to judicial review. Hence, this chapter steers clear of that effort.

⁸¹ Krishnaswamy ([n 71](#)) 2.

⁸² A list of the Supreme Court decisions during Phase 3 that advocate judicial restraint is as follows (this list does not purport to be exhaustive): *Tejas Constructions and Infrastructure Pvt Ltd v Municipal Council Sendhwa* (2012) 6 SCC 464; *Michigan Rubber (India) Ltd v State of Karnataka* (2012) 8 SCC 216; *Maa Binda Express Carrier v Northeast Frontier Railway* (2014) 3 SCC 760; *Sanjay Kumar Shukla v Bharat Petroleum Corporation Ltd* (2014) 3 SCC 493; *Siemens Atkiengesellschaft v DMRC Ltd* 2014 (2) SCALE 315.

⁸³ *Manohar Lal Sharma v Principal Secretary* (2014) 9 SCC 516.

⁸⁴ *Manohar Lal Sharma* ([n 83](#)) [104].

⁸⁵ *Manohar Lal Sharma* ([n 83](#)) [160].

⁸⁶ *Manohar Lal Sharma v The Principal Secretary*, Writ Petition (Crl) No 120/2012, order dated 24 September 2014 (Supreme Court).

⁸⁷ The influence of the facts of the *2G Spectrum* case in the reasoning and outcome has been forcefully highlighted in Krishnaswamy ([n 71](#)) 2.

CHAPTER 54

SOVEREIGN IMMUNITY

NEELANJAN MAITRA

I. INTRODUCTION

A neutral observer might find it odd if, upon securing freedom from a repressive colonial state, newly independent citizens should seek to permit their elected government to infringe their rights with impunity. The uninterrupted existence of the doctrine of sovereign immunity in independent India points to precisely this anomaly. The doctrine's ambit, and even its existence, have caused Indian courts considerable discomfort over the past sixty years. Yet, judicial discomfort has only very rarely translated to judicial action. Commentators studying the persistence of sovereign immunity and the related 'sovereign functions' doctrine in India might conclude that sovereign immunity 'turned on a sly continuance of the ideology and practice of the empire'.¹ The strange survival of doctrines so routinely reviled by Indian judges as anachronistic, undemocratic, and thoroughly inappropriate must be a matter of both curiosity and concern.

One might begin by acknowledging that the precise extent to which sovereign immunity survives in India is not entirely clear. It is a truth almost universally acknowledged amongst Indian courts and commentators that the 'sovereign functions' doctrine is certainly problematic and probably dead.² These sources generally agree that the distinction between acts which are not in pursuance of 'sovereign functions'—acts for which the State may be legally liable—and acts in pursuance of 'sovereign functions'—for which the State enjoys immunity—is insufficiently principled and ultimately unsuitable for the workings of the modern Indian State. Similarly, it is also commonly accepted that, over time, a 'liberal' judiciary has gradually eroded the zone of sovereign immunity, which may have resulted in the eventual disappearance of the 'sovereign functions' doctrine.

This chapter argues that the shift from the 'sovereign functions' doctrine has been problematic in at least three ways. First, the disappearance of the doctrine was achieved at significant systemic cost, such as unacknowledged departures from precedent and the development of doctrines that encouraged the manipulation of claims. Secondly, Indian courts moved away from the doctrine

of sovereign functions without providing a coherent alternative judicial account of the place and extent of sovereign immunity in India. One might wonder whether sovereign immunity itself had been discarded with the distinction between sovereign and non-sovereign functions. Finally, it is not immediately obvious that the Supreme Court need necessarily have viewed sovereign immunity through the perspective of sovereign functions at all. As the first part of this chapter hopes to show, pre-Independence Indian courts had developed a robust alternative account of sovereign immunity that did not draw on the sovereign functions doctrine—a fact the Supreme Court took more than forty years to acknowledge.

Section II of this chapter begins with an examination of the text of Article 300 of the Constitution, and a brief survey of the case law on sovereign immunity that preceded the adoption of the Constitution. It also considers some early attempts to refashion the law on sovereign immunity following Independence. Section III considers the judicial treatment of sovereign immunity in independent India and the Supreme Court's reactions to the constraints imposed by its own precedents. Section IV, studies the impact of the Court's evolution of fundamental rights doctrine on sovereign immunity. It considers changes in judicial doctrine relating to sovereign immunity in terms of the nature of the rights sought to be protected through the gradual erosion of sovereign immunity. It also examines some relatively recent developments that may have the effect of clarifying the scope and place of sovereign immunity in India and others which have significantly detracted from such clarity.

Ultimately, the chapter hopes to show that the Supreme Court's difficulties in providing a coherent account of sovereign immunity in India were largely of its own making. It also seeks to show that the Court's doctrinal manoeuvres, both in relation to public and private law claims against the State, have entailed considerable systemic costs, the extent of which may not yet be apparent.

II. THE CONSTITUTIONAL TEXT AND DOCTRINAL DIVERGENCE IN COLONIAL INDIA

The Union of India's relationship with sovereign immunity is characterised by a deep ambiguity. Here, I refer to sovereign immunity as an internal matter—that is, the immunity of the sovereign in its own courts, as opposed to its external immunity in foreign courts or tribunals or in its dealings with other sovereigns. The Constitution of India makes no mention of the doctrine of sovereign

immunity, although Article 300(1) recognises that the governments of the Union of India and the States may sue or be sued by their respective names, subject to any State or Central legislation.³ However, sovereign immunity in India is not a statutory creation—its origins and development are entirely judicial and the scope of the doctrine has been repeatedly challenged. The fact that the constitutional text subjects the grant of legal capacity solely upon future legislation might lead one to question whether a judicially evolved doctrine, unmoored to any Central or State statute, could serve as a check upon Article 300's grant of legal capacity to sue or be sued.

While Article 300(1) contemplates future developments, Article 300(2)(a) expressly seeks to establish continuity between the newly formed Union of India and the Dominion of India that preceded it, noting that the Union of India and the States may sue or be sued 'in the like cases' as the Dominion of India and its provinces might have sued or been sued before the adoption of the Constitution.⁴ The suggestion therefore is that the Union of India's capacity to sue or be sued is identical to that of its predecessor. Article 300(2)(b) reinforces the maintenance of continuity, noting that legal proceedings against the Dominion of India or a province would continue as if the Dominion of India had been replaced by the Union of India or the applicable State. It is this textual recognition of continuity that appears to allow for the existence of a judicial doctrine of sovereign immunity even after the passage of the Constitution.

The judicial doctrine of sovereign immunity in India considerably predates the Constitution. In fact, the doctrine first appears immediately following the establishment of direct rule by the Crown and it assumes relevance because of the transition from rule by the East India Company to rule by the Crown.⁵ In *Peninsular and Oriental Steam Navigation Co v Secretary of State for India*,⁶ the Supreme Court of Calcutta ruled on an act of negligence by servants of the Company towards servants of the plaintiff. Although the act of negligence had occurred during the Company's rule, the action was brought against the Crown, as successor to the Company under the Government of India Act of 1858. The Court noted that although the Company had exercised the functions of a sovereign, it was not, in fact, sovereign and therefore did not enjoy the immunity of the Crown. The Court held that 'where an act is done, or contract is entered into, in exercise of the powers usually called sovereign powers by which we mean powers which cannot lawfully be *exercised except by a sovereign* or private individual *delegated by a sovereign* to exercise them, no action will lie'.⁷

Nothing on the record suggested that the Company's servants had been negligent in their exercise of any function that had traditionally been recognised

as the monopoly of the sovereign—such as, for example, the use of force. Therefore, even though the Crown enjoyed an immunity denied to the Company, there was no immunity for an offence committed while carrying out a non-sovereign function. The *Peninsular and Oriental Steam Navigation Co* Court appears to have understood a sovereign function⁸ to mean a function that was the monopoly of the sovereign, irrespective of whether the monopoly was a matter of precedent and tradition or was merely the product of statute. As this survey of case law hopes to show, the distinction would prove to be crucial.

The most prominent cases that followed *Peninsular and Oriental Steam Navigation Co* took one of two positions on sovereign immunity. One line of decisions adhered, at least nominally, to the sovereign functions doctrine, although no decision appears to have undertaken any conceptual attempt to distinguish between sovereign and non-sovereign functions.⁹ Another line of decisions, including some notable judgments of the High Courts of Madras,¹⁰ Allahabad,¹¹ and Bombay,¹² took the view that State immunity was confined to certain ‘acts of State’ as well as acts done for the public safety, akin to a police power. These decisions defined an act of State as an act whose justification was derived from the sovereign’s inherent power rather than from municipal law. Acts that were done pursuant to municipal law, by contrast, were justiciable even if they were a sovereign monopoly and could not be carried out by a private individual. Courts recognising immunity for acts of State held that such acts immunised both the agent and the principal, while acts done under the colour of municipal law could not serve to immunise the agent even if they were done in furtherance of a sovereign function.¹³

Reliance on the concept of acts of State rather than sovereign functions serves to distinguish this line of cases from the decision in *P&O Steam Navigation Co*. The distinction was not merely semantic. The act of State decisions appear to have understood an act of State to mean ‘an act of the sovereign power directed against another sovereign power or the subjects of another sovereign power not owing temporary allegiance, in pursuance of sovereign rights of waging war or maintaining peace on the high seas or abroad’.¹⁴ The mere fact that the sovereign was the sole entity empowered to undertake an act did not suffice to make it an act of State—in fact the grant of a statutory monopoly in favour of the sovereign served to make an act justiciable rather than immune. By contrast, the decision in *P&O Steam Navigation Co* had, at least on its face, expressed no preference as to whether the sovereign’s monopoly was rooted in custom, tradition, or statute. The act of state decisions sought to define the State by a higher standard than sovereign functions, apparently pointing to a collection of

powers that served to distinguish the State from any other legal entity. Despite their desire to restrict the defence of sovereign immunity to only those acts that were truly sovereign, these courts did not, and perhaps could not, ever exhaustively enumerate the distinguishing characteristics of sovereignty that might serve to immunise an act from judicial review. The act of State decisions ultimately appear to have rested on some formal, almost Hobbesian, judicial conception of the State.

A historian looking at the divergent decisions on sovereign immunity might well ask whether they produced divergent results in the context of the colonial State. On its face, the ‘act of State’ decisions would appear to immunise only the most fundamental acts of the paramount power, the British Crown, while leaving the acts of lower administrative officials open to judicial review. The ‘sovereign functions’ decisions, on the other hand, seemingly treat the colonial State and its officials more sympathetically, affording immunity even to lower officials acting in pursuance of sovereign powers.

Although this hypothesis would have to be tested in far greater detail to be validated, a very brief review of some decisions seems to support the suggestion. For example, courts applying the sovereign functions doctrine recognised immunity for injuries arising out of the making or repairing of a military road,¹⁵ for the negligent seizure of property pursuant to statutory authority,¹⁶ for the negligence of officers of the court of wards in the administration of the estate in their charge,¹⁷ for the wrongful removal of an agent by a labour supply association,¹⁸ and for the wrongful refusal to issue a licence to sell liquors and drugs under excise law.¹⁹ Courts applying the act of state doctrine, by contrast, recognised no defence of immunity in cases involving the payment of excess import duties,²⁰ the requisitioning of property in peacetime,²¹ and the illegal seizure of arms.²²

III. SOVEREIGN IMMUNITY IN INDEPENDENT INDIA: THE SEARCH FOR PRINCIPLE

The divergence in doctrines and outcomes in pre-Constitution sovereign immunity cases was remarked on extensively in the First Report of the Law Commission of India in 1956.²³ After noting economic trends such as the nationalisation of various industries and public utilities and the establishment of State-owned corporations, the Law Commission considered the place of the

State's tortious liability 'in the context of a welfare State'.²⁴

The Law Commission observed that 'When the Constitution was framed, the question to what extent, if any, the Union and the States should be made liable for the tortious acts of their servants or agents was left for future legislation.'²⁵ This statement, taken by itself, might suggest that the Law Commission took the view that Article 300's grant of legal capacity was qualified only by future legislation and not by the existing case law on sovereign immunity. However, a few paragraphs later, the Law Commission seemed to contradict this, stating that 'The old distinction between sovereign and non-sovereign functions or governmental and non-governmental functions should not be invoked to determine the liability of the State'—which suggests that the Law Commission thought that the doctrine, though flawed, was nevertheless still good law.²⁶

In place of the sovereign functions doctrine, the Law Commission proposed to look to the 'nature and form of the activity'²⁷ in question and provided a list of general principles on which future legislation relating to the State's tortious liability should be based. Especially notable amongst these principles were a series of exceptions from tortious liability. The first exception provided that the 'defense of "Act of State" should be made available to the State for any act, neglect or default of its servants or agent' and defined an 'Act of State' in precisely the same terms used by the Privy Council and the Bombay High Court, namely as 'an act of the sovereign power directed against another sovereign power or the subjects of another sovereign power not owing temporary allegiance, in pursuance of sovereign rights'.²⁸ The Law Commission then proceeded to provide a lengthy list of additional exceptions such as 'acts done in the exercise of political functions of the State', 'acts done in relation to the Defense Forces', and various miscellaneous exceptions for claims arising out of defamation, malicious prosecution, and malicious arrest.²⁹

In its quest for a model for the welfare State, the Law Commission had taken the act of State line of decisions, with their restricted view of immunity and had merely sought to supplement them by a list of additional exceptions. The Law Commission's introductory words about the growing public sector and nationalisation notwithstanding, it is hard to discern the principles at play in its proposed formulation of sovereign immunity. What additional role, for example, would the act of State exception play, given the various specific exceptions provided for in connection with political acts, the defence forces, the maintenance of foreign relations, and acts done during a state of emergency? This and other questions regarding the Law Commission's report remained academic since the report's recommendations were never adopted and no

legislation on sovereign immunity was ever passed. However, the divergence of pre-constitutional precedents on sovereign immunity that the Law Commission identified would never be seriously considered by an Indian court until the 1990s. Yet, the absence of a single unified line of judicial precedents and the lack of clarity on the scope of sovereign immunity continued to produce inconsistent judicial decisions for decades to come. The Supreme Court's decisions on sovereign immunity over a span of nearly forty years suggest that the pre-Constitution past considered by the Law Commission's report is not dead; it is not even past.

Six years after the Law Commission's report, in *State of Rajasthan v Vidhyawati* (hereinafter *Vidhyawati*),³⁰ the Supreme Court considered the scope of sovereign immunity under Article 300 for the first time since the adoption of the Constitution. The case, which involved a fatality resulting from the negligent driving of a government jeep by an employee of the State of Rajasthan, involved no sovereign function in either the sense of a function which was traditionally the State's monopoly or in the sense of a function solely entrusted to the State by statute. Rajasthan nevertheless sought immunity under the sovereign functions defence by claiming that sovereign functions extended to cover all activities of a State that were not commercial. This broad claim, which would have extended immunity well beyond the boundaries established in *Peninsular and Oriental Steam Navigation Co*, was rejected by the Supreme Court. However, the Supreme Court did not entirely reject the idea of sovereign function or a sovereign power, noting only that the jeep was being driven back for repairs, rather than on State business. The Court appeared to agree that sovereign immunity would likely have been available if the jeep were being driven for a military or public purpose.³¹

More significantly, the *Vidhyawati* Court provided some general guidance as to the State's liability. First, following its survey of a chain of enactments, the Court held that the vicarious liability in tort of the Government of India and the States under the Constitution was identical to that of its predecessors, namely the Crown and the East India Company.³² Secondly, the Court seemed to indicate that the scope of such immunity was appropriate to the type of 'socialistic State' that had been established by the Constitution.³³ Echoing the Law Commission's report, the Court noted that the State had assumed a number of functions, including certain commercial ones. Therefore, according to the Court, it was 'too much to claim that the State should be immune from the consequences of tortious acts of its employees committed in the course of their employment as such'.³⁴ Like the East India Company, the post-Independence Indian State

‘functioned not only as a Government with sovereign powers’ but ‘also carried on trade and commerce, as also public transport like railways, posts and telegraphs and road transport business’.³⁵ Accordingly, the Court held that the liability of the post-Independence Indian State ought to resemble the liability of the East India Company more than it resembled the liability of the Crown in pre-Independence India.³⁶

The *Vidhyawati* decision may have raised more questions than it answered. While the Law Commission had unequivocally sought the end of the sovereign functions doctrine, the *Vidhyawati* Court appeared to view the doctrine as binding precedent, while simultaneously suggesting that it might be unfit for use by a ‘socialistic’ State.³⁷ The Law Commission had pointed to the increased role of the State in commercial and other activities as a reason to determine a new zone of immunity, which was responsive both to citizens’ right to redress as well as the State’s welfare responsibilities. The *Vidhyawati* Court, on the other hand, regarded the State’s increased welfare role as a reason for restricting sovereign immunity to a smaller space than it had occupied in pre-Independence India. Given the Court’s clear preference for a restricted form of sovereign immunity, it is unclear why the Court did not proffer the act of State line of decisions as an alternative model, especially since the Law Commission had enthusiastically endorsed the act of State doctrine. It is possible that the Court refrained from positing alternative conceptions of sovereign immunity as a matter of judicial restraint. It is also possible that the Court thought it unnecessary to consider other doctrines simply because the State of Rajasthan had no defence even under the more immunity-friendly doctrine of sovereign functions. In any event, the *Vidhyawati* Court’s failure to conclusively determine the applicability of the sovereign functions doctrine in independent India resulted in continued judicial confusion and apparently irreconcilable outcomes.

The continuing relevance of the sovereign functions doctrine was manifest in the Supreme Court’s next major foray into sovereign immunity in *Kasturilal Ralia Ram Jain v State of Uttar Pradesh* (hereinafter *Kasturilal*).³⁸ Unlike *Vidhyawati*, *Kasturilal* almost certainly involved a tort committed in the exercise of a sovereign function—gold seized from the appellant by the police was negligently stored in police custody and then misappropriated by a head constable. A five-judge bench of the Supreme Court led by Gajendragadkar CJ held that no action for damages would lie if a tortious act committed by a public servant in discharge of statutory functions were based on the delegation of the sovereign powers of the State to such public servant. For the Court, the power to arrest a person, to search him, and to seize his property, were ‘powers conferred

on the specified officers by statute and in the last analysis, they are powers which can be properly characterized as sovereign power' and accordingly, no action for damages would lie.³⁹

Although the *Kasturilal* Court recognised the State of Uttar Pradesh's immunity in the exercise of sovereign powers, it did so with deep unease. The Court noted that it had 'been disturbed by the thought that a citizen whose property was seized by the process of law, has to be told, when he seeks a remedy in a court of law on the ground that his property has not been returned to him, that he can make no claim against the State'.⁴⁰ However, although the Court explicitly agreed that this was 'not a very satisfactory position in law', it nevertheless took the view that only the legislature could impose restrictions on sovereign immunity.⁴¹ To this end, the *Kasturilal* Court, like the *Vidhyawati* Court, pointed to the narrowing of sovereign immunity by statute in the United Kingdom and asked that the 'Legislatures in India seriously consider whether they should not pass legislative enactments to regulate and control their claim from immunity in cases like this on the same lines as has been done in England by the Crown Proceedings Act, 1947.'⁴²

It is difficult to disagree with the Supreme Court's observation that the facts of *Kasturilal's* case were very different from *Vidhyawati's*. In fact, in *Kasturilal's* case, a defence of sovereign immunity might have been successful even by the standards of the act of State doctrine. However, it is equally difficult to comprehend why neither the *Vidhyawati* Court nor the *Kasturilal* Court sought to deviate from the sovereign functions doctrine, despite their clear disapproval of that doctrine's workings. The sovereign functions precedents were undoubtedly legally valid, but, as decisions of various pre-Independence High Courts, they could not have bound the Supreme Court. It is also unclear why the Supreme Court made no effort to draw upon the equally valid line of act of State decisions, despite the Law Commission's endorsement of these cases. The Supreme Court's emphasis on legislative intervention as the only appropriate source of restriction upon sovereign liability suggested that the Court privileged the text of Article 300(1) of the Constitution over the continuity of legal doctrine sought to be preserved by Article 300(2).

Legal doctrines may become 'jagged' where they lack substantial congruence with applicable social propositions. Eisenberg notes that 'Conduct that an actor has reason to know is inconsistent with norms and policies that have substantial social support will not often be morally justified.'⁴³ Such jaggedness may promote doctrinal instability, which may lead to the doctrine's modification or disappearance over a period of time. If *Vidhyawati's* case betrayed the first signs

of jaggedness of the sovereign functions doctrine, the appeal for legislative intervention by the Supreme Court in *Kasturilal*'s case made it plain that the Court thought the doctrine socially incongruent.

In *Vidhyawati*'s case, the Court could apply the sovereign functions doctrine without having produced what it considered a socially incongruous result because no sovereign function was involved and sovereign immunity would not apply. A similar outcome prevailed in *Shyam Sunder v State of Rajasthan*,⁴⁴ where the claim concerned a fatality caused by a fire in a defective truck engaged in the State of Rajasthan's famine relief works. The Court cited *Kasturilal* to acknowledge the applicability of the sovereign functions doctrine, but ruled that famine relief was not a sovereign function and sovereign immunity would therefore not apply.⁴⁵

The Court's ability to acknowledge the sovereign functions doctrine without using it to grant immunity was constrained in cases such as *Kasturilal*, which inarguably involved the exercise of a sovereign function. The *Kasturilal* Court's admission that the outcome was socially unacceptable may have formed the basis for some seemingly divergent results in cases similar to *Kasturilal*'s. For instance, three years after *Kasturilal*, in *State of Gujarat v Memon Mahomed Haji Hasam* (hereinafter *Memon Mahomed*),⁴⁶ a three-judge bench of the Supreme Court was confronted with facts similar to those in *Kasturilal*. Two trucks and a station wagon belonging to the respondent were seized by the customs authorities of Junagadh, the predecessor entity of the present State of Gujarat. The vehicles had been negligently kept in the open and a number of parts had been stolen. The Supreme Court held that the precedents in *Vidhyawati* and *Kasturilal* were inapplicable, reasoning that the parties' pleadings and the cause of action had been based in provisions of the Junagadh Customs Act, rather than in tort law and that the defence of sovereign immunity had not been raised at the first opportunity.⁴⁷

The *Memon Mahomed* decision is hard to reconcile with *Kasturilal*. The Supreme Court's assertion that the cause of action was founded in statute rather than in tort is unlikely to have served as sufficient basis to distinguish it from *Kasturilal*. As the *Memon Mahomed* Court undoubtedly knew, the *Kasturilal* Court had engaged in a relatively detailed discussion of the Uttar Pradesh Police Regulations and *Kasturilal*'s property had been seized under Section 550 of the Criminal Procedure Code. The fact that the powers had been conferred by statute did not serve to diminish their sovereign character. The powers in question in *Memon Mahomed*'s case—the power to seize and detain property—should have similarly been treated as sovereign powers conferred by statute whose exercise

would be protected by immunity.

Ten years after *Memon Mahomed's* case, in *Basavva Kom Dyamangouda Patil v State of Mysore* (hereinafter *Basavva Kom*),⁴⁸ a three-judge bench of the Supreme Court once again considered certain facts that were similar to those in *Kasturilal*. Ornaments stolen from the appellant were recovered by the police but were stolen once again from the guard room of the police station where the Chief Judicial Magistrate had ordered them to be stored. As in *Kasturilal*, the Court's power to retain custody of the property in question was founded in statute, the Criminal Procedure Code. The negligence of the police in storing the stolen property was in pursuance of this statutory power, which was ultimately based in the sovereign power to administer justice. Yet, the Supreme Court's brief opinion ordering the State to pay the appellant the value of the stolen property made no mention of sovereign immunity, or of the decisions in *Vidhyawati* or *Kasturilal*, stating only that the case raised 'a short point of law regarding the powers of the Court in indemnifying the owner of the property which is destroyed or lost whilst in custody of the Court'.⁴⁹

In the absence of the legislative intervention sought by the *Kasturilal* Court, the Supreme Court appeared to have dispensed with the sovereign functions doctrine in similar cases by simply ignoring binding precedents (as in *Basavva Kom*) or by drawing procedural distinctions (as in *Memon Mahomed*). However, these judicial manoeuvres could not, by themselves, have addressed the long-term doctrinal instability created by the repeated assertions of the Supreme Court and the Law Commission as to the inadequacy and inappropriateness of the sovereign functions doctrine in independent India. Instead, the Supreme Court ultimately bypassed precedents such as *Vidhyawati* and *Kasturilal* through the use of newer doctrines grounded in the Constitution. Initially, decisions concerning these new doctrines did not expressly consider the issue of sovereign immunity. However, the development and increasing use of these doctrines by the Supreme Court and High Courts meant that the apparent conflict with sovereign immunity and the sovereign functions decisions could not be indefinitely delayed. When this conflict did arise, the constitutional provenance of these new doctrines would serve as the basis for a newer, more restrictive theory of sovereign immunity.

1. Hollowing Out Sovereign Immunity: The Fundamental Rights Cases

The expansion in the Supreme Court's fundamental rights jurisprudence in the 1980s was not merely an expansive reading of the rights themselves. There is a considerable body of scholarship to indicate at least four overlapping doctrinal developments, which made the expansive reading of fundamental rights possible:

1. the judicial expansion of the definition of the State under Article 12, against which fundamental rights were to be asserted;⁵⁰
2. the liberal conception of standing to enforce fundamental rights and the related development of public interest litigation;⁵¹
3. the expansive reading of the right to life under Article 21⁵² and the judicial treatment of Articles 14, 19, and 21 interconnected;⁵³ and
4. the use of private law remedies such as damages for violations of fundamental rights.⁵⁴

To these four conditions, one might add the relative quiescence of the Indian State, particularly its inability or reluctance to use sovereign immunity as a defence. Despite the favourable precedent in *Kasturilal*, the Union of India and the States do not appear to have invariably asserted immunity as a defence in their own courts, as the *Memon Mahomed* and *Basavva Kom* cases suggest. This inconsistent assertion of sovereign immunity, coupled with an expanding fundamental rights jurisprudence, may have combined to gradually erode the zone of sovereign immunity from the early 1980s onwards.

One illustrative example of the State's continuing inability or reluctance to make use of its sovereign immunity is the case of *Rudul Sah v State of Bihar*,⁵⁵ where a three-judge bench of the Supreme Court ordered the payment of palliative compensation to a petitioner who had been illegally imprisoned after acquittal. Noting that the State had not claimed that damages in tort was the only relief available to the petitioner, the Court held that it was not only empowered under Article 32 of the Constitution to award monetary relief for the breach of a fundamental right but that such award was in addition to, rather than in place of, compensation under a civil suit.⁵⁶

The doctrinal move in *Rudul Sah*, the award of monetary damages for fundamental rights, was assisted by two omissions by the State of Bihar. First, the State of Bihar made no attempt to plead its sovereign immunity for the exercise of what was clearly the exercise of its sovereign function in its response to the petitioner's *habeas corpus* petition under Article 32. Secondly, the State of Bihar did not make the argument that a civil suit was the exclusive means by

which to recover damages. Thus, cases such as *Rudul Sah*, which awarded damages for violations of fundamental rights, overcame inconvenient case law as to sovereign immunity by simply not addressing the issue.⁵⁷ Most importantly, such precedents served to show that tort claims (and perhaps even contract claims) might be most effectively asserted by either being coupled with, or being presented as, fundamental rights violations. Future petitioners could entirely dispense with the meandering process of civil litigation in the lower courts by the simple expedient of filing a petition under Article 32 before the Supreme Court.

It was not until 1989 that a fundamental rights claim was sought to be resisted by a defence of sovereign immunity, and the case, like *Vidhyawati* and *Kasturilal*, arose as a civil suit rather than a petition under Article 32. In *Challa Ramkonda Reddy v State of Andhra Pradesh* (hereinafter *Challa Ramkonda Reddy*),⁵⁸ the plaintiffs sought to recover damages for negligence, which led to the murder of the deceased while in police custody. The High Court of Andhra Pradesh, in a decision that was subsequently affirmed by the Supreme Court, agreed that the arrest and detention of the deceased had been carried out under a sovereign function, but held that sovereign immunity could not be a defence to a violation of the rights protected under Article 21. The High Court also expressly noted that sovereign immunity was unavailable as a defence to a suit claiming a violation of a fundamental right, irrespective of whether the claim was put forward through a petition under Article 32 or a civil suit.⁵⁹

After the decision in *Challa Ramkonda Reddy*'s case, there is practically no doubt that sovereign immunity is no defence to a violation of a fundamental right. It is, however, worth asking whether, and when, sovereign immunity is ever a meaningful defence. Clearly, the residual category of cases to which sovereign immunity may be pleaded as a defence are those actions against the State that are grounded solely in tort or contract or in a statutory right and that do not simultaneously allege the violation of a fundamental right. The Supreme Court's recent decision in *Nilabati Behera v State of Orissa* appears to recognise this,⁶⁰ noting that even where a defence of sovereign immunity may be available as a defence against a tortious claim, it would not be available for a claim based on the same facts presented as a violation of fundamental rights.⁶¹

Following the Supreme Court's expansion of fundamental rights, however, one might wonder why any plaintiff would present his case thus, especially given the overwhelming procedural advantages and savings in time and cost represented by petitions before the High Courts and the Supreme Court. In this sense, although the High Court of Andhra Pradesh may have restored some

degree of parity to civil litigants by noting that sovereign immunity cannot be a defence to civil suits where a fundamental right has been violated, its decision was almost redundant, given the rarity with which fundamental rights are sought to be redressed by civil suits.

The Supreme Court's expansive reading of the fundamental rights meant that sovereign immunity was all but extinguished, not only as a defence to public law claims, but also as a defence to the majority of private law claims against the State simply because many of these claims can be presented as violations of fundamental rights covered by Articles 19 and 21.⁶² The similar doctrinal expansion of Article 14, which now treats any form of arbitrary State action as a violation of the right to equality,⁶³ is likewise capable of checking and providing redress against various forms of legislative or regulatory action.

2. Clarity and Confusion: *Nagendra Rao* and Beyond

Despite the remarkable development of the Court's fundamental rights jurisprudence, the sovereign functions doctrine had never quite been rendered entirely extinct. Even in *Challa Ramkonda Reddy's* case, the High Court of Andhra Pradesh (and later, the Supreme Court) had agreed only that sovereign immunity, and the sovereign functions doctrine that supported it, was no defence to a fundamental rights claim, apparently agreeing that sovereign immunity could be a defence to a private law claim founded in tort, contract or statute. A subsequent case—*N Nagendra Rao & Co v State of Andhra Pradesh* (hereinafter *Nagendra Rao*)—would provide doctrinal development of signal importance, building on *Challa Ramkonda Reddy's* consideration of the interaction between private law claims and the defence of sovereign immunity.⁶⁴

In *Nagendra Rao*, a division bench of the Supreme Court considered a situation similar to *Kasturilal*. The appellant, a licensed trader in fertiliser and foodgrain, had a large amount of stock confiscated by the police. No attempt was made to properly store the stock, despite applications to that effect by the appellant, resulting in the deterioration of the stock while in police custody. In considering the resulting appeal from the civil suit for damages, the *Nagendra Rao* Court made several doctrinal advances. First, after a lengthy excursus in which it considered the *Manusmriti*, the Charvaka school of philosophy, as well as mediaeval and modern Indian history, the Court held that sovereign immunity as a defence was 'never available where the State was involved in commercial or private undertaking nor is it available where its officers are guilty of interfering

with life and liberty of a citizen not warranted by law'.⁶⁵ The second part of this proposition appears tautological. It suggests that sovereign immunity is a defence only when the State interferes with life or liberty in a manner warranted by law. Thus, sovereign immunity would only be a defence when it was not required to be a defence, since the State had acted within the law.

Secondly, and far more importantly, the *Nagendra Rao* Court noted that while decisions concerning fundamental rights had held that sovereign immunity could not be a defence in public law cases, 'the shadow of sovereign immunity still haunts the private law'⁶⁶ because of decisions such as *Kasturilal* and the absence of remedial legislation. Finally, the *Nagendra Rao* Court did what the Supreme Court had hitherto failed to do. It recognised the act of State line of cases and suggested that *Kasturilal* was incorrectly decided because it had not taken these decisions into consideration. This was an invaluable doctrinal contribution, and the Court then resurrected the act of State doctrine, holding that *Kasturilal* would confer immunity only in cases involving the exercise of an 'inalienable function' of the State such as the maintenance of law and order.⁶⁷

The importance of the *Nagendra Rao* decision cannot be overestimated. It constitutes the Supreme Court's belated acknowledgement of its failure to develop an adequate account of sovereign immunity for private law cases. The Court also showed that the sovereign functions doctrine was not the only judicial approach to sovereign immunity and that other judicial precedents could be used to fashion a restrictive doctrine of sovereign immunity in private law cases; a doctrine substantially similar to the act of State doctrine. As a division bench, the *Nagendra Rao* Court could not have overturned *Kasturilal*. However, through its revival of the act of State doctrine, it effectively confined the application of *Kasturilal* to cases involving an exercise of the State's inalienable powers. With these three steps, the Court had effectively reversed over thirty years of precedent and provided an account of sovereign immunity that might stand the test of doctrinal stability.

The *Nagendra Rao* decision should have heralded a new era of clarity in the application of sovereign immunity by the Supreme Court. Two subsequent decisions of the Supreme Court ensured that it did not. In *Common Cause, A Registered Society v Union of India* (hereinafter *Common Cause*),⁶⁸ the Supreme Court appeared to blur the distinction between sovereign functions and an act of State. More seriously, in *The Chairman, Railway Board v Chandrima Das* (hereinafter *Chandrima Das*),⁶⁹ the Supreme Court seemingly dragged the sovereign functions doctrine back into existence and undid the progress made by *Nagendra Rao*.

Common Cause concerned the Supreme Court's review of its earlier decision regarding a writ petition alleging *mala fides* in the allotment of petrol outlets by the then Minister of State for Petroleum and Natural Gas. In its consideration of the contention that the allotment of petrol outlets was an act of State beyond judicial review, the Supreme Court cited the *Nagendra Rao* decision, referred to the act of State cases, and quoted passages from the Law Commission's report.⁷⁰ The Court then proceeded to state that the allotment of petrol outlets was not an act of State because the 'traditional sovereign functions were the making of laws, the administration of justice, the maintenance of order, the repression of crime, carrying on of war, the making of treaties of peace and other consequential functions'.⁷¹ The Court thus appeared to view an act of State as indistinguishable from the narrow category of traditional sovereign functions.

It will be recalled that this was not quite the formulation of the Bombay High Court which, following the Privy Council, had defined an act of State as an 'act of the sovereign power directed against another sovereign power or the subjects of another sovereign power not owing temporary allegiance, in pursuance of sovereign rights'.⁷² For the Bombay High Court, what truly defined an act of State was not merely the character of the act itself but also the entities against which the act was directed and the rights pursuant to which the sovereign acted.

If the *Common Cause* decision's confusion was primarily semantic, the *Chandrima Das* decision seems to potentially trigger a far more serious doctrinal controversy. *Chandrima Das* concerned an appeal from a petition under Article 226 brought in the Calcutta High Court on behalf of a foreign national who had been raped by government employees on government premises in West Bengal. The respondents put forward, among other arguments, the defence that the Union of India could not be held vicariously liable for the offence of rape committed by Railways' employees because the rape was not an act in the course of their official duties. The argument may well have entirely lacked merit. However, what it clearly was not was an attempt to invoke the defence of sovereign immunity. In fact, the argument was the opposite of the sovereign functions doctrine, since the Union of India was asking that liability only attach to its servants in their personal capacity precisely because the servants were *not* performing a sovereign or statutory function.

For reasons that are unclear, the Supreme Court appeared to treat this argument as an argument for sovereign immunity, based on a theory of sovereign functions. It went on to state:

The theory of Sovereign power which was propounded in *Kasturilal's* case has yielded to new theories and is no longer available in a welfare State. It may be pointed out that functions of the

Govt. in a welfare State are manifold, all of which cannot be said to be the activities relating to exercise of Sovereign powers. The functions of the State not only relate to the defence of the country or the administration of justice, but they extend to many other spheres as, for example, education, commercial, social, economic, political and even marital. These activities cannot be said to be related to Sovereign power.⁷³

Thus, in a single paragraph, in response to an argument that had never been made, the *Chandrima Das* Court had breathed new life into the sovereign functions doctrine that the *Nagendra Rao* Court had laboured to bury. In his scathing criticism of the *Lemon* test concerning the establishment of religion, Scalia J had once memorably written: ‘Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again ...’⁷⁴ After *Chandrima Das*, critics of the sovereign functions doctrine should fear the worst. The doctrine is not yet dead.

IV. CONCLUSION

If the *Vidhyawati* Court had taken notice of the act of State line of decisions, sovereign immunity in India might well have had a very different history. Once the *Vidhyawati* and *Kasturilal* decisions were in place, however, the Court had effectively surrendered the development of the doctrine of sovereign immunity to the legislature. This chapter has considered, at some length, how the Supreme Court sought to escape the constraints that it had placed upon itself in *Vidhyawati* and *Kasturilal*, first by simply ignoring these inconvenient precedents and then by bypassing them through the evolution of new doctrines in fundamental rights cases. The Court’s judicial manoeuvring may have been ingenious or insufficiently principled, depending on one’s perspective. However, it is certainly curious why the legislature never sought to respond to the judiciary’s repeated pleas for intervention. In this sense, legislative silence and inaction, as much as judicial assertion, have served to shape the law of sovereign immunity in India.

One partial reason for the legislature’s studied silence may lie in the rather inconsistent assertion of sovereign immunity by the Union of India and the States in their own courts. A plea of sovereign immunity was not raised in a fundamental rights case until 1989. Even in cases involving private law claims against the State, as in *Memon Mahomed* and *Basavva Kom*, the State often omitted the claim of sovereign immunity, despite the presence of recent, very

favourable precedents such as *Kasturilal*. One might therefore consider the absence of legislative intervention to be rooted in the fact that sovereign immunity was not asserted rigorously enough or often enough to be considered a significant barrier to the litigation of claims against the State. It is overly ambitious to attribute to government litigators a conscious intention to permit the gradual erosion of sovereign immunity through its non-assertion before Indian courts. It is, however, reasonable to suggest that the Supreme Court would have found it harder to bypass its own inconvenient precedents without the omissions of various government counsels in suits in courts all over India.

If the Supreme Court did ultimately succeed in creating a new, restrictive doctrine of sovereign immunity (a conclusion which the *Chandrima Das* decision appears to throw into doubt), it did so at considerable doctrinal cost. Its fundamental rights jurisprudence may have eased access to justice for very many poor litigants, but it did so by considerably easing evidentiary burdens, by promoting the representation of what were essentially tortious or statutory claims as breaches of fundamental rights, and by potentially precipitating conflicts with other branches of government. A far harder but ultimately more important task would have been to improve civil litigation processes so that civil litigants might enforce their claims without the exorbitant expenditure of time and resources. It is undeniably true that the Supreme Court could not have achieved systemic reform on this scale on its own, but the failure of the project may have ultimately caused untold harm to both individual litigants and India's legal system.

¹ Uday S Mehta, 'Constitutionalism' in Niraja Gopal Jayal and Pratap Bhanu Mehta (eds), *The Oxford Companion to Politics in India* (Oxford University Press 2010), citing Homi Bhabha, *The Location of Culture* (Routledge 1994) 86.

² Eg, HM Seervai, *Constitutional Law of India: A Critical Commentary*, vol 1 (4th edn, Universal Law Publishing 2008) 2133.

³ Constitution of India 1950, art 300(1):

The Governor of India may sue or be sued by the name of the Union and the Government of a State may sue or be sued by the name of the State and may, subject to any provisions which may be made by Act of Parliament or of the Legislature of such State enacted by virtue of powers conferred by this Constitution, sue or be sued in relation to their respective affairs in the like cases as the Dominion of India and the corresponding Provinces or the corresponding Indian States might have sued or been sued if this Constitution had not been enacted.

⁴ Constitution of India 1950, art 300(2):

If at the commencement of this Constitution

(a) any legal proceedings are pending to which the Dominion of India is a party, the Union of India shall be deemed to be substituted for the Dominion in those proceedings; and

(b) any legal proceedings are pending to which a Province or an Indian State is a party, the corresponding State shall be deemed to be substituted for the Province or the Indian State in those proceedings.

⁵ *Peninsular and Oriental Steam Navigation Co v Secretary of State for India* (1868–69) 5 Bom HCR App A1.

⁶ Well before the decision in *Peninsular and Oriental Steam Navigation Co*, in *Dhackjee Dadajee v The East India Company* (1843) 2 Morley's Digest 307 [Supreme Court of Bombay], an action was brought against the East India Company in respect of a trespass committed by a Superintendent of Police under a warrant issued by the Governor-in-Council. Sir Thomas Erskine Perry, then Chief Justice of the Supreme Court of Bombay, ruled that prior to the Charter Act of 1833 no distinction had been made between the political and commercial acts of the Company but ruled that because the Company had neither authorised, nor ratified, nor been in a position to control the act of trespass, the Company bore no liability. Significantly, however, the decision made no reference to sovereign immunity of the Crown or its application to the affairs of the Company.

⁷ *Peninsular and Oriental Steam Navigation Co* ([n 5](#)) 14 (emphasis added).

⁸ This chapter will occasionally use 'sovereign functions' interchangeably with 'sovereign power', because decisions have typically used the terms interchangeably as well.

⁹ Although some decisions did seek to introduce variations. Eg, in *Secretary of State for India v Cockcraft* (1916) ILR 39 Mad 351, Seshagiri Ayyar J added the qualification that if the State had derived benefit from the exercise of the sovereign power, it would be liable.

¹⁰ *The Secretary of State for India v Hari Bhanji* (1882) ILR 5 Mad 273.

¹¹ *Kishanchand v Secretary of State for India* (1881) ILR 2 All 829.

¹² *PV Rao v Khushaldas S Advani* AIR 1949 Bom 277 (subsequently affirmed by the Supreme Court in *Province of Bombay v Khushaldas S Advani* AIR 1950 SC 222).

¹³ *AM Ross v Secretary of State for India* AIR 1915 Mad 434.

¹⁴ *Eshugbayi Eleko v The Officer Administering the Government of Nigeria* [1931] AC 662 (PC), cited in *PV Rao* ([n 12](#)) [11]. The Supreme Court considered the definition again in *Memon Haji Ismail Haji* in determining that the act of the Dominion of India in assuming the administration of Junagadh State was an act of state. *State of Saurashtra v Memon Haji Ismail Haji* AIR 1959 SC 1383 [12], citing *Salaman v Secretary of State for India* [1906] 1 KB 613, 640 [CA], defined an act of state in the terms used by Fletcher Moulton LJ as:

'[A] catastrophic change constituting a new departure'. It is a sovereign act which is neither grounded in law nor does it pretend to be so. Examples of such 'catastrophic changes' are to be found in declarations of war, treaties, dealings with foreign countries and aliens outside the State. On the desirability or the justice of such actions the Municipal Courts cannot form any judgment.

¹⁵ *Cockcraft* ([n 9](#)).

¹⁶ *Shivabhajan Durgaprasad v Secretary of State for India* (1904) ILR 28 Bom 314.

¹⁷ *Secretary of State for India v Sreegovinda* (1932) 36 Cal WN 606.

¹⁸ *AM Ross* ([n 13](#)).

¹⁹ *Nobin Chunder Dey v The Secretary of State for India* (1876) ILR 1 Cal 11.

²⁰ *Hari Bhanji* ([n 10](#)).

²¹ *PV Rao* ([n 12](#)).

²² *Forester v Secretary of State for India* (1871) LR IA Supp 10.

²³ Law Commission of India, *First Report (Liability of the State in Tort)* (Law Com No 1, 1956) <<http://lawcommissionofindia.nic.in/1-50/Report1.pdf>>, accessed 29 October 2014.

²⁴ Law Commission of India (n 23) para 60.

²⁵ Law Commission of India (n 23) para 62.

²⁶ Law Commission of India (n 23) para 65.

²⁷ Law Commission of India (n 23) para 65, citing Lawrence Friedman, *Law and Social Change*.

²⁸ Law Commission of India (n 23) para 65.

²⁹ Law Commission of India (n 23) para 66. The Law Commission's preference for a relatively restricted and clearly defined form of sovereign immunity may have derived from the views of its Chairman, MC Setalvad. In MC Setalvad, *The Common Law in India* (Stevens & Sons 1960) 51, he discussed the Law Commission's approach and approvingly quoted the decision in *Secretary of State v Kamachee* (1859) 7 MIA 476 (PC), to the effect that municipal courts would have the jurisdiction to adjudicate the validity of acts professed to have been done in pursuance of municipal power. He noted, by contrast, that acts of state done by a sovereign power would not be subject to judicial review.

³⁰ AIR 1962 SC 933.

³¹ *Vidhyawati* (n 30) [3].

³² *Vidhyawati* (n 30) [7].

³³ *Vidhyawati* (n 30) [15].

³⁴ *Vidhyawati* (n 30) [10].

³⁵ *Vidhyawati* (n 30) [10].

³⁶ *Vidhyawati* (n 30) [15].

³⁷ *Vidhyawati* (n 30) [15].

³⁸ AIR 1965 SC 1039.

³⁹ *Kasturilal* (n 38) [28].

⁴⁰ *Kasturilal* (n 38) [29].

⁴¹ *Kasturilal* (n 38) [29].

⁴² *Kasturilal* (n 38) [29].

⁴³ Melvin Aron Eisenberg, *The Nature of the Common Law* (Harvard University Press 1991) 113.

⁴⁴ (1974) 1 SCC 690.

⁴⁵ *Shyam Sunder* (n 44) [21]. Note, however, that even in *Shyam Sunder* [20], the Court expressly avoided endorsing the appropriateness of the sovereign functions doctrine, noting instead that it would not 'consider the question whether the immunity of the State for injuries on its citizens committed in the exercise of what are called sovereign functions has any moral justification today'.

⁴⁶ AIR 1967 SC 1885.

⁴⁷ *Memon Mahomed* (n 46) [7].

⁴⁸ (1977) 4 SCC 358.

⁴⁹ *Basavva Kom* (n 48) [1].

⁵⁰ *Ramana Dayaram Shetty v International Airport Authority* (1979) 3 SCC 489.

⁵¹ *SP Gupta v Union of India* (1981) Supp SCC 87.

⁵² Eg, *Sunil Batra v Delhi Administration* (1988) 3 SCC 488.

⁵³ *Maneka Gandhi v Union of India* (1978) 1 SCC 248.

⁵⁴ *Rudul Sah v State of Bihar* (1981) Supp SCC 87.

- ⁵⁵ (1983) 4 SCC 141.
- ⁵⁶ *Rudul Sah* ([n 54](#)) [12].
- ⁵⁷ *Sebastian M Hongray v Union of India* (1984) 3 SCC 82; *Bhim Singh v State of Jammu and Kashmir* (1984) Supp SCC 504.
- ⁵⁸ AIR 1989 AP 235.
- ⁵⁹ *Challa Ramkonda Reddy* ([n 58](#)) [23].
- ⁶⁰ (1993) 2 SCC 746.
- ⁶¹ *Nilabati Behera* ([n 60](#)) [17].
- ⁶² Take, for eg, *Nilabati Behera* ([n 60](#)), where a wrongful death was presented as a violation of art 21, rather than as a tort.
- ⁶³ *EP Royappa v State of Tamil Nadu* (1974) 4 SCC 3.
- ⁷³ *Chandrima Das* ([n 69](#)) [41].
- ⁶⁴ (1994) 6 SCC 205.
- ⁶⁵ *Nagendra Rao* ([n 64](#)) [13].
- ⁶⁶ *Nagendra Rao* ([n 64](#)) [13].
- ⁶⁷ *Nagendra Rao* ([n 64](#)) [27].
- ⁶⁸ (1999) 6 SCC 667.
- ⁶⁹ (2000) 2 SCC 465.
- ⁷⁰ *Common Cause* ([n 68](#)) [72]–[80].
- ⁷¹ *Common Cause* ([n 68](#)) [80].
- ⁷² *PV Rao* ([n 12](#)) [11].
- ⁷⁴ *Lamb’s Chapel v Center Moriches Union Free School District* 508 US 384 (1993).

CHAPTER 55

PUBLIC EMPLOYMENT AND SERVICE LAW

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I. INTRODUCTION

It is standard practice for constitutions to regulate politics. A striking feature of the Indian Constitution is its extensive set of provisions on the bureaucracy. Part XIV of the Constitution focuses on public services, covering matters ranging from the recruitment of public servants to the operation of public service commissions. The structure of allegiance between the political executive and the policy executive is a delicate one, and maintaining it is a major task, particularly in democracies like India that are prone to political volatility.¹ The current model of government services is strongly rooted in the Indian Civil Service (ICS), a colonial creation that was the backbone of British rule in India, and there remains a high degree of continuity in the nature and functions of the civil services under the Raj and independent India. This chapter examines how the Indian Constitution regulates civil servants. In doing so, it explores the ways in which the often-competing ideals of bureaucratic independence and bureaucratic responsiveness find expression in constitutional controversies.

II. THE HISTORICAL LEGACY

1. Colonial India

In order to understand ‘the puzzle of ICS continuity’,² a closer look at its evolution under colonial rule is required. The ICS was formally established by the Government of India Act 1858 (‘1858 Act’), and later underwent significant transformations with the subsequent enactments of the Government of India Act 1919 (‘1919 Act’) and the Government of India Act 1935 (‘1935 Act’). Both the 1919 Act and the 1935 Act laid the foundation for the present constitutional provisions that govern the civil services in India.

Originally, governance under the Raj was centralised in the hands of the Secretary of State, who enjoyed full authority over the services.³ By the 1919 Act, the British introduced dyarchy, a system of governance whereby the executive branch of the government was divided into authoritarian and popularly responsible sections. The 1919 Act ultimately paved the way for the 1935 Act, which introduced a federal form of government, with a certain degree of autonomy granted to the provinces. The enactment of the 1919 and 1935 Acts was to primarily secure self-governance and a greater *Indianisation* of the services, including structural changes to the recruitment process.⁴

With the introduction of federalism by the 1935 Act, the question of whether the administrative system (which so far had been integrated from the top to the village level) needed to be bifurcated had to be considered.⁵ The Maxwell Committee on Organization and Procedure (1937) discussed the issue, and firmly recommended that status quo be retained, for two primary reasons. First, according to the Committee, in the event of a permanent civil service of the Union government being instituted, the officers recruited therein would most likely not directly work in the provinces. It was considered essential that the civil servants at the disposal of the Union government, whose primary duty would be policy formulation, possess the direct experience of working in the provinces, without which the context of the many issues the Union government remained concerned with would not be adequately understood. Secondly, and crucially, a rotating civil service would supply an essential link between the Union government and the provincial governments.⁶

The most significant change brought about by the 1919 Act was the devolution of administration of certain subjects upon the provinces. For the first time, the provincial governments were provided with an independent sphere of administration in subjects such as education, agriculture, medical, health, local

government, *etc.* Significantly, the transferred subjects to the provinces came directly under the elected representatives of the Indian people.⁷ With the increasing transfer of power to the provincial governments, the power of recruitment and control of the Secretary of State over the transferred subjects was discontinued. Gradually, the Secretary of State came to retain control of only the ICS, Indian Police Service, and a few other 'All-India Services', with the rest of the services being converted into provincial services.

With the enactment of the 1935 Act, this position was formalised. The Act clearly laid down that the power to make appointments vested with the Governor-General in respect of the central services, and with the Governors in respect of the provincial services. The provincial legislatures were, however, enabled to pass legislation to regulate the conditions of service of provincial civil servants.⁸

Both the Acts diluted the autonomy of the ICS and other services, since officials now had to work in close association with, and were accountable to, the elected ministers.⁹ Bureaucrats were fearful that the elected Congress ministers would exercise this power to gain retribution, since the ICS had played an antagonistic role throughout the national movement.¹⁰ It was for this reason that the tenure of civil servants was secured, and the common law *doctrine of pleasure* was statutorily introduced in India in 1919, by which the appointment of members of the civil services was made at the pleasure of the Crown, vide Section 96B. The same was retained in the 1935 Act, and eventually incorporated in the Constitution.

The 1919 Act provided that no member of the civil services could be dismissed by any authority subordinate to the authority by which he was appointed.¹¹ Since appointments to the civil services were made by the Secretary of State anyway, this provision ensured that the elected representatives could not dismiss the civil servants. These features were retained in the 1935 Act. The 1935 Act also provided unprecedented constitutional protections to civil servants (since the ICS feared that the Indian legislatures would not grant the services adequate protection), as can be seen in section 52(1), whereby the Viceroy further reserved for himself the protection of rights and legitimate interests of civil servants under his 'special responsibilities' (which included important powers such as protection of minorities and maintenance of peace and tranquility).¹²

As mentioned earlier, the 1919 Act delegated the power to regulate conditions of service in respect of the provinces to the Governor or local legislatures. However, it is interesting to note that the power to make 'Fundamental Rules',

which governed major rules with respect to conditions of service, vested solely with the Secretary of State. Thus, while the ministers had greater control over the government services, the ultimate authority was concentrated in the hands of the British executive. Further, the exact scope of the power delegated to the legislatures was clearly laid out in the Report of the Joint Select Committee of 1934 as being, mainly, the power of granting legal sanction to the status and rights of the services.¹³

The 1935 Act, by virtue of section 240, further strengthened the protections granted to the civil servants. Civil servants were given the right to appeal any imposition of punishment upon them directly to the Governor or Viceroy, by virtue of this provision, which laid down the procedure to be followed to dismiss or reduce the rank of civil servants, which included a reasonable opportunity of being heard.¹⁴ Finally, the 1919 Act established a Federal Public Service Commission to discharge functions relating to the recruitment and control of the public services, free from political interference.¹⁵ The 1935 Act further established the Provincial Public Service Commissions in all the provinces.¹⁶ Ironically, while these protections were motivated entirely by political considerations, they simultaneously symbolise the separation of the 'apolitical' executive from the 'political' legislature.

2. The Constituent Assembly Debates

The Constituent Assembly extensively debated whether or not there was place for the public services—widely seen as a symbol of colonial oppression—in a modern, democratic nation. The Congress had earlier mounted an unrelenting opposition to the services and asserted the need for their dismemberment in the new nation. However, the pressing need for security and stability, especially in light of the violence in Punjab, Hyderabad, and Kashmir, during and after Partition, highlighted not only the need for stability and continuity over drastic administrative overhauls, but also the vital role played by the services in nation building.¹⁷ Further, the political neutrality of the services, and their disciplined and unquestioned implementation of the policies formulated by the government, was advocated (primarily by Sardar Patel) as being indispensable to the newly formed nation-state.¹⁸ As Patel put it: ‘Learn to stand upon your pledged word, and, also, as a man of experience I tell you, do not quarrel with the instruments with which you want to work.’¹⁹

Patel defended the services for their neutrality, or subordination, to the prevailing political will. The services were oppressive under colonial rule because they were pursuing the policies of a colonial government. The same subordination to the prevailing political will would make them invaluable in the new democratic framework. The newly formed social welfare state, which had set for itself an ambitious agenda for development, was rife with communal strife and insurgency. The management of both urgently required a competent, efficient, and diligent task force, which was found in the services already created by the British.²⁰ Therefore, the assembly was guided by a need to create a service under the control of and accountable to the legislature, but also had to ensure that it remained free from political interference.

Patel was of the view that to leave the regulation of the conditions of service to Central and provincial legislatures would be a grave mistake, for it would increase the chance of political interference with the services, thereby compromising on their efficiency.²¹ Ambedkar, however, was of the opinion that only minimum safeguards were necessary to be granted a constitutional status; and the rules on recruitment and conditions of service could be entrusted to the wisdom of the legislatures. Even the authority of the executive over the services was vested with the legislature, in keeping with democratic values.²²

However, after much intensive debate, the safeguards contained in the 1935

Act were largely retained. A consensus was reached with regard to the establishment of an All-India Service, controlled by the Union government; with special protection (constitutional in character) afforded to these services in order to keep them independent from any kind of political interference. The proposed articles, later numbered Articles 308–314 in the Constitution, laid down that civil servants held office at the pleasure of the President and the Governor (depending on whether they were members of the All-India Services or the State Services), secured the tenure of civil servants, but clarified that they had no right to hold office, and also that civil servants were not the employees of a particular minister.²³

The safeguards against arbitrary political dismissals and punitive action contained in the 1935 Act were also retained. This meant that no person could be removed or reduced in rank by an authority below the rank that appointed him. Even this action could be taken only after affording a reasonable opportunity of showing cause, unless it was not practicable to do so, or the removal or reduction in rank was in pursuance of conviction on a criminal charge.²⁴ As an additional safeguard, the assembly provided that in the interest of administrative convenience, until the legislatures make the necessary rules for recruitment and conditions of service, the President and the Governors were empowered to do so.²⁵

The assembly also debated whether new All-India Services should be established by the President, the Parliament as a whole, or the Council of States (since one of the essential roles of such services was to serve as a ‘liaison between the provinces and the central government’). Thus, it was found imperative to acquire the consent of the Council of States.²⁶ Patel pointed out that the representatives of the provinces in the assembly did not have any objection to the retention of All-India Services, simultaneous with the provincial and federal services.²⁷ In this manner, the establishment of All-India Services was secured, despite being incongruous in a federal set-up. The All-India Services would have also included All-India Judicial Services,²⁸ but the Forty-second Amendment clarified this nevertheless. So far, despite the recommendation of the Supreme Court,²⁹ All-India Judicial Services have not been established.

As a result, by the end of the Constitution-drafting process, India had a civil service that was in principle accountable to the legislature, but over which the executive continued to exercise intense control through its rule-making powers. Consequently, there was scant change in the actual structure and functioning of the services, which preserved their colonial orientation and demonstrated a high

degree of colonial continuity. While Burra argues that the claim of colonial continuity per se is insufficient to discredit public services,³⁰ Potter³¹ and several other authors³² express concern with the services on three grounds.

The first critique is from the vantage point of democratic theory. While earlier imagined to be 'accountable to themselves',³³ democracy brought the services under the direct control and accountability of elected representatives. According to Potter, the two traditions—of an older colonial administration and of newly elected democratic representatives—sat at odds with each other. The ministers now had a far bigger role to play in policymaking, which the administrators viewed as excessive political intervention in their functioning.³⁴ The protection of their personal and professional interests under these changed circumstances required political manoeuvrability, to which bureaucrats were traditionally unaccustomed. This caused a change in the fibre of the services. Though trained in the ethic of political neutrality, 'in reality the political and practical considerations are often inseparable'.³⁵ This paved the way for excessive politicisation of the services post-Independence, attaining its peak during the Emergency, and subsisting since then.³⁶ The constitutional safeguards preventing arbitrary dismissals and punishments by the ministers were sidestepped through the loophole of discretionary transfers, thereby seriously hampering efforts to ensure accountability.³⁷

The second criticism focuses on federalism, and pertains specifically to All-India Services. The original vision was to depute servicemen to State cadres, from which the Union government could pick individuals for short durations for the All-India Services, after which they returned to their State cadres.³⁸ Potter,³⁹ and even the First Administrative Reforms Commission,⁴⁰ called the coexistence of All-India Services with a federal structure a remarkable feat unto itself. Notwithstanding the fact that the Council of States had no objection to the retention of an All-India Services during the Constituent Assembly debates, post-Independence, such an All-India administrative arrangement was bound to face some hostility from the elected leaders in the various States. In effect, the key posts at the State level were occupied by members of the All-India Services, who were recruited by the Centre. This constrains the discretion for the States themselves to appoint their personnel for implementation of policies. Further, in view of the rules of appointment made by the Centre, purportedly 'in consultation with the States', for the senior posts in the States, the choice is limited only to members of the All-India Services. Instead of being services that provided a crucial link between the Centre and the States, they have degenerated

into entities controlled by the ruling party at the Centre, to constrain governments of opposition parties in the States.⁴¹

The third concern with India's civil service has been its inability to meet the challenges of a welfare state. The colonial functions of administration were law and order, administration of justice, and revenue collection, otherwise pursuing a laissez-faire economic policy, which furthered the interests of European industrialists.⁴² Now, India pursues an agenda of all-round development, extending beyond economic activities alone.⁴³ Since the 1950s, a number of specialised welfare-based ministries and departments have been set up.⁴⁴ The expansion of the agenda into political, social, and economic reforms calls for increased expertise in policy formulation and implementation, which the 'amateur generalist' is unable to deliver upon. The reservation of top posts in the government for IAS officials further prevents the entry of technocrats and experts.⁴⁵ The problem is further exacerbated by the system of transfers and short tenures at posts.⁴⁶ No other industrialised nation of this size is run by a panel of generalists. Even the UK now permits lateral hires in ministries on a contractual basis. Japanese bureaucrats spend their entire careers in the same ministry, thereby gaining expertise on the job.⁴⁷ As we shall see, these three concerns often find articulation in constitutional controversies relating to the civil services.

III. THE CONSTITUTIONAL POSITION

Service law in India is fairly complex, involving, inter alia, a multitude of statutes, rules, directions, practices, and judicial decisions, not to mention principles of administrative law.⁴⁸ Here we focus on the constitutional status of the civil service, through provisions that are split into those dealing with the Services (Articles 308–314) and those dealing with the Public Service Commissions (Articles 315–323).

1. The Terms of Service

Article 309 lays down the power of the appropriate legislature to regulate the recruitment, and conditions of service of persons appointed to public services as well as posts in connection with the affairs of the Union or of any State. The Constituent Assembly recognised that it would take time for the various legislatures to legislate on the above matters, which included provisions with regard to qualifications for appointment/removal, promotion, and tenure, and that it was necessary for the sake of administrative convenience that rules governing the same be put in place expeditiously. This prompted the insertion of a proviso to Article 309, under which the executive was empowered to make rules regarding recruitment and conditions of service of civil servants, until the passing of laws by the appropriate legislature. However, despite being included predominantly as an interim measure, this proviso proved to be significant, as the power of the executive has frequently been invoked, giving rise to a situation where the civil service in India remains governed by the rules framed by the President or various Governors of the States.

The law as laid down by the Supreme Court, expanding the scope of protections afforded to civil servants, clearly holds that rules cannot be made operational retrospectively, if they impair a vested right. The question as to whether or not rules framed under Article 309 can take effect retrospectively has been the subject of much judicial controversy. Prior to 1969, there was disagreement among High Courts regarding the validity of retrospective applicability of such rules.⁴⁹ However, in *BS Vadera v Union of India*,⁵⁰ the Supreme Court clarified matters, holding that such rules can be given retrospective effect, as the power of the President/Governor under the proviso to Article 309 is coextensive with that of the appropriate legislature. Significantly, this rule was subsequently qualified so that retrospective rules would *only stand* if the date from which they were made to operate was shown to bear a reasonable nexus with the provisions contained in the rules.⁵¹ Thereafter, in *K Narayanan v State of Karnataka*,⁵² the Supreme Court widened the qualification on the rule-making power of the executive by holding that no rule can be made to operate retrospectively if it is unjust and unfair, apart from the absence of nexus. Thus, a retrospective amendment was held not to be valid if it affects or impairs a vested right.⁵³

The phrase ‘subject to the provisions of the Constitution’ in Article 309 imposes a significant embargo on the power conferred upon the legislature and

executive. The rules framed under Article 309 must be reasonable, fair, and not grossly unjust (as explained in the case of *Baleshwar Dass v State of Uttar Pradesh*),⁵⁴ in order to meet the requirements of equality and non-arbitrariness, guaranteed by Articles 14, 15, and 16 of the Constitution. The Supreme Court has held that:

[E]ven though the President, in exercise of his power under the proviso to Article 309, can make rules which may have prospective or retrospective operation, the said rules may be open to challenge on the ground of violation of the provisions of the Constitution, including the Fundamental Rights contained in [Part III](#) of the Constitution.⁵⁵

In addition to their rule-making power, Articles 53, 73, 154, and 162 confer ‘executive power’ upon the Union and States, vide which it is competent for the President or the Governor to issue administrative rules, circulars, or instructions.⁵⁶ The established legal position is that such administrative instructions may be made to govern service conditions in cases where no rules in that regard have been framed under Article 309,⁵⁷ or where the rules so framed are silent on that aspect.⁵⁸ These instructions aim to serve the purpose of supplementing the rules and filling the gaps in administration that may remain, in a manner not inconsistent with the rules already framed. Thus, if there is a conflict between the executive instructions and the rules made under Article 309, the rules will prevail; and if there is a conflict between the rules framed under Article 309 and the statute, the latter will prevail.⁵⁹

An important concept relating to the terms of public service is the doctrine of pleasure. The origins of this doctrine lie in the common law, with the Crown being seen as incapable of fettering its future executive action by entering into a contract in matters that concern the welfare of the State.⁶⁰ On grounds of public policy, the fact that a civil servant is dismissible at pleasure is considered an implied term in their employment under the Crown.⁶¹ In the UK, where Parliament is supreme, the doctrine of pleasure can be overridden under a statute enacted by Parliament. This common law notion of the doctrine had initially been brought to India, where under Section 96B(1) of the 1919 Act, the power was given to the Secretary of State to make rules curtailing its effect. However, the doctrine was diluted under the Constitution so that it would apply ‘except as expressly provided by this Constitution’ under Article 310(1). Accordingly, the pleasure of the President or the Governor can be fettered by constitutional provisions, though not by ordinary legislation.⁶²

The Supreme Court has recognised that society has an interest in the enforcement of the duties fixed by public law. Therefore, while the origin of

government service is contractual, once a Government servant is ‘appointed to his post or office ... [he] acquires a status and his rights and obligations are no longer determined by consent of both parties, but by statute or statutory rules which may be framed and altered unilaterally by the Government’.⁶³ The Supreme Court, while determining the status of employment under the Government, has held that ‘status’ is ‘the attachment to a legal relationship of rights and duties imposed by the public law and not by mere agreement of the parties’.⁶⁴ Accordingly, while no restrictions can be placed on the doctrine of pleasure except for those under the Constitution, the powers conferred upon the legislature and the executive by Article 309 also cannot be fettered by any agreement.⁶⁵ The Supreme Court has repeatedly justified the doctrine of pleasure as a matter of public policy, rejecting the contention that it was a special prerogative of the Crown operating as an ‘anachronism’ in a ‘democratic, socialist age ...’⁶⁶ Pertinently, the Court also observed that in consideration of the vital interest of the public in the ‘efficiency and integrity’ of the civil services, it is paramount that members of the services, both at the higher and lower levels, ‘bring to the discharge of their duties a ... collective sense of responsibility’.⁶⁷

Of the provisions of the Constitution that limit the applicability of the doctrine of pleasure, Article 311 is the most severe. This provision safeguards the interests of civil servants in certain cases of punishment being imposed upon them. Article 311 has been dealt with in detail in the next section. Articles 124, 148, 217, 218, and 324, specifically provide that Supreme Court judges, the Comptroller and Auditor General, High Court judges and the Chief Election Commissioner shall not be removed from their offices except in the manner laid down in those Articles. The Supreme Court also explained the balance between Articles 309, 310, and 311 in the following terms:

[F]or a government servant to discharge his duties faithfully and conscientiously, he must have a feeling of security of tenure. Under our Constitution, this is provided for by the Acts and rules made under Article 309 as also by the safeguards in respect of the punishments of dismissal, removal or reduction in rank provided in clauses (1) and (2) of Article 311. It is, however, as much in public interest and for public good that government servants who are inefficient, dishonest or corrupt or have become a security risk should not continue in service and the protection afforded to them by the Acts and rules made under Article 309 and by Article 311 be not abused by them to the detriment of public interest and public good.⁶⁸

The final point to note is that the power conferred upon the President/Governor under Article 310(1) is essentially an executive power, and under Articles 53(1) and 154(1) the executive power of the Union or State may be exercised by the

President/Governor, either directly or through officers subordinate to him. As explained by the Supreme Court in *Samsher Singh v State of Punjab*, 'wherever the Constitution requires the satisfaction of the President or the Governor for the exercise by the President or the Governor of any power or function ...' it is not his 'personal satisfaction' but 'the satisfaction of the President or Governor in the constitutional sense ...'⁶⁹ Thus, an official authorised under the Rules of Business can take the desired action in the name of the President or the Governor, as the case may be.

2. Constitutional Protections

Article 311 is the primary safeguard for persons holding civil posts against arbitrary punishments of a serious nature. Clause (1) of the Article states that ‘no civil servant shall be dismissed or removed by an authority subordinate to that by which he was appointed’. This guarantee provides security to civil servants, as they may not have much faith in the judgment of a subordinate authority.⁷⁰ The constitutional protection guaranteed can only be taken away by a constitutional amendment, and any legislation that seeks to do this even indirectly is void.⁷¹ This protection does not, however, apply to orders imposing a reduction in rank.⁷² Further, Article 311 does not apply to cases where minor punishments are imposed, such as censure, withholding of promotion, or withholding of increments of pay.

The protections available to a civil servant under Article 311(2), which grants a right of hearing, before being dismissed, removed, or reduced in rank, are linked to the nature of their employment under the government; so that persons holding permanent or quasi-permanent posts are at a comparative advantage to those holding a temporary post or those appointed on probation. Generally, when a person is ‘appointed substantively to a permanent post in government service [he] normally acquires a right to hold the post until he attains the age of superannuation’.⁷³ Officers serving in quasi-permanent posts are similarly placed.⁷⁴ Whereas in the case of a temporary post, the Supreme Court has significantly departed from the position held with respect to permanent and quasi-permanent posts, holding that:

A temporary government servant has no right to hold his post, his services are liable to be terminated by giving him one month’s notice without assigning any reason either under the terms of the contract providing for such termination or under the relevant statutory rules regulating the terms and conditions of temporary government servants.⁷⁵

Further, it has also been held that a simple order of termination of a temporary government servant that does not cast any ‘stigma’ or ‘[disclose] any penal consequences’ is not covered under the protections granted by Article 311(2).⁷⁶ The Supreme Court has held that the overriding test to be applied for the protection under Article 311 is to see whether the misconduct is a mere motive or is the very foundation of the order against the aggrieved officer.⁷⁷ The protection of Article 311(2) has been extended by the Supreme Court even to newly recruited civil servants in their initial period of ‘probation’ by applying

the ‘motive or foundation’ test.⁷⁸

The only exceptions to ‘full protection’ are embodied in the second proviso to Article 311(2), which reads thus:

Provided further that this clause shall not apply—

- (a) where a person is dismissed or removed or reduced in rank on the ground of conduct which has led to his conviction on a criminal charge; or
- (b) where the authority empowered to dismiss or remove a person or to reduce him in rank is satisfied that for some reason, to be recorded by that authority in writing, it is not reasonably practicable to hold such inquiry; or
- (c) where the President or the Governor, as the case may be, is satisfied that in the interest of the security of the State, it is not expedient to hold such inquiry.

The satisfaction of the President/Governor as required under clause (c) of the second proviso to Article 311(2) has been described as a subjective satisfaction by the Supreme Court in *Tulsiram Patel*. The Court observed that ‘expediency involves matters of policy. Satisfaction may be arrived at as a result of secret information received by the Government about the brewing danger to the security of the State and like matters.’⁷⁹

The above examples illustrate that the judicial trend has not only been to widen the nature of protections available to government servants under Article 311(2), but also to expand the range of officers to whom such protection would be available. This approach of the judiciary has been severely criticised for ensuring to civil servants a security of tenure that is so indefeasible that it hampers any incentive to perform. This, among other reasons, has caused those occupying civil posts to become inefficient in the discharge of their duties and indifferent to the needs and interests of the general public. Given the range of functions of the government, this excess security is unbecoming of a service that is required to be dynamic, innovative, and to act quickly to solve problems. It has even enabled politicians to blame the stagnancy of a particular department/ministry, on its inability to remove incompetent officers. The one weapon that exists in the hands of the political class is the power to transfer. Transfer is considered an incident of service, and therefore may be exercised unless expressly barred.⁸⁰ Given that the rules and regulations across the services on transfer are fairly scant, a competent civil servant whose grievance is genuine does not have much protection against a transfer order.

3. Public Service Commissions

The Public Service Commissions (PSCs), which operate as autonomous bodies, discharge important constitutional functions. As quasi-advisory bodies, they are responsible for recruitment into the civil services, and for matters relating to promotions, transfers, and other conditions of service of civil servants. They also advise the President/Governor on any disciplinary action against civil servants. The primary objective of establishing PSCs was to insulate the recruitment of civil servants from political intervention. While the attempts under the 1919 Act to kick-start the federal PSC were tepid, the 1935 Act contained detailed provisions pertaining to the composition and powers of the PSC, while simultaneously establishing provincial PSCs. The current constitutional provisions—Articles 315–323—closely resemble the 1935 Act.

The powers of PSCs in India are wider than the corresponding body in the UK, which is responsible only for recruitment.⁸¹ The Constituent Assembly, being mindful of the significance of the functions of PSCs, considered and rejected a proposal to make PSCs a creature of statute and instead conferred a constitutional status on them so that they are not abolished through mere legislation.⁸² As constitutional bodies, their discharge of functions warrants a higher degree of independence, which the constitutional provisions seek to secure at every step.⁸³ Articles 316, 317, and 318, whereby it is the President or the Governor that appoints, removes, and decides the conditions of service of the members of the PSC; and Articles 319 and 322, whereby members are prohibited from undertaking any public employment after the conclusion of their tenure, except, conditionally, with other PSCs, clearly demonstrate the constitutional intent to keep PSCs immune from political influence.

With regard to PSC appointments, a high premium is placed on integrity. It is important for functionaries to be above not only partisan influences, but also personal biases, and to shun nepotism.⁸⁴ Section 196(2) of the South African Constitution of 1996 is a useful comparative example in this regard—it specifically provides that ‘The Commission is independent and must be impartial, and must exercise its powers and perform its functions without fear, favour or prejudice in the interest of the maintenance of effective and efficient public administration ...’ While Indian courts were once reluctant to interfere in the process of appointments in order to ensure that the personal judgement of the President/Governor is not supplanted by judicial discretion, in recent years they have been increasingly directing the State to frame guidelines on the

qualifications and process of appointment of members.⁸⁵ This is chiefly due to the rampant meddling by governments in the process of appointments, packing PSCs and distorting recruitment to the civil services.

Further, the conduct of elected officials and ministers in influencing the decisions of PSCs has also been an area of concern. They have been found to send secret circulars to PSC members to influence their decisions.⁸⁶ This has led the Supreme Court itself to observe that:

There is no doubt that the ... Public Service Commission has clearly fallen from grace and the exalted status it enjoys under the Constitution. That one scam after another should erupt in respect of such a constitutional body is a very disturbing aspect. If constitutional institutions fail in their duties or stray from the straight and narrow path, it would be a great blow to democracy, a system of governance that we have given unto ourselves and the great vision our Constitution-framers had about the future of this country.⁸⁷

One solution to this might lie in the Constitution itself prescribing qualifications for members and chairpersons of PSCs.

IV. CONCLUSION: THE CHALLENGE OF ADMINISTRATIVE REFORMS

Independence was meant to transform the relationship between the Indian State and people, between the Union and provinces, and between the legislature and executive. However, the structure of the civil services was largely retained. While early relations between the political class and civil servants were initially characterised by mutual respect and understanding of each other's roles,⁸⁸ friction soon developed. The mettle of the 'steel frame' of India was tested in the Emergency years (1975–77), when the executive was made to actively participate in the quashing of civil liberties of the public at large. To avoid the wrath of the incumbent party, many bureaucrats kept ethical considerations aside in enforcing the Maintenance of Internal Security Act 1971. Those who refused to participate in the political drama of the time were compulsorily retired, resulting in 25,962 premature retirements.⁸⁹

This period is seen as the darkest in India's democratic history. While analysing the relationship between ministers and civil servants, the Shah commission,⁹⁰ noted that it was:

[I]mperative to ensure that the officials at the decision making levels are protected and immunized from threats or pressures so that they can function in a manner in which they are governed by one

single consideration: the promotion of public well-being and the upholding of the fundamentals of the Constitution and the rule of law.⁹¹

It was asserted that public servants must be politically neutral at all levels and at all times, and that the government must encourage its employees to function freely and fearlessly within the framework of established principles.⁹² According to the Second Administrative Reforms Committee set up in 2008, the onus to safeguard political neutrality and impartiality of civil servants lies equally with the political executive and the civil servants.⁹³

With the Supreme Court broadening the protections available to civil servants under Article 311, the use of transfers as a mode of punishment became rampant. To address this, the Hota Committee, set up in 2004, recommended that before any transfer order is passed, a departmental inquiry should be conducted by a designated officer, who submits his report to the concerned State Services Board, which would then provide its views to the Chief Minister. Significantly, the Hota Committee also recommended that a Central Civil Service Act should be enacted, under which a Central Service Board and separate State Service Boards should be set up.

The National Police Commission, in its reports submitted between 1979 and 1981, underscored the concurrent need for professional independence amongst the police in India, as well as methods to ensure that the government could oversee police performance and ensure its conformity with the law. In *Prakash Singh v Union of India*,⁹⁴ the Supreme Court observed that despite detailed recommendations being made by the National Police Commission and various other commissions on the need for police reforms in India, no action had been taken by the government. Accordingly, the Supreme Court issued extensive directions to both the Central and State Governments calling for, inter alia, the setting up of State Security Commissions to prevent unwarranted influence from the State Governments, fixation of minimum tenure for senior officers, a separation of investigating police from the law and order police, and the establishment of Police Complaints Authorities starting from the district level to look into complaints against police officers. Unfortunately, the implementation of these directions has been far from satisfactory, and the matter is still engaging the attention of the Court.

The question of administrative reforms recently came before the Supreme Court in *TSR Subramanian v Union of India*.⁹⁵ Performing an extensive survey of various unimplemented reports on civil service reform, the Court admitted a

petition under Article 32 of the Constitution. It expressed concern over the transfer of civil servants and instability of tenure, the practice of oral instructions, and instances of political interference, and directed the State to establish Civil Service Boards. Rather than confronting the central democratic challenge to bureaucratic independence, the Court simply observed that:

Ministers are responsible to the people in a democracy because they are the elected representatives of Parliament as well as the State General Assembly. Civil servants have to be accountable of course to their political executive but they have to function under the Constitution, consequently they are also accountable to the people of this country.⁹⁶

The implementation of the Court's order and its impact on civil service reform remains to be seen. But the decision itself was subject to important criticisms—such as the Court's distrust of democratic politics and belief in the superior integrity of the bureaucratic judicial institutions, its scant reliance on legal provisions, and its improvised understanding of the challenges that confront the structure and operation of the civil service.⁹⁷ Some of these criticisms have to do with the exercise of judicial power and the appropriate role of the Supreme Court. But others involve a much larger debate between two contrasting visions of the State: one which places its hope in the domain of politics, and the other which attempts at a technocratic insulation from democratic life. Within constitutional law, the tensions between these visions are most often seen in the context of judicial review. An important feature of the Indian constitutional experience has been the visibility of this contest within public employment and service law. With persistent concerns over both the inefficient, stifling character of India's civil service and the widespread prevalence of political corruption, the contest between these two visions is unlikely to subside any time soon, and might well, as in the case of *TSR Subramanian*, be played out in the judicial arena.

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EPILOGUE

CHAPTER 56

THE INDIAN CONSTITUTION SEEN FROM OUTSIDE

MARK TUSHNET

I. INTRODUCTION

THIS chapter examines some aspects of the Constitution of India and its judicial interpretation, as seen from outside India. In doing so it necessarily focuses on topics that have travelled abroad. But, where is 'abroad'? The Indian Constitution and its interpretation has been an important model for constitutional development elsewhere in South Asia. Doctrines like that dealing with unconstitutional constitutional amendments were rapidly adopted in Pakistan and Bangladesh, for example. In the *Sisters of Menzinger* case, the Sri Lankan Supreme Court relied on differences between the Sri Lankan Constitution's text and the Indian Constitution's to reject a proffered interpretation of guarantees of religious liberty.¹ Indeed, it might be said that in South Asia constitutionalism developed, at least for a generation or two, with participants looking over their shoulders at India.

Beyond South Asia, courts and scholars have paid attention to developments in Indian constitutional law. The topics that interest them are not necessarily the ones of most interest to domestic scholars of the Indian Constitution. For example, as the chapter on emergency powers lays out,² the constitutionality of Presidential rule—the displacement of State-level governments by rule from the Centre—or, more precisely, the conditions under which Presidential rule is constitutionally permissible, has been the focus of a great deal of attention *within* India. The reason is the political significance of Presidential rule. Yet, though the question of Centre–State relations is common to all federal systems and so is a topic clearly suitable for comparative constitutional study, the Indian experience has received relatively little attention *outside* of India.

The reasons for this relative lack of attention may be complex. Constitutional federalism takes a wide variety of forms, and comparison may be more difficult with respect to federalism than with, for example, some individual rights, and even some other structural issues. In addition, Presidential rule or its equivalent

has occurred in other federal systems, but less extensively than in India. Jurisprudence elsewhere is less developed, so non-Indian scholars have fewer resources to draw upon in the comparative enterprise. Yet, the very fact that the issue of Presidential rule is important in Indian constitutionalism and not elsewhere can be made a matter for inquiry. The impetus for elaboration of constitutional doctrine regarding Presidential rule was a conflict between the national government and sub-national governments over secularism.³ In the United States parallel conflicts might arise in connection with the constitutional requirement that the national government guarantees that each State has a republican form of government. But in the United States such conflicts are rare, though one might describe the Civil War as in part about that question. Reflecting on why India has a practice and jurisprudence relating to Presidential rule and the United States does not have one relating to the republican form of government might tell us something about differences in national identity.

If domestic importance does not provide a good guide to attention from the outside, what does? This chapter discusses several topics in which the Indian constitutional experience has entered into comparative constitutional discourse: doctrine about unconstitutional constitutional amendments; public interest litigation; aspects of affirmative action doctrine; and, in some ways related to the preceding ones, the mechanisms by which judicial independence has been secured in India. What unites these topics is, first, that many other constitutional systems have substantial experience with each, and secondly, at least as a first approximation, each topic can be discussed without connecting it too extensively with too many other details of a specific constitutional system. That is, scholars can compare the theoretical justifications offered within India for the 'basic structure' doctrine, which the Indian Supreme Court has said applies to questions of secularism and federalism, with the justifications offered elsewhere without knowing a great deal about precisely how federalism or secularism—as constitutional values—actually work in India.

Indian jurisprudence on unconstitutional constitutional amendments has been influential elsewhere, whereas the Indian experience with the other topics discussed here is not best understood as a source of influence. Rather, that experience provides students of constitutionalism with an important set of materials they can incorporate into their general accounts. So, for example, students of judicial independence and students of the relation between constitutional review and the political branches should develop accounts compatible with their general accounts of the fact that Indian judges have managed to obtain almost complete control over the appointment of justices to the Indian Supreme Court.

II. UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS AND THE 'BASIC STRUCTURE' DOCTRINE

Some constitutions distinguish among constitutional amendments, constitutional revisions, and constitutional substitutions, prescribing different mechanisms—different majorities, different decisionmaking institutions—for amendments as against revisions or substitutions. These distinctions can support conclusions that a particular change in a constitution is unconstitutional for what have come to be called procedural reasons. Other constitutions have 'eternity' clauses—the term given to the relevant provisions of Germany's Basic Law. These provisions specify that some constitutional changes are substantively impermissible (absent what has to be conceptualised as a constitutional revolution). Constitutional theorists have dealt with the procedural and substantive provisions by deploying ideas about an original and a derivative constituent power.

Prior to decisions taken by the Supreme Court of India, there was some jurisprudence dealing with constitutional changes found to be unconstitutional for procedural reasons, but no significant jurisprudence dealing with substantively unconstitutional provisions.⁴ This does not mean that eternity clauses were constitutionally irrelevant; they may have been quite effective in making unthinkable the changes they barred. But, overstating the point for emphasis, the fact that no one seriously proposed an amendment barred by an eternity clause meant that there was no concrete jurisprudence fleshing out what eternity clauses actually meant.

The Indian Constitution does not have eternity clauses. One modest implication of that fact is that political actors who simply read the constitutional text would not be able to identify proposals for constitutional amendments that were obviously ruled out by the Constitution itself. In addition, the Indian Constitution is relatively easy to amend. This means that proposals with substantial political support often have a decent chance of being adopted. And, finally, the Congress Party dominated the nation's politics for a significant stretch of India's post-Independence history. This meant that amendments sought by the Congress Party would be adopted without difficulty. Taking these features together, we have a picture of a constitutional system in which constitutional changes that might be deeply normatively troubling could be—and were—adopted with some regularity.

The proximate origin of the doctrine developed by the Supreme Court of India

was the Emergency period of 1975–77. The Court's actions during that period, largely acquiescing in what came to be seen as the government's abuses of its power, severely impaired its reputation among the public. The Court's doctrine about unconstitutional amendments can be understood as its effort to say to the public, 'Never again will our constitutional system be subject to deep distortion when politicians find it useful to do so.'

But the doctrine may rest on deeper foundations. One can fairly argue that the Supreme Court of India developed its doctrine in response to the fact that the Constitution's easy amendment rule was in the hands of a dominant-party government. The abuses of the Emergency period resulted from those more fundamental characteristics. So, put schematically, an easy amendment rule in a dominant-party system caused the Emergency, and the Emergency caused the Court to develop a doctrine that some constitutional amendments were unconstitutional.

The doctrine on unconstitutional amendments in India holds that amendments inconsistent with the Constitution's 'basic structure' are substantively unconstitutional. The 'basic structure' doctrine has spread well beyond India, and has now become a subject of a substantial amount of scholarship in comparative constitutional law.⁵ This influence may flow from the fact that India's Constitution does not have eternity clauses embedded in its text. Consider some eternity clauses in the German Basic Law: insulating the constitutional protection of human dignity and of Germany's form of a federal social welfare state from amendment. German constitutional lawyers have no need to develop a synthetic or theoretical account of why these particular provisions and not others are protected by eternity clauses. It is enough for them to understand how each specific text operates. In contrast, without a text to work with, the Supreme Court of India could only develop a doctrine dealing with unconstitutional amendments by offering some generalisable justification for the specific elements protected against amendment.

What does the development of the 'basic structure' doctrine tell us? First, it suggests that, at least where conditions like those prevailing in India occur (ie, one-party dominance and ease of amendment), a doctrine of substantive unconstitutionality for amendments might be a defensible component of constitutional law.⁶ As the doctrine has spread to other nations, scholars might devote some attention to whether it is being deployed in the right circumstances. The 'basic structure' doctrine is in some tension with straightforward notions of popular sovereignty and more theoretically informed concepts about the constituent power. While the doctrine might be defensible in some

circumstances, this tension means that one's enthusiasm for it should be tempered.

If amending a constitution is difficult, or if the political system consists of two or more parties with substantial political support, a doctrine of substantive unconstitutionality of amendments might not be necessary.⁷ One might wonder, for example, whether it would be appropriate for the German Constitutional Court to find a procedurally proper constitutional amendment to be a violation of an eternity clause, at least where, as suggested in the discussion below, there is a plausible case to be made that the amendment expresses a reasonable specification of 'human dignity' or 'social welfare state'.

Secondly, the conceptual structure of the doctrine deserves some attention. The Indian Supreme Court's terminology has been widely adopted, but not examined carefully. The terms are 'basic' and 'structure'. The former term resonates with the language used in discussing 'basic' human rights, but the latter term may be the more important one. Constitutional scholars typically distinguish between a constitution's rights provisions and its structural provisions. As formulated by the Indian Supreme Court, the doctrine is concerned with those *structures* that are basic. The Court's initial applications of the doctrine dealt with judicial independence, easily characterised as a basic structure of constitutional governance. Similarly with federalism, mentioned in the Indian Supreme Court's enumeration of elements of the basic structure in India. Constitutional theorists who focus on structures tend to argue that they are important not merely because they provide the operating instructions for a nation's political institutions, but because they provide indirect protections for individual rights: Design the structures well and you will have little need to spell out protections for basic rights because the institutions' natural operations will protect (or not produce infringements upon) those rights.

Some applications of the basic structure doctrine outside India have the feature just described. For example, if we regard the decision by the Colombian Constitutional Court to reject as unconstitutional an amendment authorising a President to serve three terms as resting on the amendment's substantive unconstitutionality,⁸ the justification for the decision would be that Presidents who hold office 'too long' are in a position to entrench their supporters throughout the government in ways that make abuses of rights substantially more likely to occur.

The Indian Supreme Court and some courts that have followed its lead have included more substantive matters in its enumeration of elements of the Constitution's basic structure.⁹ Doing so raises the stakes by increasing the

occasions on which substantive questions about the constitutionality of amendments arise. Again, the Colombian Supreme Court provides a good example, in its decision that a constitutional amendment affecting the tenure of civil servants was an unconstitutional alteration of the Constitution's basic structure.¹⁰ One can imagine an argument that the independence of the civil service is an important component of good governance, and of the impartial administration of the laws. Yet, it seems like a judicial overreach to treat even non-trivial changes in the rules of civil service tenure as threatening the Constitution's basic structure.

The example illustrates a pervasive problem with the basic structure doctrine. The components of the basic structure—federalism, secularism, and the like—are, and probably can only be articulated, at a rather abstract level. Consider an example from Turkey.¹¹ A government with (at the time) moderately Islamist tendencies supported a statute that made it lawful for women to wear head coverings in locations where doing so had previously been unlawful. The Turkish Constitutional Court held the statute unconstitutional. The government then obtained a constitutional amendment specifically authorising the action taken in the invalidated statute. The Constitutional Court then held the amendment substantively unconstitutional as a violation of the secularism element of the basic structure of Turkey's Constitution. Critics of the decision contend, not unreasonably, that expanding the lawfulness of the wearing of head coverings was not inconsistent with the principle of secularism but was instead an alternative specification of what secularism permits.

The more general point is that the basic structure doctrine has been attractive in large part because enumerating the components of the basic structure is generally uncontroversial only because those components are described in general, abstract terms. The more the doctrine is applied in specific circumstances, the more likely it is that its application will be justifiably controversial. The Indian Supreme Court's articulation of the basic structure doctrine has opened up intriguing possibilities for constitutional development and controversy in other constitutional systems.

Finally, the political conditions generating the basic structure doctrine illuminate another feature of Indian constitutionalism in light of non-Indian constitutional theory. Elsewhere, particularly in the United States, the theory of constitutional review has centred around the so-called counter-majoritarian difficulty. Constitutional review by courts whose judges are only weakly accountable to the people, it is said, is in tension with the idea that a democratic people should be responsible for its own governance. For long stretches of post-

Independence Indian constitutional history, though, the idea that there could be a counter-majoritarian ‘difficulty’ made little sense. The Supreme Court did rule against legislative efforts to expropriate land, as discussed in the chapter on the right to property,¹² but those decisions were readily overridden by constitutional amendment. The reason lies in the combination of an amendment rule making it relatively easy for a dominant party to obtain constitutional amendments. Though the easy amendment rule may remain stable, as the conditions of one-party dominance change—disappearing and then reappearing—concern about the counter-majoritarian difficulty will wax and wane accordingly. The Indian experience thus helps us understand some connections between political structures and constitutional theory that the US-focused scholarly literature overlooked.

III. PUBLIC INTEREST LITIGATION

The Supreme Court’s ‘public interest litigation’ (PIL) is well known around the world for its procedural innovations as well as its substantive outcomes, both of which raise interesting questions about constitutional law generally. Public interest litigation, described in more detail in Shyam Divan’s chapter,¹³ has several important procedural features. One is an expansion of the notion of standing to the breaking point. Standing doctrines typically identify characteristics entitling a person or entity to initiate litigation. The most typical characteristic is that a potential litigant must be injured by the action it is challenging, with a fair amount of doctrine, and controversy, over what counts as sufficient injury. Standing for individuals is sometimes augmented by a principle of third-party standing, in which a person or entity with some relation to another who could satisfy the individual-standing requirement is allowed to sue on the latter’s behalf.

For all practical purposes, PIL does away with standing as a bedrock requirement, transforming it into what in US constitutional law would be described as a matter of prudential concern. In a PIL case, there need be no litigant (in the traditional sense) whatsoever, only a problem deemed by the Court as worthy of attention. Having identified such a problem, whether through a case filed, a petition or letter received, or in some celebrated cases a newspaper article read, the Court will scour the litigation universe to locate someone who can provide adequate litigation support for the claim. Sometimes, of course, the Court will find that a non-governmental organisation that, in classic terms, might

have had third-party standing, is the right entity to propel the case along. But sometimes the Court will be unable to locate such an entity. Here too the Court has innovated by creating a 'public interest unit' within the Court itself.

The procedural innovations associated with PIL raise interesting questions about whether judicial institutions necessarily have a limited set of institutional characteristics. Lon Fuller believed that they did. For Fuller, courts were distinguished from other institutions of governance in part because they were necessarily reactive. Courts mobilised to deploy government power only when asked to do so. Further, courts necessarily dealt only with problems where someone claimed that a pre-existing right had been violated by someone else. For Fuller, adverseness was built into the structure of the judicial institution. Fuller contrasted judicial institutions with administrative and legislative ones. Legislatures, for example, could seek out problems to solve, perhaps propelled by the political ambitions of their members, and the problems they dealt with could be systemic ones without identifiable victims or villains.¹⁴

The Indian Court's PIL practice places enormous pressure on Fuller's conceptualisation of judicial institutions. That practice's features conflict with Fuller's specification at nearly every point. One might respond that the PIL practice shows that, when the Court engages in it, it is not acting 'as a court'. That, though, seems unnecessarily stipulative. Better to respond that Fuller was mistaken in thinking that judicial institutions had to have only those characteristics he identified.

Fuller's was mostly a definitional argument, but he supplemented it with some consequentialist observations. He argued that institutions, whether called courts or something else, that did more than respond to complaints about rights violations brought to them would, as he put it, depart from the judicial proprieties, which he identified mostly by negative example. These institutions would engage in *ex parte* contacts (there being, to coin a phrase, no 'parte' anyway), call on 'outsiders' to supply them with institutions (because, in some sense, no one could be outside the institution's domain anyway), experiment with solutions and revise them in light of experience, and more.

The PIL experience, and similar experience elsewhere, shows that Fuller was correct about institutional behaviour in the absence of adverseness and rights claiming. The Indian Supreme Court has on one or another occasion done everything Fuller said would be done. In public interest cases, for example, much of the Court's work is done through the use of interim orders, nominally pending a final disposition but having immediate and important effects. What remains, then, is the question: when officials who are called judges do those things, are they violating judicial proprieties? Again it is hard to avoid the

conclusion that Fuller's was a stipulative approach, which we can now reject on the basis of the PIL experience and similar practices elsewhere.¹⁵ The Indian Supreme Court looks like a court, and its judges look like judges; to the extent that Fuller's argument attempts to persuade us to call them something else, it is not persuasive.

The PIL practice is linked to the enforcement in India of social and economic rights.¹⁶ Questions about the enforcement of such rights have generated quite an extensive literature, which need not be surveyed here. Much of the attention to enforcement of these rights has shifted away from India to other nations and regions, especially Latin America. At the heart of that literature is a set of concerns about the relation between judicial enforcement of such rights and the choices made by democratically responsible political actors with respect to questions of social provision, questions sometimes described as implicating the separation of powers. These cases are sometimes thought to raise the counter-majoritarian difficulty in a particularly acute form because of the large amounts of money thought to be at stake, and because of real disagreement over what policies are most effective in ensuring social provision over the long run.

Some PIL cases are truly counter-majoritarian, but others are not. On the most general level, often the Court's interventions arise when bureaucrats fail to implement existing statutes. Although one can develop an argument that what the democratic majority wants is manifested in its combination of substantive statutes and effective (or ineffective) enforcement, much of what the Supreme Court has done has received support, sometimes tacit but sometimes explicit, from Parliament.

The right-to-food litigation implicated not the costly acquisition of food for distribution, but the (less costly) distribution of food already on hand but held in storage houses either because of bureaucratic mismanagement or corruption.¹⁷ Ordering that food on hand be distributed is counter-bureaucratic, perhaps, but not obviously counter-majoritarian. The *Delhi Bus* case accelerated the implementation of a policy already chosen by the political process.¹⁸ It was counter-majoritarian, but only in the sense that pushing the policy forward more quickly required financial outlays now rather than later. And, the *Vishaka* case was explicitly dialogic in form, seeking to prod the legislature into enacting legislation against gender discrimination while creating what was, again explicitly, an interim remedy.¹⁹

Finally, why did the PIL practice arise, and why do legislative and executive officials tolerate it? The answers undoubtedly have many elements. The PIL practice is a response to government failure—failure to address evident social

problems, as in the *street dwellers* case and the *Vishaka* case, failure to implement enacted policies as in some right-to-food cases. Perhaps problems inevitably elicit institutional solutions. That is, given something perceived as a problem and the absence of any existing institutional attempt to address it, some institution will do what it can to address the problem. One might see some aspects of PIL as an effort by the courts to address widespread corruption at the level of administration, thereby linking it to broader institutional reforms being sought in Indian political life. And the PIL practice may have arisen because of the failure of another government institution, the Supreme Court itself. As with the basic structure doctrine, the Court may have developed PIL in part to rebuild its reputation after the Emergency period, by making constitutional rights effectively available on a widespread basis.

Politicians might tolerate the PIL practice in part because the Court's actions have popular support precisely because PIL deals with problems that no one else is dealing with. A politician who attacked the Court's PIL practice might be vulnerable to the charge that at least the Court is trying to do something, in contrast to the politicians, who are content to do nothing. Sometimes, too, the PIL practice might be compatible with politicians' goals. Probably the most notable example here is the *Delhi Bus* litigation, where judicial intervention enabled politicians to complete a transformation of policy on which they had already embarked but which was impeded by ordinary political concerns that the Court's intervention helped displace. PIL interventions provoked by corruption at the level of administration might also be welcomed by higher-level politicians.

But, finally, we should not overestimate the effectiveness of the PIL practice overall. It has had some notable successes, but some less noted failures as well. And, it seems likely that the Court has refrained from aggressive PIL intervention in some situations where it anticipated likely failure or likely strong political pushback. The actual practice of PIL, that is, might be less troublesome to politicians than its theoretical justifications suggest it could be. If so, finding themselves not substantially bothered by complying with PIL orders, politicians might put up with it even if they would, overall, rather have the courts stay out of their affairs entirely.

IV. AFFIRMATIVE ACTION

India has a long history of dealing with affirmative action (or positive discrimination) as a constitutional matter. The chapter on affirmative action

describes the evolution of policies reserving government and other positions for members of ‘backward classes’ and other groups and the treatment of those policies in constitutional law.²⁰ As other nations grapple with similar policies, targeted at those groups that have historically been subordinated in their nations, some policymakers and scholars have looked to India for lessons.

One lesson might be that, once adopted, affirmative action policies are extremely difficult to limit or displace. At each stage in the adoption of these policies in India, the policies were said to be limited in time. Yet, as each time limit approached, the provision specifying the limit was amended so that the affirmative action policies could persist. The reason for this pattern is clear enough: such policies create a constituency of political support for the programme’s perpetuation, and their existence suggests to other groups the possibility of gaining similar reservations and benefits through political action. If one holds a normative view according to which affirmative action is problematic—defensible in some limited circumstances but in tension with other strong normative commitments nonetheless—the Indian experience suggests caution at the first step.

A second lesson from the Indian experience is the ‘creamy layer’ doctrine. Sometimes affirmative action policies are defended on the ground that their beneficiaries are typically in a condition of material deprivation because of their group-based status. The Indian Supreme Court acknowledged that sometimes some of those identified by their group membership—in a group that is *generally* in a condition of material deprivation—are not especially deprived. These are the ‘creamy layer’ in the group, and the Court has said that they should be excluded from obtaining the benefits of affirmative action programmes targeted at relieving material deprivation.

The ‘creamy layer’ idea has attracted some attention in the general literature on affirmative action, perhaps because it serves as a limit on policies that, as noted before, are sometimes thought to be normatively troubling. Yet, the ‘creamy layer’ idea is closely tied to a specific justification for affirmative action. If the reason for affirmative action is compensating for the current effects of past policies of discrimination, for example, including the creamy layer within the class of potential beneficiaries might be defensible: although the members of the creamy layer might not be in a condition of substantial material deprivation, they might be less well-off than they would have been had there been no prior discrimination. Excluding them from the benefits of affirmative action programmes might be seen as punishing them for their initiative in reaching the creamy layer. Similar arguments for including the creamy layer in affirmative action programmes can be made in connection with other justifications for

affirmative action.

The 'creamy layer' doctrine brings to the surface questions about both the justifications for affirmative action and its appropriate scope given its justifications. Those questions disrupt, and may force a reformulation of, the standard formulations dealing with affirmative action, which counterpose 'colour-blindness' to 'anti-subordination'. The 'creamy layer' doctrine does not fit comfortably into either formulation. Here too Indian constitutional law has contributed to discussions around the world.

V. JUDICIAL INDEPENDENCE

Constitutional courts fit uneasily within constitutional structures generally committed to democratic self-governance. An enormous literature offers normative justifications for judicial displacement of decisions taken by institutions—legislatures and executives—directly responsible to the electorate. Without questioning the validity of any of those justifications, one can wonder about how constitutional courts survive politically. That is, constitutional courts routinely put themselves in opposition to the political elites in other institutions, who, one would think, have the resources to retaliate against those courts. Under these quite predictable circumstances, how can constitutional courts survive?

Answering that question directs our attention to how the politics surrounding a constitution operates. For example, a constitutional court can survive challenges in a robust multiparty system by drawing support from a party that is currently in the opposition but has a real chance of taking office in the near future: the opposition party is the court's political 'ally'. And, more generally, in such a system each party can anticipate being in the opposition at some point, and for that reason is willing to tolerate the constitutional court's intervention when the party happens to be in power.

As noted earlier, though, for much of its post-Independence history India was a dominant-party nation, lacking robust opposition to the Congress Party. So, how could the Indian Supreme Court become as interventionist as it did? The first step in the analysis must focus on the process of appointing members of the Supreme Court. Typically, constitutions are designed to ensure that legislative and executive elites have substantial input into the appointment process. The reason is clear: legislative and executive leaders know that the constitutional court is structured to intervene (sometimes) against the policies they favour, and they want to have as much influence as they can over the court's membership so

as to limit the extent of judicial opposition to their policies. One can expect relatively inactive constitutional courts in dominant-party systems with substantial party input into judicial appointments.

The Indian experience shows that even in a dominant-party system a court can sustain its independence from the dominant party. As detailed in the chapter on judicial independence,²¹ the Indian Supreme Court did so by what in other contexts might be called an ‘auto-coup d’état’—that is, the seizure by judges of the power over the appointment of their own successors.²² This pushes the inquiry back one step: why were legislative and executive leaders willing to accept their own disempowerment in the appointment process?

Several answers suggest themselves. First, the Indian Supreme Court might have developed an independent source of political support in the people, or in activist legal elites, as one institution that functioned reasonably well in a political system pervaded by corrupt and otherwise badly functioning institutions. Secondly, strong conventions arose limiting the pool of potential appointees to the Supreme Court. Appointees had to have many years of service on High Courts, which meant that they were relatively old when they reached the Supreme Court. Together with a mandatory retirement age, that meant that no judge could anticipate serving on the Supreme Court for a long enough period to advance any agenda of personal interest. ‘Activism’, that is, would not make much personal sense from the point of view of any individual judge. Allowing judges to appoint their successors might not produce judicial activism, so political elites need not be concerned about the phenomenon. Against this, though, are the occasional examples of judges appointed at a young enough age to have a long-term activist agenda, and, perhaps more important, the possibility that a judge appointed close to retirement might decide that he or she has no time to waste.

Thirdly, as the previous discussion of PIL suggests, what the courts were doing might not have been important enough for those leaders to worry about. The Indian Supreme Court’s decisions, that is, might be something like occasional bites from an annoying flea, but not a source of serious political trouble for the leaders in other institutions. If Supreme Court judges did not generally find judicial activism attractive from a personal point of view, legislative and political leaders did not find judicial activism important enough to worry about. Finally, perhaps the political system had lost its party-dominant character by the time the Supreme Court gained its current degree of control over the appointment process.²³ That would imply that no one was in a position to mobilise effectively against the Court’s auto-coup.²⁴

As in other areas, Indian practice on judicial independence pushes the boundaries of constitutional ideas well beyond limits found elsewhere. It is not uncommon to have judges participating in the selection of other judges, a practice compatible with general practices in civil law systems. Ever since Kelsen, though, it has been widely understood that constitutional courts are different from ordinary courts, and processes of appointment to such courts are widely thought to require substantial input from the political branches, both to ensure that the constitutional courts are staffed by judges who know more than 'mere' law and to ensure that those courts have a reservoir of support in the political branches, to be drawn upon when, as they inevitably will, judges act against the wishes of those holding political power. But, in India, judges have achieved a degree of independence of political control or even influence over the appointment process that is probably unsurpassed in the world. Understanding the Indian experience is likely to help us better understand the very idea of judicial independence itself.

VI. CONCLUSION

Several of the discussions in this chapter have connected doctrinal developments to dominance of the Congress Party when the doctrines began to emerge, and to the phenomenon of large-scale failures of governance, including corruption. Similar conditions exist elsewhere, of course, and to that extent the Indian constitutional experience may have some relevance outside India, both as a source of normative guidance for doctrine and as an aid to understanding. In a more methodological vein, the Indian constitutional experience suggests the importance for analytical purposes of understanding the connection between constitutional developments, including the development of constitutional doctrine, and a nation's overall political system, with special attention to the party system in place.

Governance failures can be overcome through mechanisms other than judicial intervention, and the Congress Party is no longer dominant in India. The conditions that encouraged and perhaps enabled the courts to engage in PIL and to find constitutional amendments substantively unconstitutional may disappear, or may have faded in importance already. Even so, constitutional doctrine has some degree of autonomy, and can persist after the conditions that gave it birth have changed. In a new political environment, old doctrine may be transformed, and it will certainly face new challenges. We can expect Indian constitutional

jurisprudence to change, and it seems likely that those outside India will continue to find it helpful to study that jurisprudence for what it will continue to tell them about the relation between constitutional doctrine and the political environment in which it operates.

¹ A Bill titled ‘Provincial of the Teaching Sisters of the Holy Cross of the Third Order of Saint Francis in Menzingen of Sri Lanka (Incorporation)’, SC Special Determination No 19/2003 (Sri Lanka).

² See [Rahul Sagar, ‘Emergency Powers’](#) (chapter 13, this volume).

³ *SR Bommai v Union of India* (1994) 3 SCC 1.

⁴ See [Madhav Khosla, ‘Constitutional Amendment’](#) (chapter 14, this volume).

⁵ For a recent comprehensive discussion, see Yaniv Ronzai, ‘Unconstitutional Constitutional Amendments: A Study of the Nature and Limits of Constitutional Amendment Powers’ (2014) PhD dissertation, Department of Law, London School of Economics <<http://etheses.lse.ac.uk/915/>>, accessed November 2015.

⁶ The foregoing argument does raise a puzzle, to which I return below: how, under the conditions that make the doctrine normatively appropriate, those occupying judicial positions *would* actually enforce such a doctrine against the dominant political party that, in most systems, would have had some substantial influence on their selection in the first place.

⁷ Difficulty of amendment and party competition are not unrelated, because, in general, difficulty of amendment is measured by the majority needed to amend the constitution, and the more parties there are, the more difficult will it be to obtain the required majority.

⁸ Sentencia C-1040/2005, 19 October 2005 (Constitutional Court of Colombia). That characterisation is contested within Colombian constitutional discourse. Some analysts treat the Court’s decision as resting on procedural grounds—that such a change could be adopted only by using the mechanisms for substituting one constitution for another, not by the mechanisms for amending the constitution.

⁹ The protection of ‘human dignity’ by an eternity clause in the German Basic Law is an example outside the context of the ‘Basic Structure’ doctrine of making a specific human rights protection unamendable.

¹⁰ Sentencia C-141/2010, 26 February 2010 (Constitutional Court of Colombia).

¹¹ The relevant cases are discussed in Yaniv Ronzai and Serkan Yolcu, ‘An Unconstitutional Constitutional Amendment—The Turkish Perspective: A Comment on the Turkish Constitutional Court’s Headscarf Decision’ (2010) 10 *International Journal of Constitutional Law* 175.

¹² [Namita Wahi, ‘Property’](#) (chapter 52, this volume).

¹³ [Shyam Divan, ‘Public Interest Litigation’](#) (chapter 37, this volume).

¹⁴ Lon Fuller, ‘The Forms and Limits of Adjudication’ (1978) 92(2) *Harvard Law Review* 353.

¹⁵ Such practices include social reform litigation in the United States and elsewhere and the ‘public hearing’ practice in the Brazilian Supreme Court.

¹⁶ The substance of the cases described briefly here is addressed in more detail in [Shyam Divan, ‘Public Interest Litigation’](#) (chapter 37, this volume).

¹⁷ *People’s Union for Civil Liberties v Union of India* Writ Petition (Civil) No 196/2001 (Supreme Court).

¹⁸ *MC Mehta v Union of India* (1998) 6 SCC 63.

¹⁹ *Vishaka v State of Rajasthan* (1997) 6 SCC 241.

²⁰ [Vinay Sitapati, ‘Reservations’](#) (chapter 40, this volume).

²¹ [Justice BN Srikrishna, 'Judicial Independence'](#) (chapter 20, this volume).

²² The term 'auto-coup d'état' is my version of the Spanish 'autogolpe', which has been used to describe coups d'état carried out by Presidents and other leaders who initially achieved their offices through ordinary and fully legitimate means.

²³ Recent political developments resulting from the renewal of government by a party with a commanding parliamentary majority may change the form of judicial appointment. If they do, that will confirm the relevance of party structure to the preservation or limitation of judicial independence.

²⁴ For a parallel observation about the 'basic structure' doctrine, see Pratap Bhanu Mehta, 'The Rise of Judicial Sovereignty' (2007) 18 *Journal of Democracy* 70, 75: 'the 1990s saw no full-scale parliamentary assault on the courts' interpretation of what the "basic structure" doctrine requires, but that was an accidental side effect of a fragmented political system in which no one party could achieve dominance in Parliament'.

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